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Dublin IV and EXCOM: Aspirational Blunders and Illusive Solidarity

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Abstract

The Dublin IV proposal of 2016 was ostensibly made necessary by the lack of functional and effective burden-sharing between EU Member States. Dublin IV purports to ameliorate this inequality by instituting a series of mechanisms that would ensure that any increase in the rate of migration to the EU territory would be met with collective action. However, an analysis of the Dublin IV provisions reveals that in its operation it would do no such thing. Also in 2016, the Executive Committee of the UNHCR provided conclusions on burden-sharing and youth respectively. Though considered by some national judiciaries and human rights treaty bodies to be of significant value to the development of international refugee law, the conclusions of the Executive Committee on burden-sharing and youth are not reflective of EU State practice. Rather, EU State practice is revealed in the Dublin IV proposal and the inequality that it promotes. This article comparatively analyses the 2016 EXCOM Conclusions and the Dublin IV proposal and makes the case that the conclusion of EXCOM are purely aspirational and lack substantive value, and that Dublin IV illustrates that lack of substantive value through the potential future operation of its provisions.

Keywords

Refugee Law – Dublin Convention – EXCOM – Human Rights Law – European Union Law – burden-sharing

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1 Introduction

The *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 third-country national or a stateless person (recast)*[1] ('Dublin IV') is currently subject to EU parliamentary scrutiny and, in that process, has been the object of vociferous denunciation by Border-States and institutions of the European Union. Dublin IV has been criticised as being manifestly inequitable, for derogating from procedural norms established by the Treaty on the Functioning of the European Union (TFEU), and for attempting to erode the right to family unity and the application of the paramountcy principle to all actions concerning minors.[2]

1 European Union: European Commission, COM(2016) 270 final, 4 May 2016.

2 See, European Parliament: Committee on Legal Affairs, *Reasoned opinion of the Italian Senate on the 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 third-country national or a stateless person (recast)*, 8 November 2016, PE592.432v01-00, p. 6, ('Reasoned Opinion of the Italian Senate'); European Parliament: Committee on Legal Affairs, *Reasoned opinion of the Hungarian Parliament on the proposal for a regulation 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 third-country national or a stateless person (recast)*, PE589.336v01-00, 22 August 2016, p. 2 ('Reasoned Opinion of the Hungarian Parliament'); European Parliament: Committee on Legal Affairs, *The Romanian Chamber of Deputies' reasoned opinion on the 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 third-country national or a stateless person (recast)*, PE592.320v01-0, p. 5, ('Reasoned Opinion of the Romanian Chamber of Deputies'); C. Wikström, *Draft report on the 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 third-country national or a stateless person (recast)*, Committee on Civil Liberties, Justice and Home Affairs, 24 February 2017 ('Wikström draft report'). The paramountcy principle refers to the principle that 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.' The paramountcy principle is enshrined in the Convention on the Rights of the Child and various regional instruments including Article 24 of the Charter of Fundamental Rights of the European Union.

In 2016, the Executive Committee of the High Commissioner's Program (EXCOM) delivered two conclusions on equitable burden-sharing and youth, respectively.[3] Though not a legal entity, nor principally mandated to propound conclusions on matters pertaining to refugee protection, EXCOM conclusions have wielded significant power in guiding courts in the interpretation of matters pertaining to protection. The EXCOM has been considered to derive value from the fact that it is 'itself an assembly of states which has debated the issue and settled on a formal statement concerning it.'[4] EXCOM conclusions have been considered to serve as 'good evidence of the views of State Parties to the Refugee Convention and of their understanding both of the law and of the content of applicable minimum standards';[5] yet the wisdom espoused by the EXCOM in 2016 appears to be more aspirational than an accurate reflection of State practice. This is most evident when the EXCOM conclusions of 2016 on burden sharing and youth are compared with Dublin IV and the developing legal trends in burden-sharing and protection of minors in the EU.

A comparative analysis of Dublin IV and the EXCOM conclusions of 2016 reveals substantive and procedural paradoxes from which one may only conclude that the two schemes are irreconcilably incompatible. This article examines the tangible significance of the 2016 EXCOM conclusions in reinforcing EU Member States' accountability to burden-sharing principles and protection of minors, and proposes significant adjustments and additions to Dublin IV to ensure equitable burden-sharing and the protection of vulnerable minors are of paramount consideration.

2 The Origins of Dublin IV

The Common European Asylum System (CEAS), of which the Dublin System[6] is a cornerstone, was conceived of a need to protect the newly defined external

3 UN High Commissioner for Refugees (UNHCR), *Conclusion of the Executive Committee on international cooperation from a protection and solutions perspective No. 112 (LXVII) 2016*, 6 October 2016, No. 112 (LXVII) 2016; UN High Commissioner for Refugees (UNHCR), *Conclusion of the Executive Committee on youth No. 113 (LXVII) 2016*, 6 October 2016, No. 113 (LXVII) 2016.

4 *Attorney-General v. Refugee Council of New Zealand, Inc.* [2003] 2 NZLR 577, New Zealand: Court of Appeal, 16 April 2003, § 100.

5 *Refugee Appeal No. 70951/98*, New Zealand: Refugee Status Appeals Authority, 5 August 1998.

6 In referencing the 'Dublin System' the author is referring collectively to the European Union, *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities* ('Dublin Convention'), 15 June 1990,

frontiers of the EU as its founding documents established the dissolution of internal borders and the unrestricted freedom of movement of EU citizens between the territories of its Member States. Rather than serve as a regional normative framework which supports the administration of the 1951 Refugee Convention, as does its counterparts in Africa[7] and the Americas,[8] the CEAS is, and has been from its inception, primarily concerned with the protection of internal Member States rather than with the protection of individuals seeking international protection.[9] As such the CEAS is designed so that the concept of protection is inverted; the protection of the individual is secondary to the protection of the State. This is revealed in the operation of the Dublin system which restricts the freedom of movement principle to EU citizens and lawful residents only and does not promote mutual recognition of refugee status among Member States. The absence of these restrictions would otherwise leave internal Member States exposed to uncontrolled migration. The Dublin system purports to be an instrument for the 'fair and equitable distribution of responsibility among Member States',[10] while in practice it protects internal Member States from the financial burden of absorbing persons of concern, the responsibility for which then falls to Border States. Dublin IV does not remedy this inequality, but instead exacerbates inequality between Member States through deliberate circumvention of effective burden-sharing measures and the removal of financial safeguards previously available for States experiences particular pressure.

