ISSN 2384-9169
Fascicolo n. 3 - 2024
rivista.eurojus.it

The residence document criterion in the revised Dublin system, *today*, between EU secondary law and the jurisprudence of the Court of Justice

ORIANA BALSAMO*

TABLE OF CONTENTS: 1. Introduction. – 2. Documents control in the revised Dublin system, *today*. – 3. The residence document criterion in the jurisprudence of the CJ: the *E and S* case and beyond. – 3.1. The factual background. – 3.2. The relationship between the Dublin system and the Vienna Convention on Diplomatic Relations and the Diplomatic Cards. – 3.3. The allocation of responsibility with the residence document criterion. – 3.4. Possible alternatives to the "country of first entry" rule. – 4. The novelty of the *E. and S* case. – 5. Conclusion: a critical appraisal of the residence document criterion and the future challenges.

1. Introduction

For years, migration and asylum in the EU have mirrored the routes of migrants seeking a prosperous future within the territories of the Union's Member States.[1] Asylum measures continually fluctuated inside the vast "*mare magnum*" of the area of freedom security and justice ("AFSJ") between the States retaining their responsibilities and those calling for more solidarity. In this scenario, the right to asylum[2] is a central aspect of the European legal framework, where Title V of the TFEU recognizes the Union's competences

* Teaching assistant for diritto dell'unione europea, LUISS Guido Carli

[1] See S. VELLUTI, *Reforming the common European asylum system - legislative developments and judicial activism of the European courts*, Berlin, 2014, I ed, p. 5 ff.

[2] Following the Treaty of Amsterdam, the Union recognized as a fundamental objective the achievement of an area without internal borders. Thanks to Article 67 TFEU, this object is not merely established but also realized in European Union law. TFEU, Art. 3, para. 2. The right to asylum is currently governed under Article 18 of the Charter of fundamental rights of the European Union ("Charter") and artt. 67, 78 and 80 of the TFUE. Those primary norms are in line with the criteria set under International Refugee Law ("IRL"), governed by the Refugee Convention relating to the Status of Refugee of 1951 ("Geneva Convention 1951") and the Protocol Relating to the Status of Refugees of 1966 ("New York Protocol"). For further analysis, see also, U. VILLANI, *Istituzioni di Diritto dell'Unione europea,* Bari, 2020, VI ed.; H. J. BLANKE, S. MANGIAMELI, *The Treaty on European Union (TEU). A commentary,* London, 2012, p. 157 ff; A. TIZZANO, *Trattati dell'Unione Europea,* Milano, 2014, p. 17.

to regulate the conditions of entry, stay, and movement of third-country nationals on the territory of the Member States.[3] The area is, therefore, both an object of the EU under Article 3(2) TFEU and an area of shared competences under Article 4(2)(j) TFEU.[4]

In the Tampere Conclusion of 1999, the Commission created the Common European Asylum System ("CEAS") with the aim of reaching a uniform refugee status, as prescribed under Article 78(2) TFEU. [5] The plan was divided into two distinct phases of five-year periods, from 1999 to 2005 and from 2008 to 2013.[6] The first stage concerned the development of the so-called "four building blocks", with six legislative instruments establishing minimum standards.[7] In 2008, the European Pact on Immigration and Asylum pushed for the achievement of a higher level of harmonization and more comprehensive protection for asylum seekers with the starting of the second phase.[8] In this scenario, the so-called Dublin system ("System") was governed by two main Regulations.[9] Regulation

[3] Ibidem, Artt. 68-89. See also, R. SCHÜTZE, *European Union Law,* Oxford, 2021, III ed.*,* p. 76 ff.*;* H. J. BLANKE, S. MANGIAMELI, *op. cit.,* p. 255 ff.*;* A. TIZZANO, *op. cit.,* pp. 17 and 387 where he talks about the European competences. More in particular, Article 5(2) TUE confers competences to the Union as long as Member States attributed competences to the Union pursuant the Treaties. In this regard, Article 5 TUE establishes the principles governing the delimitation of competences between the Union and the Member States, i.e., principles of conferral, subsidiarity, and proportionality. Article 2 of the TFEU, instead, divides the categories of competences into exclusive, shared, and supporting competences. Indeed, the TFEU recognizes exclusive competences under Article 3 where the Union is the sole body entitled to legislate and adopt acts. The shared competences, under Article 4 TFEU, have residual characteristics and include most areas. In this field, the Union and the Member States are both legitimized to intervene, but their relationships are established in light of the principles of solidarity and pre-emption. The former attributes legitimacy to intervene in specific areas, whereas the latter regulates the competitive relationship of these types of competences.

[4] Thus, the latter may exercise their powers as long as and to the extent that the Union has not already exercised them. TFEU, Art. 4(2)(j) and Art. 2(2), See among others C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford, 2015, I. ed., p. 41 ff., ; C. COSTELLO, M. MOUZOURAKIS, *The common European asylum system: Where did it all go wrong?,* in M. FLETCHER, E. HERLIN-KARNELL, C. MATERA (eds.), *The European Union as an area of freedom, security and justice*, London, 2016, p. 281 ff; A. LANG, *Commento di Alessandra Lang,* in A. TIZZANO, *op. cit.,* p. 826 ff; A. DI PASCALE, *Commento di Alessia Di Pascale,* in A. TIZZANO, *op. cit.,* p. 834 ff.; A. ADINOLFI, *Commento all'art. 80 TFEU,* in F. POCAR, M. C. BARUFFI, *Commentario breve ai Trattati dell'Unione Europea,* Milano, 2014, II ed., p. 497 ff.

[5] See Tampere European Council 15 and 16 October 1999 Presidency Conclusions available at https://www.europarl.europa.eu/summits/tam_en.htm. On the Tampere Programme see among others S. CARRERA, D. CURTIN, A. GEDDES, *20 Year Anniversary Of The Tampere Programme,* Florence, 2020.

[6] See E. CODINI, M. D'ODORICO, M. GIOIOSA, Per una vita diversa. La nuova disciplina italiana dell'asilo, in *Francesco Angeli,* 2009, I ed., p. 17 ff.; K. GROENENDIJK, *Migration and Law in Europe,* in E. GUILD, P. MINDERHOUND (eds.), *The first decade of EU migration and asylum law,* Boston, 2012, p. 1 ff.

[7] Council Directive 2001/55/EC, Directive 2013/33/EU ("Reception of Asylum Seekers Directive"); Council Regulation (EC) No 343/2003 ("Dublin II Regulation"); Directive 2003/59/EC ("Qualification Directive"); Directive 2013/32/EU ("Asylum Procedures Directive"). See also S. PEERS, V. MORENO-LAX, M. GARLICK, E. GUILD, *The Dublin III Regulation,* in S. PEERS, N. ROGERS (eds.), *EU Immigration and Asylum Law: Text and Commentary*, Leiden, 2006, p. 345 ff.

[8] The second stage was governed by Regulation 604/2013/EU ("DR"), Directive 2013/32/EU ("Asylum Procedure Directive Recast"); Directive 2013/33/EU ("Reception Conditions Directive recast"); Directive 2011/95/EU ("Qualification Directive Recast"). See Council of the European Union, *European Pact on Immigration and Asylum*, no. prev. doc. 13189/08 ASIM 68. See also EUROPEAN UNION AGENCY FOR ASYLUM (EUAA), *2.1 The Common European Asylum System and current issue.*

[9] See V. MORENO-LAX, *Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 605 ff.; G. MORGESE, *La*

604/2013 ("DR") established a set of clear and objective criteria under Chapter III determining the Member State responsible for examining an asylum application.[10] In line with the repealed Dublin II Regulation, the main purpose was to avoid "asylum shopping" or a lack of examination due to uncertainty.[11] The Eurodac Regulation 603/2013 ("Eurodac 2013") provided a biometric database to better assist DR execution, registering fingerprint information of asylum seekers with a hit-or-miss process.[12]

The System was based on the idea that States trust each other's determination procedures, recognizing their outcomes without having a legal duty to share their responsibility. In fact, the registration of an asylum application in the first country of arrival prevented a second application in another Member State, and, in such cases, allowed for the initiation of a transfer procedure to the first one.[13] Namely, Article 3(1) DR attributed to one Member State only the responsibility for the examination, whereas para. 2 established the "country of first entry" rule. The latter attributed responsibility to the country where the applicant first entered the European Union ("EU") whenever the DR criteria failed to identify the Member State responsible.[14] However, the DR has ended up placing high pressure on the border States due to their geographical position.[15] The 2015

---

solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo, Bari, 2018, I. ed, p. 121 ff.

[10] It repealed the Dublin II Regulation, providing some valuable changes, e.g., amended the definitions of family members, introduced a suspensive effect of the appeal, provided deadlines for the take-back procedure, the exchange of health information for the applicant's protection, and the possibility of detention of the applicant due to the risk of absconding. See DR, cit., art. 2(g), Art. 27(2)(b), Art. 32, Art. 28(2).

[11] The first provision of Chapter III, Article 7 of the Dublin Regulation expressly mandated the allocation of responsibility according from Artt. 8 to 15 DR, including, in order of importance, family considerations, recent possession of a visa or a residence permit in an EU country, entry into EU territory irregularly or regularly, a focus on minors, family members who are beneficiaries of international protection, family members who are applicants for international protection, family procedure, issuance of residence documents or visas, entry and stay, visa waived entry, and application in an international transit area of an airport. See also E. PAPASTAVRIDIS, *Recent "Non-Entrée" Policies in the Central Mediterranean and Their Legality: A New Form of "Refoulement"?,* in *Diritti umani e diritto internazionale,* 2018, p. 493 ff. See L. RIZZA, *La Riforma del sistema Dublino: laboratorio per esperimenti di solidarietà*, in *Diritto, Immigrazione e Cittadinanza*, 2018, p. 1 ff.; S. LAVENEX, *Failing forward towards which Europe? Organized hypocrisy in the common European asylum system*, in *JCMS: Journal of Common Market Studies*, 2018, p. 1195 ff.

[12] The Regulation (EU) No 603/2013 ("Eurodac 2013") repealed the Regulation (EC) No 407/2002 ("Eurodac 2002"). It was fundamental in determining their place of arrival, and therefore, the possible application of Article 3(2) DR. In particular, the transferred data were automatically compared with other recorded fingerprints, issuing a notification in the case of a match, i.e., a hit. Member States were allowed to initiate transfer procedures under DR norms when fingerprints turned out to have been previously registered by another Member State. Consequently, it functions as a quasi-identifying tool despite the fact that identification is not a stated purpose of the System. See among others S. PEERS, V. MORENO-LAX, M. GARLICK, E. GUILD, *Eurodac,* in S. PEERS, N. ROGERS, *op. cit.*, p. 429 ff.

[13] See S. PEERS, N. ROGERS*, Asylum Procedures,* ID., *op. cit.*, p. 346; F. MAIANI, *The Dublin III Regulation: A New Legal Framework for a More Humane System?*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System: The New European Refugee Law,* Boston, 2016, p. 99 ff.; E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, *The 2015 Refugee Crisis in the European Union*, in *Centre for European Policy Studies Policy Brief* ("CEPS")*,* 2015.

[14] Ibidem, Art. 3(2).

[15] See G. MORGESE, *La riforma del sistema Dublino: il problema della condivisione delle responsabilità*, in *Il Mulino-Rivisteweb,* 2020, p. 97 ff.; E. JURADO, H. BEIRENS, S. MAAS, M. LABAYLE, D. UNGUREANU, S. FRATZKE, N. BANULESCU-BOGDAN, B. SALANT, J. SIENKIEWICZUROPEAN, *Evaluation of the implementation*

refugee crisis caused the system collapse under its own weight, revealing its crumbling structure and calling for the legislative intervention.[16]

In 2020, the Commission proposed the New Pact on Migration and Asylum ("Pact") to amend and supplement the former CEAS instruments through the introduction of new mechanisms.[17] Initially, the debate focused on the reform of the current framework and the need to definitively overcome of the "country of first entry" criterion.[18] However, the emphasis soon shifted to the adoption of measures aimed at equitable burden-sharing in the spirit of solidarity, as required under Article 80 TFEU.[19] In May 2024, the Pact was complemented by nine legal instruments: five new legislative provisions, signalling a desire to ensure uniform application in the Member States, as well as non-binding acts, including three recommendations and one guideline.[20] However, the European legislator has ensured continuity between the 2013 and the current Dublin system.[21] The latter is governed by Regulation (EU) 2024/1351 on asylum and migration management ("RAMM") providing few substantive changes to the DR and Regulation (EU) 2024/1358 ("Eurodac 2024).[22] In this regard, the automatic application of the traditional DR criteria is kept under the RAMM provision.

Even today, European asylum law is going through a "positive integration process" where Member States are the prominent actors in shaping the asylum law by internal

---

of the Dublin III Regulation – Final Report, 2016, p. 1 ff; ASYLUM INFORMATION DATABASE (AIDA), *The implemention of the Dublin III Regulation in 2020,* 2021, p. 2 ff.

[16] For further analysis see M. DEN HEIJER, J. RIJPMA, T. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, in *Common Market Law Review (CMLR),* 2016, p. 607 ff.; D. THYM, *European Migration Law,* Oxford, 2023, p. 337 ff.; European Commission, *Common European Asylum System*; C. DI STASIO, *La politica migratoria europea: da Tampere a Lampedusa,* Napoli, 2012.