OJ C 254, 19/08/1997 p. 0001–0012; European Union: Council of the European Union, *Council Regulation* (EC) *No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003, OJ L 50/1–50/10; 25.2.2003, (EC) No 343/2003 ('Dublin II'); European Union: Council of the European Union, *Regulation* (EU) *No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L ('Dublin III'). 180/31–180/59; 29.6.2013, (EU) No 604/2013, and Dublin IV.

7 Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45.

8 *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984.

9 For a more in-depth analysis of the origins of the CEAS, see: V. Chetail, 'The Common European Asylum System: Bric-à-Brac or System?', in: V. Chetail, P. De Bruycker & F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Martinus Nijhoff, 2016), pp. 3–38.

10 Dublin IV, 604/2013, recital 7 new.

2.1 *Financial Solidarity and the Corrective Allocation Mechanism*

Under Dublin III, resources of the European Asylum Support Office (EASO), were available to Member States experiencing high rates of migration. These financial 'solidarity measures', among them, the Asylum Intervention Pool, were available along with asylum support teams, to assist Member States under particular pressure or in situations where applicants for international protection could not benefit from adequate standards, in particular vis-à-vis reception conditions and procedural safeguards.[11] Dublin IV proposes to remove the financial solidarity measures previously provided by EASO including the Asylum Intervention Pool and asylum support teams. Under Dublin IV however, the role of financial subsidiary, currently held by EASO, would be replaced by a European Union Agency for Asylum (EUAA), which would substitute financial assistance for purely administrative assistance. No such funds as those available under Dublin III would be available to Member States under Dublin IV, and those experiencing particular pressure to provide adequate standards of reception and protection would not receive EU assistance.

The EUAA would instead establish a distribution key for the allocation of asylum seekers among Member States under a mechanism called the 'corrective allocation mechanism'. The EUAA would adapt the figures underlying the distribution key each year based on Eurostat data,[12] calculated using a metric based on the size of the population and the economy of the EU Member States. The distribution key would inform the operation of the corrective allocation mechanism, which would in turn, theoretically ensure a fair distribution of responsibility between Member States in situations where a Member State was confronted with a disproportionate number of applications for international protection.[13]

The origins of the corrective allocation mechanism lie in the European Commission's proposed emergency response mechanism to assist Italy and Greece.[14] Established under art.78(3) of the *Treaty on the Functioning of the European Union*, the emergency response mechanism was a relocation scheme

11 European Union: European Parliament, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, Article 8.

12 Dublin IV, 604/2013 recital 8.

13 Dublin IV, 604/2013 recital 22 (adapted) new.

14 European Commission, 'European Commission makes progress on Agenda on Migration', Press Release, Brussels, 27 May 2015.

which applied only to Syrian and Eritrean nationals that arrived in Italy or Greece after 15 April 2015. The European Commission proposed that a total of 40,000 persons should be relocated from Italy and Greece to other EU Member States based on a distribution key. This figure would correspond to approximately 40% of the total number of asylum seekers whom Europe deemed to be 'in clear need of international protection'. The proposal concluded that 'Member States will receive € 6,000 for each person relocated on their territory.' Under that mechanism, Italy transferred 24,000 applicants and Greece 16,000.

In September 2015, the European Council adopted two relocation decisions which allowed temporary derogation from the Dublin system to relieve the burden on Greece and Italy.[15] Dublin IV aims to concretise a permanent distribution key that would 'ensure a fair sharing of responsibility between Member States'.[16] It suggests that it therefore:

> [H]as a similar objective as the proposal made by the Commission in September 2015 and, depending on the results of the discussions on this proposal, the Commission could consider withdrawing the September proposal.[17]

However under Dublin IV, the corrective allocation mechanism would only be triggered 'in situations when a Member State is confronted with a disproportionate number of applications for international protection for which it is responsible under this Regulation'.[18] This 'disproportionate number' is anything in excess of 150% capacity of the rate predefined by the distribution key.[19] In 2015, under this mechanism, Border-States with frontiers exposed to the Mediterranean crossing would have remained suspended in a state of overexertion of resources, to which other Member States would have only been legally obliged to render assistance above and beyond 150% capacity.

15 European Union: Council of the European Union, *Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, 14 September 2015; European Union: Council of the European Union, *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, 22 September 2015.

16 Dublin IV, § 31.

17 Dublin IV, p. 5.

18 *Ibid.*

19 Dublin IV, 604/2013 recital 22 (adapted) new, § 33.

A further deficiency in the distribution key is that it pertains only to the distribution of numbers for the purposes of refugee status determination (RSD) and not for permanent resettlement of refugees. Where Border-States may be beyond designated capacity for conducting RSDs, other Member States would only assist insofar as determining the Member State responsible for resettling the beneficiary. As such, despite the operation of the distribution key, Border-States would, in most cases, end up the subject of take-back notifications for the majority of maritime arrivals by virtue of the first country of arrival principle without financial solidarity or burden-sharing obligations being triggered.

Dublin IV provides for an alternative arrangement between Member States and the EU in which Member States may temporarily elect to not take part in the Dublin system. Under the relevant provisions, Member States could unilaterally trigger this 'opt-out' clause for a maximum duration of 12 months. During this time, applicants who would have otherwise been the responsibility of the Member State not participating would be absorbed by other Member States according to their capacity determined by the distribution key. However, the price for opting-out comes at a cost of 250,000 euros per applicant transferred to another Member State—a fee dubbed a 'solidarity contribution'.[20] This presents two matters of concern for the proper function of burden-sharing: first, the Member States most likely to require opt-out would be those under strain by virtue of their geographic exposure and the operation of the first country of asylum principle—the same States most in need of effective burden-sharing principles. Second, the cost of 250,000 euros per applicant is unjustifiable in that it far outweighs any reasonable estimation of the costs associated with the RSD procedure and is an enormous increase to the figure of 6,000 euros provide in the September 2015 relocation decisions.

In assessing the functionality of the proposed opt-out clause, it is advantageous (if not logical) to evaluate the mechanisms employed for transfer from Greece and Italy of the 40,000 persons in need of international protection in 2015, and whose transfer was covered by the two decisions adopted by the Council of the EU on 14 September, and 22 September 2015, respectively.[21] Such an assessment reveals that the two Member States would have owed a combined 10 billion euros to other Member States who assumed responsibility

20 Dublin IV, § 35.

21 European Union: Council of the European Union, *Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*; and European Union: Council of the European Union, *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*.

had the transfers occured under the Dublin IV opt-out clause. If one considers the rate at which Greece was required to transfer applicants for international protection in May 2015, this 'solidarity contribution' would have amounted to 4 billion euros. Italy's 'solidarity contribution' would have amounted to 6 billion euros. It is neither equitable, nor consistent, that 'burden-sharing' as applied here should push Border-States like Italy and Greece to exhaust their own, limited, resources—while offering relief only when those states exceed 150% of their own capacity. This can hardly be described as a fair allocation of responsibility for asylum applications made within the EU.

2.2 *The Emergency Warning System*

Under Dublin IV, the mechanism for early warning, preparedness and management of impending asylum emergencies would be abolished. It would not be replaced by an equivalent emergency warning mechanism that would trigger financial solidarity or burden-sharing in advance of an impending crisis. Instead, the corrective allocation mechanism would be utilized to transfer asylum seekers to Member States after the fact.

Under the previous Dublin Regulations, EASO was responsible, under the early warning mechanism, for the collection of data on migration trends and for monitoring the potential impact these trends would have on the EU. Under EASO's mandate, the early warning system allowed the agency to play a key role in providing financial solidarity to Member States under particular pressure.[22] The early warning system was incorporated into the Dublin system to ensure that:

> [t]he Union is alerted as soon as possible when there is a concern that the smooth functioning of the system set up by this regulation is being jeopardized as a result of particular pressure on, and/or deficiencies in, the asylum system of one or more Member States ... [T]he process for early warning, preparedness and management of asylum crises could improve the steering of concrete measures of genuine and practical solidarity towards Member States, in order to assist the affected Member States in General and the applicants in particular.[23]

22 European Union: European Parliament, *Council of the European Union, Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.*

23 Dublin IV, 604/2013 recital 22 (adapted) new.

However, the Early Warning Mechanism has not been implemented to date. While some Member States argued that the conditions for triggering the mechanism were never fulfilled, others argued that it is difficult to reach a political agreement on triggering the mechanism in the absence of clear criteria and indicators to measure the pressure. While Dublin IV justifies this lack of implementation as being unnecessary, it does so by stating that:

> Alternative support measures had also helped to relieve the pressure and may have obviated the need to trigger the mechanism. The European Asylum and Support Office [is] an example of support that made it unnecessary to activate the mechanism, helping to prevent or manage crises in the field of international protection.[24]

As seen in part 2(1) of the current article, the 'alternative support measures' provided by EASO are abolished under Dublin IV, leaving no alternative for the Early Warning Mechanism.

Instead of simply easing the criteria required to trigger the Early Warning System, Dublin IV proposes to transfer responsibility for the monitoring of migration trends to Member States themselves.[25] Member States would then notify the EUAA of an impending crisis meriting a collective response. In practice, this would, however, be something of a redundant action as the corrective allocation mechanism would not be triggered until the Member State concerned reached in excess of 150% capacity. In this way, Dublin IV proposes to delegate EASO's mandated power back to Member States and impose reporting requirements to an EU institution which would serve no purpose for alleviating pressure on Member States or for the deployment of additional resources for the purposes of burden-sharing until the distribution key is triggered.

The monitoring of migration trends by Member States would only be for the benefit of that Member States' own preparedness. Member States would have no incentive to research migration trends which did not affecting them directly and there would be no incentive to data-share, nor any requirement to do so. Even if there were such a requirement, the removal of all emergency preparedness mechanisms would make it utterly redundant as neither Member State, nor EU institution would be legally required to render assistance at that point in time.

This bric-a-brac approach fosters an inefficient system in which data collection and research overlap and disaggregation is not required by law. By

24 Dublin IV, p. 11.

25 Dublin IV, 604/2013 recital 23 (adapted); Dublin IV, Section VII, Article 33.

delegating EASO's powers to Member States, the burden of proof lies with the Member States at risk to demonstrate the existence of an impending emergency requiring assistance that would only be made available once the emergency was deemed imminent by the EUAA.

2.3 *Burden-Sharing and the Principles of Subsidiarity and Proportionality*

The power of the EU parliament to legislate derives from Article 5 of the *Treaty on the European Union* (TEU).[26] Article 5 provides that the limits of EU competences are governed by the principle of conferral, and that the use of EU competences is governed by the principles of subsidiarity and proportionality.[27] Under the principle of conferral, the EU is limited to the promulgation of acts only within the limits of the competences conferred upon it by Member States. Competences not conferred upon the EU remain with Member States.[28] The power to make laws on the 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection' is conferred on the EU by Article 78(2)(e) of the TFEU. It is by virtue of this power that the EU proposes Dublin IV.

Under Article 5 of the TEU, any proposed action by the EU fulfils the principle of subsidiarity only if it cannot be achieved by the Member States, or if the set goal can be achieved at EU level in a better, more efficient way and action by the EU creates added value.[29] Under the principle of proportionality, the content and form of EU action shall not exceed what is necessary to achieve the objectives of the TEU and the TFEU. The institutions of the EU are bound to apply the principle of proportionality in all proposed legislation as laid down in Protocol (2) to the TFEU *on the application of the principles of subsidiarity and proportionality* ('Protocol (2)').[30]

Any draft legislative act must contain a detailed statement making it possible for Member States to appraise its compliance with the principles of subsidiarity and proportionality.[31] The statement must include the reasons

26 European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, OJ C325/5; 24 December 2002, (TEU).

27 TEU, Article 5(1).

28 TEU, Article 5(2).

29 TEU, Article 5.

30 *Consolidated version of the Treaty on the Functioning of the European Union—PROTOCOLS—Protocol (No 2) on the application of the principles of subsidiarity and proportionality*, OJ C 115, 9.5.2008, pp. 206–209, ('Protocol 2').