[17] More in particular, the CEAS is a package of secondary norms setting out common standards to ensure equal treatment in asylum law, governed prior to May 2024 by five legislative instruments and one agency. In this scenario, the DR establishes the criteria and mechanism to determine the Member State responsible for examining an application for international protection lodged by a third-country national. See S. CARRERA, D. GROS, E. GUILD, *What Priorities for the New European Agenda on Migration?*, in *CEPS*, 2015, p. 1 ff.; S. PROGIN-THEUERKAUF, *Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?*, in *European Papers,* 2021, p. 7 ff.; T. GAZI, *The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups?,* in *European Papers,* 2021, p. 167 ff.

[18] The latter is set forth in current Article 16 RAMM. A further analysis will be provided in the following sections, more in particular in section 3.3.

[19] The solidarity principle under Article 80 TFEU has been conceived mostly as a political duty to cooperate in managing migration and asylum flows. In the Dublin provisions, solidarity was conceived under the Recital as a mere goal to be achieved in managing migration without any legal formalities. Art. 80 of TFUE; J. S. VARA, *Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?*, in *European Papers-A Journal on Law and Integration*, 2022, p. 1243 ff.

[20] The Pact amending three previous legislative acts through the introduction of Regulation (EU) 2024/1347 ("Qualification Regulation"), Regulation (EU) 2024/1350 ("Resettlement regulation 2024"), and Directive (EU) 2024/1346 ("Reception directive 24").[20] Additionally, the Pact includes five new legislative provisions, including Regulation (EU) 2024/1348 and Regulation (EU) 2024/1349 on the procedure management ("Procedures Regulations"), Regulation (EU) 2024/1351 on asylum and migration management ("RAMM"), Regulation (EU) 2024/1356 ("Screening Regulation"), Eurodac 2024, cit., and Regulation (EU) 2024/1359 addressing situations of crisis and *force majeure*.

[21] RAMM, cit., Recital No. 76.

[22] Ibidem, cit., Eurodac 2024.

provisions.[23] The CEAS results in a fragmented system with important divergences both in the recognition procedures and the types of status recognized in each Member State. In this context, the Dublin system has been subject to criticism due to its mechanism for the allocation of responsibilities.[24] The "country of first entry" rule was, and still is, the main obstacle to the development of a workable method, since the criteria's automatic application avoids any possible consideration of the applicants' preferences. The same formulation of Article 3 DR has been kept under Article 16 RAMM, showing the willingness of the European legislator to determine only one responsible Member State, usually resulting as the country of first entry.[25] The so-called "negative mutual recognition" of asylum applications continues to limit the applicants' secondary movement, relying on automatic allocation of responsibility.[26] In this regard, the System fails to consider the applicants' preferences to avoid that the responsibility would be placed on the country of first choice.[27]

The 2024 legislative intervention did not overcome specific problematic aspects of the DR, i.e., the residence document criterion under Article 12 DR and its relationship with international norms. The criterion is currently governed by Article 29(1) RAMM without relevant normative changes, whereas Article 2(13) RAMM represents its legal basis as defining the residence document.[28] Moreover, the doctrinal contributions and jurisprudential intervention did not delve into the examination of the residence document

[23] See Court of Justice ("CJ"), 21 September 1999, case C-378/97, *Wijsenbeek,* EU:C:1999:439, para. 40.
[24] See B. NASCIMBENE, *Refugees, The European Union And The 'Dublin System. The Reasons For a Crisis*, in *European Papers,* 2016, p. 101 ff.; A. DI PASCALE, *La futura agenda europea per l'immigrazione: alla ricerca di soluzioni per la gestione dei flussi migratori nel Mediterraneo*, in *Eurojus.it*, 2016, p. 1 ff.
[25] The countries of first entry are usually the Member States located at the EU border due to their geographical position, such as Italy, Greece, Spain and Malta. See ASILO IN EUROPA (AE), *Regolamento Dublino III,* 2013, p. 1 ff.; B. NASCIMBENE, cit., 2016, p. 101 ff.; C. FAVILLI, *La crisi del sistema Dublino: quali prospettive?,* in *La crisi migratoria tra Italia e Unione europea: diagnosi e prospettive,* in M. SAVINO (eds.), Napoli, 2017, I. ed., p. 279 ff.
[26] The concept was originally developed in the area of the internal market through the landmark *Cassis De Dijon* judgment. In 1979, the CJ required the recognition of a liquor legally produced in a Member State despite its having an alcohol content below that required by the receiving State's legislation. Thus, the principle of mutual recognition is based on the trust in each other's process of determination, with a presumption that decisions are taken based on adequate rules which are applied correctly and offer equal or equivalent protection. See CJ, 20 February 1979, Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42 ("*Cassis De Dijon*"). See C. FAVILLI, *L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'«emergenza» immigrazione*, in *Quaderni Costituzionali*, 2015, p. 785 ff.; A. ADINOLFI, *op. cit*.
[27] See B. GARCÉS-MASCAREÑAS, *Why Dublin Doesn't Work*, in *Notes Internacionals CIDOB,* 2015, p. 1 ff; E. BROUWER, C. RIJKEN, R. SEVERIJNS, *Sharing responsibility: A Proposal for a European Asylum System Based on Solidarity,* in *EU Immigration and Asylum Law and Policy,* 2016; G. CAGGIANO, *Ascesa e caduta della rotta balcanica. Esternalizzazione contro solidarietà per i richiedenti asilo*, in *Studi sull'integrazione europea,* p. 221 ff.; G. MORGESE, *Principio di solidarietà e proposta di rifusione del regolamento Dublino*, in E. TRIGGIANI, F. CHERUBINI, E. NALIN, I. INGRAVALLO, R. VIRZO, *Dialoghi con Ugo Villani*, Bari, 2017, XX ed., p. 471 ff.; P. DE PASQUALE, *Verso la refusione del regolamento "Dublino III"*, in *Studi sull'integrazione europea,* 2018, p. 267; F. FERRI, *Il regolamento "Dublino III" tra crisi migratoria e deficit di solidarietà: note (dolenti) sulle sentenze Jafari e A.S.*, in E. TRIGGIANI, U. VILLANI, G. CAGGIANO, *Studi dell'Integrazione Europea*, 2018, p. 519 ff.; T. M. MOSCHETTA, *I criteri di attribuzione delle competenze a esaminare le domande d'asilo nei recenti sviluppi dell'iter di riforma del regime di Dublino*, in *Federalismi.it,* 2018, p. 2 ff.
[28] RAMM, cit., Artt. 29(1) and 2(13).

criterion. On the one hand, the complex foundation of the CEAS compelled the doctrine to examine its basic gaps without the possibility of addressing specific inquiries. On the other hand, the jurisprudence of the Court of Justice ("CJ") has been limited to two preliminary rulings on the interpretation of Article 12 DR. First, the *Jafari* judgement paved the way for a contextual interpretation of the criterion.[29] The recent *E and S* decision was crucial in presenting the difficult relationship between the Vienna Convention on Diplomatic Relations ("VCDR") and the Dublin system.[30]