31 Protocol 2, Article 5.

for concluding that an EU objective can be better achieved at the EU level rather than by individual Member States. The statement should also include a future impact statement on the financial liabilities it would impose on the EU, Member States, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved. Dublin IV contains no such statement.

The TFEU provides for the proposed actions for the EU to be submitted to parliamentary scrutiny of the Member States. As such, Member States may respond to proposed legislation and provide a statement on the compliance of the act with the principles of subsidiarity and proportionality. At the time of writing, several Member States have submitted reasoned opinions to the Presidents of the European Parliament, the Council and the Commission on the conformity of Dublin IV with these principles.

The Italian Senate submitted its Reasoned Opinion on subsidiarity to the European Union Committee of Legal Affairs on 8 November 2016. It made clear that the Italian government considered the proposed action to be of 'particular national interest', and that is vehemently opposed the proposal. It draws particular attention to the absence of effective burden-sharing mechanisms by stating that:

> [i]t does not help to distribute migrants equally among Member States, but rather, strengthens and extends, in several ways, the first-entry criterion, increasing the difficulties for border countries such as Italy.[32]

The Italian Senate concluded that despite the aspirations of Dublin IV to secure a fair sharing of responsibilities among Member States at times of crisis and to curb secondary movements among Member States of citizens from third countries:

> the proposed measures and mechanisms do not meet the need to address this historic wave of migration as Europe as a whole, and the overall effects of the proposed amendments are not geared to achieving [proportionality and subsidiarity].[33]

Moreover, the Italian Senate concluded that, where the applicant comes from a safe third country or a first country of asylum, the operation of Dublin IV would entail a considerable increase in the number of applications to be

32 Reasoned Opinion of the Italian Parliament.

33 *Ibid.*, p. 6.

examined in Italy, as a likely first country of arrival. Dublin IV would, therefore, increase the number of cases in which Italy became the Member State responsible, which would, in turn, impact Italy as the Member State responsible for the returns of those not entitled to international protection,[34] the cost of which would be entirely absorbed by Italy under Dublin IV.

One Italian Member of the EU Parliament was so moved by the injustice of Dublin IV that he introduced a motion for a resolution 'on the need to abolish the Dublin Regulation, which is a legal abomination.'[35] In doing so, he provided:

A. whereas Germany has unilaterally decided to suspend the Dublin Regulation in relation to Syrian refugees alone;
B. whereas in so doing it implicitly recognises that the Dublin Regulation is wrong, as it shifts the responsibility for receiving and processing asylum applications on to EU Member States with external borders alone, in particular Italy, which are subject to huge, unmanageable migratory pressure;
    1. Calls on Parliament, the Commission and the Council to take note of this major new development, which marks the end of that legal abomination known as the Dublin Regulation, which has caused so much harm to Italy.

On 13 June 2016, the Hungarian Parliament adopted a resolution on Dublin IV and submitted a Reasoned Opinion to the EU Council. The report made clear that it was the opinion of the Hungarian Parliament that Dublin IV violated the principle of subsidiarity.[36] The report also pointed out that despite the soaring rhetoric of reinforcing and respecting burden-sharing principles in the Explanatory Memorandum, Dublin IV 'does not materially modify the fundamental conditions in force'.[37] Rather that Dublin IV extends beyond the authorisation granted in Article 78(2)(e) of the TFEU because 'it does not provide any legal grounds for either the introduction of the so-called financial

34 *Ibid.*
35 European Parliament, Gianluca Buonanno, *Motion for a resolution pursuant to Rule 133 of the Rules of Procedure on the need to abolish the Dublin Regulation, which is a legal abomination*, 26 August 2015, B8-0868/2015.
36 Reasoned Opinion of the Hungarian Parliament.
37 Id., p. 6.

solidarity or the establishment of an automated allocation mechanism without upper limits.'[38] The report concluded that:

> The financial solidarity regulated in Article 37 of the Proposal does not recognise any equity, flexibility or objective grounds of excuse; its extent is clearly contrary to the principle of proportionality.[39]

The Romanian Chamber of Deputies submitted its Reasoned Opinion on Dublin IV on 21 October 2016. In it, the Chamber of Deputies considered that Dublin IV did not demonstrate enough added value, and thus violated the principle of subsidiarity.[40] Further, it determined that the corrective mechanism was manifestly inadequate in achieving the objective of a viable management of the migration pressures upon the European Union[41] and that it does not comply with the proportionality principle of the TFEU.[42] The Chamber of Deputies concluded that 'by introducing a permanent mandatory distribution key instead of adopting provisional measures in emergency situations, the draft regulation goes beyond the extent necessary to achieving the objective and thus violates the principles of subsidiarity and proportionality.'[43]

Despite the fact that a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament is required before a proposed action is rejected, it is clear that Border-States and States commonly of first arrival are resoundingly and unanimously opposed to the proposed provisions of Dublin IV. These are the States who will be most affected by the future operation of Dublin IV clauses as the 2015 European migration crisis demonstrated. As such, members of the Council should take particular account of the fact that the Member States who will be most affected by the burden-sharing principles in Dublin IV, state unequivocally that Dublin IV promotes no such principle.

38 Id., p. 2.
39 Id.
40 Reasoned Opinion of the Romanian Chamber of Deputies.
41 Id., p. 3.
42 Id., § 7.
43 Id., § 13.

3 The Origins of the EXCOM

The EXCOM was established under UN Economic and Social Council Resolution 672 (XXV),[44] and was entrusted with the terms of reference set forth in General Assembly resolution 1166 (XII), which requested the ECOSOC to establish an Executive Committee of the High Commissioner's Program.[45] In 1957, the ECOSOC established the Executive Committee of the Programme of the United Nations High Commissioner for Refugees to take the place of the Executive Committee of the United Nations Refugee Fund, which ceased to exist after 31 December 1958. The modern EXCOM took office on 1 January 1959, consisting of between 20 and 25 Member States of the UN and members of any of the specialized agencies 'with a demonstrated interest in, and devotion to, the solution of the refugee problem'.[46]

By virtue of the terms set forth in ECOSOC Resolution 672 (XXV), EXCOM was entrusted with the terms of reference set forth in General Assembly resolution 1166 (XII), which stipulated that the mandate of the EXCOM would permit it to:

b) Advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office;
c) To advise the High Commissioner as to whether it is appropriate for international assistance to be provided through his Office in order to help solve specific refugee problems remaining unsolved after 31 December 1958 or arising after that date;
d) To authorise the High Commissioner to make appeals for funds to enable him to solve the refugee problems referred to in sub-paragraph (c) above;
e) To approve projects for assistance to refugees coming within the scope of sub-paragraph (c) above;
f) To give directives to the High Commissioner for the use of the emergency fund (...).

44 UN Economic and Social Council (ECOSOC), UN *Economic and Social Council Resolution 672 (XXV): Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, 30 April 1958, E/RES/672 (XXV), ('E/RES/672 (XXV)').

45 UN General Assembly, UN *General Assembly Resolution 1166 (XII): International assistance to refugees within the mandate of the United Nations High Commissioner for Refugees*, 26 November 1957, GA/RES/1166 (XII), § 5, ('GA/ RES/1166 (XII)').

46 *Ibid.*

Resolution 1166 (XII) authorized the High Commissioner:

> under conditions approved by the Executive Committee of the High Commissioner's Programme, to make appeals for the funds needed to provide supplemental temporary care and maintenance to, and participate in the financing of permanent solutions for, refugees coming within his mandate and otherwise not provided for;[47]

Though the EXCOM was mandated to act as the overseer of requests for funds, the High Commissioner retained discretion to consult the EXCOM 'at his request, in the exercise of his functions under the Statute of his Office'.[48]

From its first plenary session in 1975, the EXCOM seemingly permitted itself to adopt a liberal interpretation of its advisory role on protection matters. The EXCOM established the *Sub-Committee of the Whole on International Protection* which would 'study in more detail some of the more technical aspects of the protection of refugees and would report to the Committee on its findings.'[49] In its second session in 1976, the EXCOM:

> Reaffirmed the need to intensify its role in the field of protection and welcomed the establishment of a Sub-Committee of the Whole on protection, designed to focus attention on protection issues with a view to determining existing shortcomings in this field and to proposing appropriate remedies.[50]

Over the years, the High Commissioner has increasingly sought the advice of the EXCOM on matters pertaining to protection to the degree that it is now less a discretionary power of the High Commissioner and more a mandated power of the EXCOM. In 2017, the EXCOM consists of 101 members and purports to be mandated to:

47 GA/RES/1166 (XII), § 6.
48 GA/RES/1166 (XII), § 5(e).
49 UN High Commissioner for Refugees (UNHCR), *Establishment of the Sub-Committee and General Conclusion on International Protection*, 14 October 1975, No. 1 (XXVI), § (h).
50 UN High Commissioner for Refugees (UNHCR), *Functioning of the Sub-Committee and General Conclusion on International Protection No. 2 (XXVII)—1976*, 12 October 1976, No. 2 (XXVII)—1976, § (i).

> review and approve the [UNHCR's] programmes and budget, advise on international protection and discuss a range of other issues with UNHCR and intergovernmental and non-governmental partners.[51]

In 2017 the EXCOM is no longer restricted to performing its original function as advisory committee on matters concerning appropriation and allocation of funds, but has morphed into a quasi-assembly of States, providing annual guidance on matters of protection and principles of law. This mission creep is significant due to the fact that EXCOM is composed of States and as such, is vulnerable to States using their position in EXCOM to yield influence on matters concerning their own political agenda. In this respect, EXCOM is purely a State-run consultative process which raises questions about the quality of its output. Indeed, as Chetail has observed:

> The proliferation of nonbinding standards and consultative processes among a plethora of actors with different and sometimes conflicting agendas remains [...] a deeply ambivalent phenomenon: while acknowledging migration as a discrete field of cooperation, soft law reflects the reluctance of destination states to commit to a binding form of global governance.[52]

Despite the fact that EXCOM remains a non-legal entity which produces non-binding conclusions, the opinions espoused by the EXCOM in its annual conclusions have been enthusiastically recognised by courts as carrying interpretative value that the judiciary may consider discretionarily.[53] Courts have even gone as far as to consider it 'appropriate' to have regard to EXCOM conclu-

51 UNHCR, *About us: Executive Committee*, http://www.unhcr.org/executive-committee.html, retrieved 15 May 2017.

52 V. Chetail, 'The Architecture of International Migration Law, A Deconstructivist Design of Complexity and Contradiction', 111 *American Journal of International Law* (unbound) (2017) 18–23 at 23.

53 See *Attorney-General v. Refugee Council of New Zealand, Inc.* [2003] 2 NZLR 577, New Zealand: Court of Appeal, 16 April 2003, § 4 and 104; *Refugee Appeal No. 70951/98*, New Zealand: Refugee Status Appeals Authority, 5 August 1998; *Curtis Francis Doebbler v. Sudan*, 235/00, African Commission on Human and Peoples' Rights, 11 May 2012, § 165; *Z. v. The Minister for Justice, Equality and Law Reform, James Nicholson Sitting as the Appeals Authority, Ireland and the Attorney General* [2002] IESC 14, Ireland: Supreme Court, 1 March 2002, pg. 13; *QD (Iraq) v. Secretary of State for the Home Department; AH (Iraq) v. Secretary of State for the Home Department* [2009] EWCA Civ 620, United Kingdom: Court of Appeal (England and Wales), 24 June 2009, § 10; *Zgnat'ev v. The Minister for Justice,*

sions when assessing a state's obligations under the Refugee Convention.[54] The New Zealand court of appeal has even afforded EXCOM conclusions greater weight than the UNHCR Guidelines and recommended practice, stating that:

> [t]he Guidelines do not ... have a status in relation to interpretation of the Refugee Convention that is equal to that of the resolutions of the UNHCR Executive Committee.[55]

Dublin IV is one example of a regional instrument whose provisions do not square with the alleged State practice propounded by EXCOM. In 2017, the EXCOM provided two conclusions on burden-sharing and youth respectively; a far cry from funding allocation. When comparatively analysed, Dublin IV and the EXCOM conclusions of 2017 are clearly repugnant leaving one of two options: either Dublin IV is not reflective of State practice or the EXCOM conclusions of 2017 are purely aspirational statements which do not in reality reflect State practice.