Therefore, the present study will delve into the *E and S* decision, referring mostly to the DR numbering as being the legal instrument applicable until May 2024. First, the examination will present the new provisions governing document control in the revised Dublin system. The analysis will demonstrate the challenging application of the residence document RAMM criterion due to the latest introduction of the screening mechanism (section 2). Hence, the following sections will be devoted to the study of the *E and S* judgment as providing a critical interpretation of the criterion (section 3). In this regard, the interpretation of the residence document definition as defined under Article 2(l) DR is fundamental as being the legal basis for the application of the residence document criterion under Article 12(1) DR. In doing so, the study will compare the current formulation to the traditional DR formulations (sections 3.1 and 3.2). More in particular, the study of the allocation of responsibility mechanism will consider whether the CJ could have considered other criteria for determining the Member States' responsibility in the *E and S* decision (section 3.3). Consequently, the examination must delve into the doctrinal alternatives to the "country of first entry" rule as one of the System's main criticalities (section 3.4). Hence, the study will consider the relevance of the *E and S* judgment in the new legal scenario (section 4). The investigation will demonstrate the importance of the *E and S* decision in understanding the residence document definition and the need for future jurisprudential intervention for its interpretation.

2. Document control in the revised Dublin system, *today*

In the New Pact, the Dublin system was intended to be a "fresh start" for the management of migration flows. However, the allocation of responsibility remains anchored to the objective Dublin criteria, with a few limited additions.[31] In the RAMM, the legislator's main purpose is still to promptly determine the State responsible for processing each application.[32] The "new" criteria are mostly in continuity with the traditional Dublin

[29] CJ, 26 July 2017, case C-646/16, *Proceedings brought by Khadija Jafari and Zainab Jafari,* EU:C:2017:586, ("*Jafari*").
[30] CJ, 21 September 2023, case C-568/21, *Staatssecretaris van Justitie en Veiligheid v E. and Others,* EU:C:2023:683, ("E and S"); Vienna Convention on Diplomatic Relations 1961 ("VCDR").
[31] See F. MIANI, *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*, in *EU Immigration Law and Policy,* 2020; D. THYM, *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum,* in *EU Immigration and Asylum Law and Policy,* 2020.
[32] RAMM, cit., Recital No. 37. For further analysis see G. MORGESE, *Dublin system, "scrooge-like" solidarity and the EU law: Are there viable options to the never-ending reform of the Dublin III regulation?,*

criteria, including the "country of first entry" rule and the avoidance of any possible consideration of the applicants' choice.[33] More in particular, under Article 16(1) RAMM each asylum application must be examined by a single Member State, and responsibility rests primarily on the country of first entry.[34] In some respects, the burden of the "country of first entry" rule is made even worse due to the introduction of a set of obligations for third-country nationals under Article 17 RAMM.[35] Yet, the RAMM does not alter the DR criteria but maintains their hierarchical application without considering applicant preferences.[36]

In this regard, the issuance of a residence document under Article 29(1) RAMM places responsibility on the issuing country. The new provision adds few changes to Article 12 DR. The first three paragraphs remain identical, following Article 12 DR's formulation. Under paragraph 4, the scope of the criterion has been expanded to include also residence documents or visas that have expired or been annulled, revoked, or withdrawn. More in particular, the responsibility can be allocated not only for documents expired less than 2 years ago, but also for residence documents that have been "annulled, revoked or

in *Diritto, Immigrazione e Cittadinanza,* 2019, p. 86 ff.; M. DI FILIPPO, *Considerazioni critiche in tema di sistema di asilo dell'UE e condivisione degli oneri*, in *I diritti dell'uomo*, p. 47 ff.

[33] RAMM, cit. Recital No. 76. To better understand, see the report of EUROPEAN COUNCIL ON REFUGEES AND EXILES ("ECRE"), *ECRE Comments On The Regulation Of The European Parliament And Of The Council On Asylum And Migration Management, Amending Regulations (Eu) 2021/1147 And (Eu) 2021/1060 And Repealing Regulation (Eu) No 604/2013,* 2024, p. 31 ff. Here, ECRE compared the DR criteria with the RAMM. First, "minors" DR criterion is now conceived as "unaccompanied minors" provision under Article 25 RAMM. The "family members who are beneficiaries of international protection" as "family members residing legally in a Member State" under Article 26 RAMM. The 2024 provision has expanded the scope of the definition of family member, including both families formed in the country of origin and in transit. In addition, the criterion is now applicable not only to BIP family members but also to those residing legally based on the Long-term Residence Directive. The provision has also lowered evidential requirements to demonstrate a family connection. Third, the "family procedure" is practically identical to the previous Dublin criterion. Residence document under Article 12 DR has been changed numerically under Article 29 RAMM. The scope of its application is expanded as well as the period of responsibility for Member States issuing the residence documents and visas. Moreover, the "entry and/or stay" has been changed in "visa waived entry" under Article 32 RAMM. The "visa waived entry" is now written as "transit area of an airport" under Article 32 RAMM. Lastly, "transit area of an airport" has been changed to "entry" under Article 33 RAMM. The latter has been prioritized over entry criterion.

[34] DR, cit., Art. 3(1), stating that "the application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible"; RAMM, cit., Article 16(1), stating that "the application shall be examined by a single Member State which shall be the Member State responsible on the basis of the criteria set out in Chapter II or the clauses set out in Chapter III of this Part." *See* also H. BRU, *The Circumvention of the Dublin III Regulation Through the Use of Bilateral Agreements to Return Asylum Seekers to Other Member States*, in *Human Rights and Migration Law Clinic*, 2019, p. 5 ff.

[35] For example, the applicants themselves must now present their request to the country of first entry. In the previous DR, the rule did not place the duty on the applicant itself. In the case of non-compliance, the applicant will lose certain reception conditions as outlined in the updated reception conditions Directive. Additionally, under Article 33, the duty to examine the application has been extended from 12 to 22 months after the expiration of the document. The period remains the same for those coming into the territory of the Union after a rescue operation, see RAMM, cit., Art. 33. See also S. PEERS, *The new EU asylum laws, part 6: the new Dublin rules on responsibility for asylum-seekers*, in *EU Law Analysis*, 2024.

[36] See A. DI PASCALE, *Raggiunto l'accordo per il nuovo Patto sulla migrazione e l'asilo: quali i passaggi per l'adozione definitiva?*, in *Fondazione ISMU,* 2024; C. FAVILLI, *Il patto europeo sulla migrazione e l'asilo: "c'è qualcosa di nuovo, anzi d'antico,"* in *Questione giustizia,* 2020.

withdrawn less than three years before the application was registered". With regard to visas, the period has been extended from 12 to 18 months.