3.1 *EXCOM Conclusion on International Cooperation and Burden-Sharing*

The concept of burden-sharing is not new to the EXCOM. As early as 1979, the EXCOM began to develop its own *acquis* on burden sharing, calling upon States to:

> take appropriate measures individually, jointly or through the Office of the United Nations High Commissioner for Refugees or other international bodies to ensure that the burden of the first asylum country is equitably shared.[56]

Throughout the 1980s and 1990s, the EXCOM continued to underscore the critical importance of carrying out all asylum activities in accordance with the principles of international solidarity and burden-sharing.[57] The centrality of the

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Equality and Law Reform, No. 2000 No. 533JR, Ireland: High Court, 29 March 2001; *RRT Case No. 1010720* [2011] RRTA 532, Australia: Refugee Review Tribunal, 7 July 2011.

54 See *Attorney-General v. Refugee Council of New Zealand, Inc.* [2003] 2 NZLR 577, New Zealand: Court of Appeal, 16 April 2003, § 8, per J McGrath & J Glazebrook J.

55 *Ibid.*, § 111.

56 EXCOM Conclusion No. 15 (XXX)—1979, § (g).

57 See, for example: EXCOM Conclusion No. 23 (XXXII)—1981—Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, § 3; EXCOM Conclusion No. 87 (L)—1999, §

burden-sharing concept in the EXCOM *acquis* has changed little in the decades that followed.[58] In 2005, the EXCOM underlined the 'importance of burden and responsibility sharing at all stages of a refugee situation, including ensuring access to protection in responding to the assistance needs of refugees ...'[59]

In 2016, the EXCOM *conclusion on international cooperation and burden sharing* primarily comprises a commitment from Member States to further strengthen international cooperation, solidarity, equitable responsibility and burden sharing. It further urges all States and UNHCR to:

> [i]ncrease their efforts to implement these important principles, including through the provision of much needed support to host countries by mobilizing financial and other necessary resources, and ensure protection and assistance and realize durable solutions for refugees and for other persons of concern, as appropriate, in order to enhance the coping ability and resilience of host communities, as well as provide assistance in a more predictable, timely, sustainable and equitable and transparent way;[60]

It also calls upon States and all other relevant actors to:

> [C]ommit themselves, in the spirit of international solidarity and burden-sharing, to comprehensive, multilateral and multi-sectoral collaboration and action, in addressing the root causes of protracted refugee situations, in ensuring that people are not compelled to flee their countries of origin in the first place, to find safety elsewhere, and in resolving the protracted refugee situations which persist, in full respect for the rights of affected persons;[61]

Despite the professed importance of the burden-sharing principle, the provisions of Dublin IV reveal the principle to be something of a misnomer.

(b); EXCOM Conclusion No. 85 (XLIX)—1998 § (p); EXCOM Conclusion No. 67 (XLII)—1991, § (e); EXCOM Conclusion No. 85 (XLIX)—1998, § (p); EXCOM Conclusion No. 93 (LIII)—2002, (c); EXCOM Conclusion No. 82 (XLVIII)—1997—Conclusion on Safeguarding Asylum, § (c).

58 See, for example: EXCOM Conclusion No. 90 (LII)—2001, (k); EXCOM Conclusion No. 93 (LIII)—2002, (c).

59 EXCOM Conclusion No. 102 (LVI)—2005, (k).

60 EXCOM, *Conclusion on international cooperation and burden-sharing*, § 1.

61 *Ibid.*, § 8.

Provisions cutting out emergency funds and centralized data-collection, and introducing unfair thresholds for interstate assistance will impose financially onerous conditions on Border-States through the implementation of the corrective allocation mechanism, the distribution key, and the solidarity contribution, while the EXCOM conclusion urges the provision of financial support and other necessary resources. These provisions cannot in any way be considered as means of implementing the burden-sharing principle.

In response to the 150% capacity threshold, the Italian Senate submitted to the Council of Europe that it considers it 'necessary considerably to lower the threshold that will be required to trigger the relocation mechanism and to abolish the option of replacing participation in the mechanism with a financial contribution, in order effectively to pursue the goal set out in the proposal itself—a fair distribution of applicants between the Member States.'[62]

In her report of 9 March 2017, Cecilia Wikström, Member of the European Parliament and lead on the reform of the Dublin system, presented a draft report to the Civil Liberties Committee, in which she proposed, among other things, the introduction of a transitional system to compliment the operation of the corrective allocation mechanism. Wikström proposes that the corrective allocation mechanism should be triggered automatically where the number of applications for international protection for which a Member State is responsible exceeds 100% of the figure identified in the distribution key, not 150%. The corrective allocation should then cease to apply when the number of applicants for which a Member State is responsible drops below 75% of the figure identified in the distribution key.[63]

Wikström suggests that the distribution key should be based on the average numbers of historically lodged applications for international protection in Member States and then transition from this 'status quo' model towards a fair distribution by removing 20% of the baseline and adding 20% of the fair distribution model per year until the system is fully based on the fair sharing of responsibilities.[64]

Di Filippo and Schiavone, while acknowledging the importance of Wikström's proposals, suggest that, in some regards, they do not go far enough.[65] Di Filippo instead advocates for a radical overhaul of the Dublin system and the establishment of a new system governing the determination of State jurisdiction

62 Reasoned Opinion of the Italian Parliament, p. 7.
63 Wikström draft report, p. 16.
64 Reasoned Opinion of the Italian Parliament, p. 17.
65 di Filippo, M., & Schiavone, G., An Ambitious and Pragmatic Reform of the Dublin System: Selected amendments to the Draft Report by MEP Cecilia Wikström, 16 March 2017.

over persons of concern.[66] Under such a system, Di Filippo proposes that jurisdiction is established by any Member State which enters into contact with a person in need of international protection. That State must then assume responsibility for conducting a Refugee Status Determination and is assisted by an asylum support team including liaison officers and specialized staff of other Member States, EASO, UNHCR and other actors.[67] The consequences of this model are twofold: first, the States who are most frequently the first point of contact with asylum seekers are Border-States. Second, the implementation of a first country of contact principle may cause States to then withdraw their presence from known transitory zones.