However, Article 2(13) RAMM describes "residence document" following the previous formulation prescribed under Article 2(l) DR.[37] This approach could be due to the *E and S* judgment under analysis, where the CJ recognized that the broad formulation allows for the inclusion of several documents, despite their particular features. However, neither the CJ nor the legislator considered the dissimilar permits that might authorize a third-country national to stay in the territory of a Member State. Indeed, potential interpretative doubts are likely to arise unless a new formulation is created to clarify at least the following three main factors: first, the nature of the authority granting such permits; second, the rights and duties arising from such documents; and lastly, the minimum and maximum period of stay required in order to claim an effective "residency" in the territory of the Member State. The following section will provide a detailed debate over such points.

Generally speaking, the DR criteria remain applicable in the same sequence, albeit with slight modifications to their provisions and order of presentation.[38] However, the current application of the RAMM criteria is made more complex due to the introduction of a mandatory screening mechanism.[39] The Screening Regulation is new.[40] Compared to the Dublin system, the Regulation cannot be associated with a previous version nor can it be considered in light of previous jurisprudence. Technically, it regards external border control and does not aim to fall within the scope of European asylum law.[41] In this regard, the Preamble explicitly provides for the possibility of presenting an asylum application during the screening procedure.[42] The registration will be governed by the rule governing those

[37] With regard to the definition of residence document, both Article 2(l) DR and Article 2(13) RAMM define a residence document as "any authorization issued by the authorities of a Member State authorising a third-country national or a stateless person to stay on its territory, including the documents substantiating the authorization to remain on the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply […]".

[38] The criterion regarding the responsibility for unaccompanied individuals remain mostly unaltered. The formulation changes slightly by giving responsibility to the applicants where the minor's application was "first registered" rather than where the application was "lodged". Furthermore, the definition of "family member" has been broadened to include familial connections that existed prior to entering the territory, rather than to solely include families that originated in the nation of origin. Under Article 29 RAMM, the Regulation includes a new requirement concerning "diplomas or other qualifications". Specifically, the Member State responsible for processing the asylum application is the one where the asylum-seeker received a diploma or other qualification within the past six years prior to submitting the application. The following two criteria have been elevated in priority on the list, surpassing irregular entry: individuals who arrived using a visa waiver or those who applied within the international transit area of an airport. In relation to the irregular entry requirement, the obligation no longer applies after a period of 20 rather than 12 months. Finally, the specific regulations regarding dependents and the "sovereignty clause" have undergone few alterations.

[39] See E. L. TSOURDI, *The New Screening And Border Procedures: Towards A Seamless Migration Process?,* in *European Policy Center,* 2024, p. 2 ff.; S. LAVENEX, *Migration and asylum policy*, in S. B.H. FAURE, C. LEQUESNE, *The Elgar Companion to the European Union,* Paris, 2023, p. 334 ff.

[40] Screening Regulation, cit.

[41] European Council, *A new Screening Regulation*, 2024.

[42] With regard third-country nationals who irregularly cross borders, the "pre-entry screening" procedure must be conducted promptly and finished within seven days of apprehension, disembarkation, or presentation at the border. It is intended to ensure a verification of the conditions provided for the recognition of the

who have presented asylum applications, while the registration of that application is governed by the asylum procedures Regulation.[43]After the final outcome of the screening procedure, the national authorities must assess which of three procedures to perform between repartition, relocation, and the recognition of international protection.[44]

The New Pact, contrary to its aims, has introduced a first-entry screening mechanism that aggravates the burden of border Member States.[45] The screening procedure may give rise to several human rights concerns by placing too many burdens on asylum seekers and duties on third-country nationals.[46] Several criticisms may arise regarding the time limits and the legal fiction of the non-entry rule. [47] During this period, the third-country national will be subject to European legislation in any case since they are materially present in the territory of the State despite the non-entry rule. Conversely, the screening process merely regulates the procedure that national authorities must follow despite any procedural rights concerns. It sets out a list of non-judicial guarantees aimed at preventing breaches of human rights. The only procedural guarantees regard the judicial methods in case of pushbacks contrary to human rights and EU law standards.

It must be kept in mind, in any case, that the final purpose of the Regulation is to filter information in order to speed up the process. For instance, the determination of the responsible Member State cannot be ascertained by the screening outcome but by the RAMM criteria. In this context, the New Pact results in securing border controls and aggravating the application of the traditional Dublin criteria.[48] More in particular, the RAMM formulation maintains the Dublin legislative vacuum in its definition of basic

---

various types of status, and, where appropriate, the initiation of an immediate return procedure. The procedure is also applicable to those who have been disembarked after a search and rescue operation.

[43] See S. PEERS, *The new screening regulation: Comparing the Commission's new rules on screening of third-country nationals to the current regime*, in *EU Law Analysis*, 2024.

[44] First, the third-country national may be subject to repatriation in its country of origin. Second, their data may be sent to the competent authorities in order to evaluate the conditions for an international protection request, subjecting them to border or accelerated procedures. Lastly, the applicant may be subject to relocation in another Member State seen as responsible under the RAMM criteria. The procedure will end after the given deadline, after an authorization to enter the territory or it "*may"* end after a voluntary return to the country of origin.

[45] As stated in S. PEERS, cit., 2024, its personal scope will apply to three main categories of third-country nationals, three regarding external borders, and one concerning illegal stay.

[46] In case of a violation of their fundamental rights, they could rely on Article 47 of the Charter regarding the right to effective remedy. The individual might challenge the results of the screening procedure due to a lack of a legal basis or the expiration of the time limit. On the fundamental rights concerns see among others A. ADINOLFI, *Alcune riflessioni sulla reazione dell'Unione europea alle violazioni dei diritti umani in Turchia e sui possibili strumenti di contrasto*, in E. TRIGGIANI, F. CHERUBINI, E. NALIN, I. INGRAVALLO, R. VIRZO, *op. cit.,* p. 223 ff.; G. MORGESE, *op. cit.,* 2018.

[47] During the screening process, third-country nationals coming from outside EU borders are not legally authorized to stay or enter the territory of the Member States. However, they must stay in the territory for the time needed to carry out the procedure. Hence, this generates a legal fiction, which is exacerbated by the prospect of continuing that legal fiction under the "borders procedure" for up to 12 weeks pursuant to the procedures Regulation. See P. DE PASQUALE, *Il Patto per la migrazione e l'asilo: più ombre che luci*, in *AISDUE*, 2020, p. 1 ff.; A. DI PASCALE, *L'immigrazione "legale" nel nuovo Patto sulla migrazione e l'asilo*, in *AISDUE*, 2020, p. 141; A. DI PASCALE, cit., 2024.

[48] See V. MITSILEGAS, N. VAVOULA, V. MORENO LAX, *Securitizing Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights,* Leiden, Boston, 2020, I ed., p. 1568 ff.

concepts without mandating a binding form of solidarity between Member States.[49] The meaning of residence documents under RAMM is the same as that provided under the Dublin criterion. The 2024 legislator avoided any meaningful clarification regarding the authorities that must issue the document, the features of such documents, as well as the minimum and maximum period required for qualification as a "residential" one.

The situation gets more complicated where the documents, as in the *E and S* case, are issued under a national provision implementing an international convention. The factual background is useful to understanding the different concepts of trust required under international and European asylum law. Even with the New Pact, the CEAS still results in normalizing pushbacks and the deterioration of fundamental rights at the EU level.[50] The Commission's decision to maintain the automatic application of the criteria, without considering the "country of first choice" rule, plays a crucial role in this. The "country of first entry" rule has been implemented as the applicants' obligation, exacerbating their duties and rendering their position even more vulnerable. Hence, the *E and S* judgment is vital in understanding whether the CJ's interpretation of the residence document might respond to these unresolved questions. In this respect, the *E and S* judgment was a missed opportunity for the Luxembourg judges to overcome the traditional "residence document" Dublin criterion.

3. The residence document criterion in the jurisprudence of the CJ: the *E and S* case and beyond

In the *E and S* decision, the intricate factual and legal background presents a compelling study into the interplay between the VCDR norms and the DR criteria. The case involved a father, one of the applicants, who was seeking international protection under the European asylum system while simultaneously serving as a member of a diplomatic mission under the VCDR regime. The receiving State, Member State X, was also potentially responsible for the examination of the international protection requests under Article 12(1) DR. The applicants presented their application for international protection in a second Member State, the Netherlands, after receiving a diplomatic card from the Member State where the father was part of a diplomatic mission.[51]

The factual background highlights the critical situation in which the allocation of responsibilities mechanism, prescribed in Chapter III DR,[52] should have applied due to the issuance of a document under international norms. However, the preliminary proceedings brought under Article 267 TFEU concerning the DR dealt with the interpretation of

[49] The RAMM has introduced also a new permanent solidarity mechanism to be used in times of migratory pressure. However, the binding solidarity mechanism operates solely during "migration pressure" without imposing an *ex-ante* duty to share responsibility fairly. Furthermore, the new mechanism leaves too much discretion to the Commission and the Member States on furnishing financial and material support. For instance, the Commission can determine which Member State is under migratory pressure and, therefore, entitled to contributions. See A. DI PASCALE, cit., 2024.
[50] See P. DE PASQUALE, cit., 2020, footnote no. 24.
[51] CJ, *E and S,* paras 14-24.
[52] RAMM, cit., chapter II.

different provisions arising from the following usual contexts: the interpretation of Article 29 DR regarding the "transfer procedure" in times of mass migration flows,[53] the meaning of the "country of first entry" rule under Article 3(2) DR to avoid cases of "asylum shopping",[54] and the use of the "humanitarian" and "sovereignty clauses" under Article 17(1) and (2) DR in order to prevent human rights infringements.[55] In the *E and S* case, the CJ was faced with a unique interpretative question, that of elucidating the meaning of residence documents under Article 2(l) DR to include a document released according to international norms. The *Raad van State* of the Netherlands submitted, in September 2021, a request for a preliminary ruling pursuant to Article 267 TFEU in order to verify whether diplomatic cards issued by a Member State under the VCDR are "residence document[s]" within the meaning of Article 2(l) DR.[56]

The dialogue between national courts and the CJ has, in the past, dealt mostly with interpreting the DR with respect to national provisions or human rights obligations prescribed under the International Refugee Law ("IRL").[57] The legal background at stake highlights the difficult coordination between the Dublin criterion determining the responsibility allocation mechanism, i.e., Article 12(1) DR, and the establishment of a diplomatic mission procedure under the Vienna Convention, i.e., Articles 2, 4, 5, 7, and 9 VCDR. Thus, the decision is a pivotal turning point for understanding DR-specific provisions in situations where the residence document does not necessarily match the definition prescribed under Article 2(l) DR, such as a valid permit issued in accordance with the VCDR.

---

[53] RAMM, cit., chapter V, section VI. On the Dublin transfer procedure see CJ, 16 February 2017, case C-578/16, *C. K., H. F., A. S. v Republika Slovenija*, EU:C:2017:127 ("*CK")*; CJ, 26 July 2017, case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland,* EU:C:2017:587; CJ, 19 March 2019, case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218 ("*Jawo*"), para 89. See also ECRE, *AIDA Update: The implementation of the Dublin III Regulation in 2021,* 2022, p. 6 ff.; E. FERRI, *Asilo – ecco il nuovo regolamento Dublino III,* in *Melting Pot Europa*, 2013.

[54] RAMM, cit., Art. 16(2). See also ECRE, cit.*,* 2022, p. 12 ff.; UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), *Left in Limbo UNHCR Study on the Implementation of the Dublin III Regulation Executive Summary,* 2017, p. 1 ff.; L. RIZZA, cit.; G. MORGESE, cit., 2020, p. 97 ff.

[55] RAMM, cit., Art. 35 on *"discretionary clause"* for humanitarian grounds; DR, cit., Art. 17 regarding the "sovereignty clause". For a jurisprudential perspective, see also European Court of Human Rights ("ECtHR"), 21 January 2011, *M.S.S. v Belgium and Greece*, application no. 30696/09; Court of Justice; CJ, 21 December 2011, joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department* and *M. E. and Others v Refugee Applications Commissioner and Minister for Justice*, EU:C:2011:865 ("*NS*"); CJ, 23 January 2019, case C-661/17, *M.A., S.A., A.Z. v International Protection Appeals Tribunal, Minister for Justice and Equality, Attorney General, Ireland*, EU:C:2019:53; CJ, 30 May 2013, case C-528/11, *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet,* EU:C:2013:342. For doctrinal debate over the point see also S. MORGADES-GIL, *The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?*, in *International Journal of Refugee Law,* 2015, p. 433 ff. Regarding the humanitarian clause see CJ, 30 May 2013, case C-528/11, *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet,* EU:C:2013:342; CJ, 24 September 2013, case 394/12, *Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813 ("*Abdullahi*").

[56] CJ, 16 September 2021, cit., *Request for a preliminary ruling from the Raad van State (Netherlands) lodged on 16 September 2021 — Staatssecretaris van Justitie en Veiligheid; Other parties: E. and S., also on behalf of their minor children.*

[57] On the IRL see footnote 2. See also F. CHERUBINI, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione europea,* Bari, 2012, I ed, p. 1 ff.