While the hotspots approach raises myriad questions concerning protection issues, most notably, reception conditions, it is clear that the 150% capacity threshold imposed by Dublin IV is manifestly unreasonable. As has been highlighted by the Hungarian, Italian and Romanian parliaments, Border-States are being set up to fail by the operation of these provisions.

The author agrees with the recommendations of Wikström however proposes that the trigger for EU support must occur at 70% capacity according to the population and GDP metric however instead of triggering relocation, it would trigger an EU response. The corrective allocation mechanism would then become redundant for the purposes of allocating responsibility to Member States for processing asylum applications as the Member State of first arrival would benefit from the collective response of the EU Member States and institutions.

Any increase in migration to a Member State triggering the 70% capacity threshold would in turn, trigger burden-sharing obligations of other Member States and EU institutions to render assistance in a coordinated effort to register and assess each individual application for asylum. In this way, the hotspots approach could function more effectively with sufficient resources provided by the Member States and institutions of the EU and the UNHCR. Specialist teams of protection officers from Member States, EU institutions and the UNHCR should be immediately mobilized and deployed to hotspot locations once the 70% capacity threshold of a Member State's distribution key figure is triggered.

66 di Filippo, M., An International Law Oriented Approach to the Allocation of Jurisdiction in Asylum Procedure, in Dialoghi con Ugo Villani, Cacucci, 2017, pp. 451–460.

67 M. Di Filippo, *From Dublin to Athens: A plea for the Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures*, Policy Brief (Sanremo: International Institute of Humanitarian Law, 2016), p. 11.

3.2 *EXCOM Conclusion on Youth*

Like the EXCOM conclusion on international cooperation and burden-sharing, the EXCOM Conclusion on youth is not the first of the committee's pronouncements relevant to minors.[68] In 1981, the EXCOM concluded that:

> Every effort should be made to trace the parents or other close relatives of unaccompanied minors before their resettlement. Efforts to clarify their family situation with sufficient certainty should also be continued after resettlement.[69]

Importantly, the EXCOM conclusions have historically recognised the principle of paramouncy; the principle that the best interests of the child are, in all actions concerning children, the paramount consideration.[70] The EXCOM conclusion on youth of 2016 came off the back of the Global refugee youth consultations, which 'ultimately [sought] to place refugee adolescents and youth higher on the humanitarian agenda'.[71] Though primarily a commentary on migrant and refugee youth engagement, the EXCOM did still take the opportunity to call upon the international community to provide 'the necessary support and resources for UNHCR, concerned States and partners, to meet the specific and diverse needs and build the capacities of youth of concern to UNHCR.'[72] Any mention of the principle of paramountcy was however, notably absent.

Recital 15 of Dublin IV proposed the text:

> In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European

68 EXCOM Conclusion No. 98 (LIV) 2003; EXCOM Conclusion No. 99 (LV) 2004; EXCOM Conclusion No. 100 (LV) 2004; EXCOM Conclusion No. 101 (LVI) 2005; EXCOM Conclusion No. 102 (LVI) 2005; EXCOM Conclusion No. 105 (LVII) 2006; EXCOM Conclusion No. 107 (LVIII) 2008; and EXCOM Conclusion No. 108 (LIX) 2008.

69 EXCOM Conclusion No. 24 (XXXII)—1981, § 7.

70 See, for example: No. 47 (XXXVIII)—1987—Refugee Children, §§ (d) & (k); No. 84 (XLVIII)—1997—Refugee Children and Adolescents, § (a); No. 88 (L)—1999—Protection of the Refugee's Family, § (c); No. 98 (LIV)—2003—Protection from Sexual Abuse and Exploitation; No. 103 (LVI)—2005—Provision on International Protection Including Through Complementary Forms of Protection, § (n); No. 105 (LVII)—2006—Women and Girls at Risk, § (n); No. 107 (LVIII)—2007—Children at Risk, §§ (b), (g) & (h).

71 UN High Commissioner for Refugees (UNHCR), *'We Believe in Youth'—Global Refugee Youth Consultations Final Report*, 19 September 2016, pg. 2.

72 EXCOM, *Communication on youth*, § 5.

> Union, the best interests of the child should be *a* primary consideration of Member States when applying this Regulation.[73]

However this provision is not in accordance with the 1989 United Nations Convention on the Rights of the Child which requires the best interests of the child to be *the* primary consideration.[74] Indeed, in her Draft Report, Wikström highlighted that the application of the paramountcy principle was weakened by this provision.[75] She recommended that Recital 15 be amended to provide that 'the best interests of the child should be *the* primary consideration of Member States when applying this Regulation'.[76]

New Article 10(5) of Dublin IV stipulates that, in the absence of a family member, the Member State responsible for the application of an unaccompanied minor would be the Member State in which the unaccompanied minor first lodged his or her application for international protection. A decision to transfer an unaccompanied minor under this provision would be conditional upon the demonstration that it is not in the best interests of the child. However, according to Recital 15, the best interests of the child would be only one of several considerations necessarily made for the determination of the Member State responsible.

Although Dublin IV proposes to broaden the scope of the definition of 'family' to include siblings and families formed outside the country of origin (but before their arrival on the territory of the Member State),[77] it in turn removes the right of the applicant, including the minor-applicant, to be informed of his or her right to provide information concerning the presence of family members, relatives or any other family relations in the Member States, in order to facilitate the procedure of determining the Member State responsible.[78] If, however, the unaccompanied minor claims that he or she has a relative in another Member State, the scope of the effective remedy would, as discussed above, not be limited to an assessment of the best interests of the child, but to

73 Dublin IV, Recital 15. Emphasis added.

74 1989 United Nations Convention on the Rights of the Child, Art.21; Charter of Fundamental Rights of the European Union.

75 European Parliament: Committee on Civil Liberties, Justice and Home Affairs, *DRAFT REPORT on the 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 third-country national or a stateless person (recast)*, 24 February 2017, 2016/0133(COD).

76 *Ibid.*, p. 7. Emphasis added.

77 Dublin IV, recital 15 new, § 19.

78 Dublin IV, recital 18 (adapted) new, § 23.

> an assessment of whether the applicants' fundamental rights to respect of family life, the rights of the child, or the prohibition of inhuman and degrading treatment risk [being] infringed upon.[79]

This new framework is in furtherance of a policy to discourage secondary movement of unaccompanied minors, 'which [is] not in their best interests'.[80] In this regard, the Standing Committee of the Italian Senate in its report on *Subsidiarity and Proportionality*, took the view that when it came to enacting Dublin returns of unaccompanied minors to the Member State of first arrival, 'it is more in the interests of the minor if the Member State in which the minor is located when the application is submitted is deemed responsible'.[81] In line with this finding, Wikström proposes to delete any limitation on the scope of the grounds for assessment:

> since it would likely not be compatible with the requirements of Article 47 of the Charter of Fundamental Rights of the EU to limit the right of a remedy to only certain breaches of rights.[82]

Wikström also suggested reinforcing consideration of the paramountcy principle by providing that transfers of minors must only be actioned 'provided that such a transfer is in the best interests of the child'.[83] Furthermore, in order to avoid secondary movements and to increase the prospects of integration and facilitate the administrative processing of applications for international protection it would be beneficial to ensure that applicants who wish to be transferred together can register and be transferred under the corrective allocation mechanism as a group to one Member State rather than to be split up between several Member States.[84]

Historically, attempts to transfer unaccompanied minors back to the Member State of first arrival under the Dublin system have proven to be unnecessarily time-consuming which is, in the opinion of the Court of Justice of the European Union, never in the best interests of the child. In *MA and Others v. the Secretary of State for the Home Department*, the Court held that:

79 Dublin IV, recital 19 new, § 24.
80 Dublin IV, recital 16 new, § 20.
81 Italian Parliamentary *Report on Subsidiarity and Proportionality*, p. 6.
82 *Ibid.*, p. 15.
83 *Ibid.*
84 Dublin IV, Recital 33 b (new), pg. 19.

> [s]ince unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.[85]

This is, according to the Court, justified by the paramountcy principle that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration.[86]

The author is of the opinion that unaccompanied minors should immediately be identified and processed and that contact should immediately be established with relatives within the EU. This would necessitate the preservation of the minor's right to be informed that he or she may identify relatives within the EU during RSD. In the case of an unaccompanied minor with no relatives present in the EU, the Member State of first arrival should become the Member State responsible for resettling the minor. This is based on the principle that it is never in the best interests of the child to be transferred to another Member State unnecessarily. Similarly, the Member State of first arrival should assume responsibility of the minor in order to expedite the continuation of his or her education. The minor should immediately be placed into the education system of the Member State responsible for his or her guardianship as any delay in education should not be considered in the best interests of the child in any circumstances. It should be agreed by all Member States that in all actions concerning minors, disruption, including movement and delays in access to education and psychosocial support, is never in the best interests of the child.

Additionally, a monitoring system should be established to identify any relatives of unaccompanied minors in EU territory, proceeding the resettlement of unaccompanied minors, with a view to transferring the relative to the Member State with guardianship of the unaccompanied minor. This monitoring system should function on a continual basis until the child reaches maturity. This too would be founded on the principle that it is always in the best interests of the child to be in the care of relatives.

85 *The Queen, on the application of MA and Others v Secretary of State for the Home Department*, Court of Appeal (England & Wales) (Civil Division), C-648/11, 6 June 2013, § 55.

86 *Ibid.*, § 57.

4 Concluding Remarks and Recommendations for an Effective Dublin IV

If the EXCOM has in fact reached the status of 'reflective of State practice' then it is, insofar as it is relevant to the practice of the EU, solely an aspiration and meretricious document of little value to the enforcement of its professed principles and of no correlation to EU State practice. This could not be more self-evident than when placed beside Dublin IV. The principles of Dublin IV are so fundamentally incompatible with the EXCOM conclusions that they are in fact completely contrary. Dublin IV is inequitable in its interaction with the State, and oppressive in its interaction with the individual.

The proposal for the reform of Dublin IV as being required to ensure the 'fair sharing of responsibilities between Member States' is no such reform.[87] Dublin IV offers a plethora of procedural reforms that purport to support burden-sharing, yet, in fact threaten to have a significantly destabilising effect on Border-States by imposing undue burden on their asylum systems while excluding other Member States from any legal obligation to render assistance until the number of arrivals threatens to spill over into neighbouring Member States. Should these amendments be adopted by the European Parliament, Italy, Greece and other Border-States will be almost single-handedly responsible for the protection of the EU and will be financially responsible for the provision of international protection.

Dublin IV claims to achieve the burden-sharing objectives and remedy the failures of the Dublin system, however, Dublin IV proposes to essentially maintaining the Dublin hierarchy of criteria without amendment. While proposing to introduce the corrective allocation mechanisim to remedy the undue burden placed on Border-States, the European Commission failed to effect any logical remedy for the imbalance in burden-sharing. The corrective allocation mechanism instead makes it impossible for Border-States to illicit additional funds and personnel support until they are barely able to maintain a structured asylum system alone. As they are, the proposed burden-sharing provisions of Dublin IV violate the fundamental EU principles of proportionality and subsidiarity.

There is one significant positive amendment to Dublin IV concerning the broadened definition of 'family' to include siblings, however, the weakening of protection for unaccompanied minors coupled with the willingness to transfer unaccompanied minors will expose some of the most vulnerable refugees to abuses of fundamental human rights.

87 Dublin IV, p. 4.

The monitoring and identification of migration trends and the potential impending increase in migrant movement into the EU must be a collective action, carried out by all Member States concerning their own territories and communicated and collated through a centralized EU migration institute, whether that be EASO, EUAA or a separate entity.

These proposals for a reform of the Dublin system are neither radical nor particularly innovative. Many prominent academics have presented similar proposals for the improved functionality of the Dublin System, including its burden-sharing principles and protection obligations.[88] The political will of Member States however is presently lacking and proposals to strengthen protection obligations and the establishment of a system which is based on fair and equitable burden-sharing fall on deaf ears. Dublin IV appears to be concerned with the diminution of responsibility to persons of concern. The rise in populist politics and the demise of any pre-existing fervor to protect human rights in the EU will make it exceedingly difficult for any proposition for the overhaul of the Dublin system to be successful.

88 See, for example, Chetail 2016; Di Filippo 2016.