The following section will provide a detailed account of the facts relevant to the case, including the context, events, and circumstances that led to the preliminary question. This foundational understanding is essential to comprehend the evolving definition of "residence documents" under Article 2(l) DR and how it relates to the legal frameworks involved, including the DR and the VCDR. The discussion will then delve into the rule for establishing a diplomatic mission within the rights and duties of diplomatic cards and the Vienna Convention, with a focus on Articles 2, 4, and 9 VCDR. The third section will uncover the key criteria used in the present judgment to determine the Member State responsible for examining the applicants' asylum applications. These criteria are hierarchical, meaning they are considered in a specific order of priority.

The examination must ascertain whether the interpretation of Article 2 DR offers a clear legal basis to declare Member State X's responsibility under Article 12 DR. This is a central aspect of the study to determine whether the period of stay in Member State X shall be considered when determining which Member State is responsible under the DR. The study explores alternatives to the common practice of assigning responsibility to the Member State of first entry, with a discussion of other possible criteria and proposals to reform this aspect of asylum policy in order to address inefficiencies, highlighting why the CJ avoided such alternatives in its legal reasoning. Specifically, the examination delves into the "country of first choice" rule, the issue of humanitarian visas, and the principle of mutual recognition of positive asylum decisions. The aim of the case study is to determine the most feasible legal route to strengthen the current weaknesses in Dublin. The concluding section of the study aspires to ascertain whether the CJ adopted an evolving position concerning the interpretation of Article 2 DR in consideration of its previous jurisprudence on the Dublin Regulation.

3.1.The factual background

The applicants, E and S, and their underage children were third-country nationals applying for international protection in the Netherlands after living in Member State X due to the father's diplomatic mission. Specifically, the Ministry of Foreign Affairs of that Member State issued diplomatic cards to the applicants during their stay in line with the international provisions prescribed under the VCRD.[58] The State Secretary concluded on 31 July 2019 that Member State X was obligated to review those applications following Article 12(1) DR since the diplomatic cards issued by its authorities served as evidence of residency in that Member State. The Netherlands acknowledged Member State X's responsibility, submitting a take-charge request in accordance with Article 21(1) DR and, therefore, declined to evaluate the international protection applications submitted by E and S.[59] The applicants lodged appeals against those decisions before the *Rechtbank Den Haag*, i.e., the District Court in The Hague, Netherlands.[60] The claimants asserted that the diplomatic cards issued by Member State X did not fall under the meaning of residence

[58] See CJ, *E and S*, cit., para.14.
[59] Ibidem, para. 16.
[60] Ibidem, para. 18.

document pursuant Article 2(l) DR and, therefore, Member State X was not responsible for reviewing their request. The applicants maintained that their period of stay within Member State X's territory was not contingent on anything other than the *agrément* mandated in Article 4 of the Convention and the international standards of the VCRD.[61] In its judgment of 20 March 2020, the *Rechtbank Den Haag* upheld the decisions, determining Member State X's responsibility for issuing diplomatic cards based on international norms.[62]

The State Secretary appealed the *Rechtbank* outcome before the *Raad van State*, i.e., the Council of State. The State Secretary specifically asserted that diplomatic cards must fall under the definition of "residence document" as outlined in Article 2(l), DR. The Council of State confirmed that the diplomatic cards had been issued by the authorities of Member State X and were still valid at the time when the applicants lodged their applications to the Netherlands. In addition, the Council emphasised that both Member State X and the Kingdom of the Netherlands were Contracting Parties to the Vienna Convention and, as such, were obligated to observe the rules governing diplomatic relations. Of primary concern to the Council of State was whether a diplomatic card issued by a Member State could be classified as a "residence document" as defined in Article 2(l) DR. However, a legal definition could not be found in the applicable European and international law, the CJ's jurisprudence, nor State practices.[63] Given these circumstances, the *Raad van State* stayed the proceedings and made a preliminary reference to the Court of Justice pursuant to Article 267 TFEU, asking whether "Article 2(l) of the Dublin III Regulation [must] be interpreted as meaning that a diplomatic card issued by a Member State under the Vienna Convention is a residence document within the meaning of that provision".[64]

3.2. The relationship between the Dublin system and the Vienna Convention on Diplomatic Relations

In the area of public international law, the VCDR is the foundational document which codifies the rules for the exchange of embassies among the Contracting Parties.[65] Diplomatic missions are established in light of the concept of solidarity, which regulate the relationship between subjects, i.e., between States, international organisations, and other

[61] See VCDR, cit., Art. 4.
[62] See CJ, *E and S*, cit., para.19.
[63] Ibidem, para. 21.
[64] Ibidem, para. 23.
[65] In particular, diplomatic law concerns the organs involved in international relations between States by regulating the procedures of such relations and the structures within the framework of which such relations are established and carried out. See, on this point, C. GURTI GIALDINO, *Diritto diplomatico-consolare internazionale ed europeo*, Torino, 2022, VI ed., p. 3 ff.; T. FARER, *Diplomacy and International Law,* in A.F. COOPER, J. HEINE, R. THAKUR (eds.), *The Oxford Handbook of Modern Diplomacy*, Oxford, 2013, I ed., p. 493 ff. See also E. DENZA, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford, 2016, III ed., p. 1 ff.; J. C. BARKER, *In Praise of a Self-Contained Regime: Why the Vienna Convention on Diplomatic Relations Remains Important Today*, in P. BEHRENS (ed.), *Diplomatic Law in a New Millennium*, Oxford, 2017, I ed., p. 23 ff.

bodies.[66] States establish missions in each other's territories, creating a scenario whereby each State might be a sending an actor into one territory and/or receiving in another.[67] Hence, the Contracting Parties have an interest in conducting the mission in full observance of the principle of reciprocity as they rely on the good faith of the sending State's staff. [68]

The high levels of cooperation and reciprocity required at any stage of a diplomatic mission recall the form of solidarity prescribed in the AFSJ.[69] More in particular, the notion of "mutual recognition"[70] is a structural principle of the European Union legal system, developed by the CJ with the aim of enhancing cooperation between the Member States.[71] In the *NS and ME* decision, the CJ described the principle as the *raison d'être* of EU asylum law, based on a high level of confidence that all Member States will comply with human rights standards.[72] Mutual recognition became a matter of cooperation and integration with

---

[66] See W. G. GREWE, *The Role of International Law in Diplomatic Practice,* in *Journal of the History of International Law*, 1999, p. 22 ff.; R. ST. J. MACDONALD, *Solidarity in the Practice and Discourse of Public International Law, Pace International Law Review*, in *Pace International Law Review,* 1998, p. 259 ff.; C. CHATTERJEE, *International Law and Diplomacy*, London, 2010, I ed.; J. C. BARKER, *op. cit.*, in P. BEHRENS, *op. cit*; C. GURTI GIALDINO, *op. cit.,* p. 3.

[67] See J. BROWN, *Diplomatic immunity: State practice under the Vienna convention on diplomatic relations*, in *International & Comparative Law Quarterly*, 1988, p. 53 ff.

[68] See C. GURTI GIALDINO, *op. cit.,* p. 20; E. DENZA, *op. cit.*, p. 1 ff. See also VCDR, cit., the Preamble. On the concept of sovereignty in Europe see R. BIFULCO, A. NATO, *The Concept of Sovereignty in the EU – Past, Present and the Future,* in *RECONNECT Working Paper,* 2020, p. 1 ff.; ID., *La sovranità nel prisma dell'integrazione europea: passato, presente e future*, in *Rassegna Di Diritto Pubblico Europeo,* 2023, p. 247 ff.

[69] For further analysis on the solidarity principle in EU see A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK, *European solidarity – what now?*, in A. BIONDI, *Solidarity in EU Law: Legal Principle in the Making*, Cheltenham, 2018, I ed., p. 1 ff.; E. KÜÇÜK, *Solidarity in EU law: an elusive political statement or a legal principle with substance?*, in A. BIONDI, *op. cit.,* p. 36 ff.; P. VAN CLEYNENBREUGEL, *Typologies of solidarity in EU law: a non-shifting landscape in the wake of economic crises,* in A. BIONDI, *op. cit.,* p. 13 ff.; L. J. GREIM, *Solidarity in the Common European Asylum System: Application and implementation of a principle in the Dublin Regulation and the ERF/AMIF*, Essay Bachaler of University of Twente, 2015, p. 1 ff.; R. L. HOLZHACKER, P. LUIF, *Introduction: Freedom, Security and Justice After Lisbon*, in R. HOLZHACKER, P. LUIF, *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty*, New York, 2014, I ed., p. 1 ff.; G. MORGESE, *op. cit.,* 2018; A. NATO, *La solidarietà sovranazionale dopo Laval e Dano: il ruolo della Corte di Giustizia dell'Unione Europea,* in CASTELVECCHI, *Miserie del Sovranismo giuridico. Il valore aggiunto del costituzionalismo europeo,* 2023, p. 193 ff.

[70] The concept was originally developed in the area of the internal market through the landmark *Cassis De Dijon* judgment. In 1979, the CJ required the recognition of a liquor legally produced in a Member State despite its having an alcohol content below that required by the receiving State's legislation. Thus, the principle of mutual recognition is based on the trust in each other's process of determination, with a presumption that decisions are taken based on adequate rules which are applied correctly and offer equal or equivalent protection. See CJ, 20 February 1979, Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42 ("*Cassis De Dijon*").

[71] The concept of mutual trust is a fundamental principle of European integration, which can be described as "based on the basic presumption that each Member State shares with all other Member States a set of common values on which the Union is formed", as expressed by the CJ, 18 December 2014, case opinion 2/13, *Opinion 2/13*, EU:C:2014:2475, para. 168. For further analysis see also M. HO-DAC, *The Principle of Mutual Trust in EU Law in the Face of a Crisis of Values, The European Association of Private International Law,* in *European Association of Private International Law* ("EPIL"), 2021; S. PRECHAL, *Mutual Trust Before the Court of Justice of the European Union*, in *European Papers,* 2017, pp. 75 ff.

[72] See CJ, *N. S.*, cit., paras 79 and 83. See also S. AMEDEO, F. SPITALIERI, *Il diritto dell'immigrazione e dell'asilo dell'Unione europea,* Bari, 2022, II ed., p. 177 ff.

no means, operating in asylum law despite the lack of harmonization.[73] Thus, the *NS and ME* decision was pivotal in creating a State-centric relationship whereby States trust each other's determinations without any further check of the conditions of the asylum systems.[74]

In the *Abdullahi* judgment, the Court potentially limited this presumption of trust in the case of "systemic deficiencies in the asylum procedure and in the reception condition" of the receiving Member State .[75] The CJ's legal reasoning even went further in the *C.K.*[76] and *Jawo*[77] decisions, requiring an individual assessment-based test in times of transfer and a further derogation to the principle when there is a potential breach of Article 4 of the Charter. Hence, the CJ jurisprudence prevented the application of the Dublin criteria in order to limit any form of "blind trust." The primary concern was to maintain respect for international and European human rights standards, such as the *non-refoulment* principle.[78] In accordance with the CJ jurisprudence, RAMM no longer incorporates the reference to "systemic flaws" in the national asylum procedures and reception conditions.[79] This approach allows a broader assessment of the risk. Article 16(3) RAMM provides an updated formulation, avoiding transfer also in times of potential breach of human rights

[73] This trust was based on the assumption that each Member State assesses an asylum applicant's request in accordance with international human rights and European fundamental rights standards. In particular, only one Member State shall be responsible for examining an asylum application pursuant Article 16(1) RAMM. The latter follows the same formulation prescribed under the previous Article 3(1) DR, applicable at the time of the *E and S* decision.

[74] In the *Melloni* decision, the CJ defined the principle of mutual trust with positive and negative connotations contingent upon the domain of law in which it is implemented. In the context of asylum law, the negative connotation implies that a Member State will acknowledge refugee claims from another Member State on the basis of reciprocal trust, thereby averting possible migration crises and an excessive backlog of asylum demands. This understanding is crucial as it allows the State where the second application is lodged to automatically refuse the examination whenever the determination has been previously made in another State. See CJ, 26 February 2015, case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107 ("*Melloni*"). See also C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford, 2013, I ed, p. 67 ff.. See S. PEERS, cit., 2024.

[75] CJ, *Abdullahi,* cit., para. 64.

[76]The prohibition of torture and inhumane or degrading treatment or punishment prescribed under Article 4 equals to Article 3 of the ECHR. In particular, the CJ clarify in *C.K.* that "it is nevertheless apparent […] from the general and absolute nature of the prohibition laid down in Article 4 of the Charter that the transfer of an applicant to that Member State is ruled out in any situation in which there are substantial grounds for believing that the applicant runs such a risk during his transfer or thereafter". See CJ, *C. K.,* cit., paras 83, 84 and 87.

[77] In *Jawo,* the CJ clarified that DR "must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the Charter, inter alia Article 4 thereof, which prohibits, without any possibility of derogation, inhuman or degrading treatment in all its forms and is, therefore, of fundamental importance, and is general and absolute in that it is closely linked to respect for human dignity […]". See CJ, *Jawo,* cit., paras 78, 85, 87, 93.

[78] The principle prohibits the return of third-state nationals to nations where they would endure cruel, inhuman, or degrading treatment or punishment, torture, or other irreparable damage, as stipulated under Art. 33 of Annex II of the Geneva Convention. Furthermore, the Inter-American Convention on the Prevention of Torture 194, the American Convention on Human Rights195, and the CFR196 all explicitly articulate this principle. The Geneva Convention 1951 incorporates the prohibition on refoulement outlined in Art. 33. Under EU law, torture and punishments that are inhumane, dehumanizing, or degrading are prohibited under Art. 4 of the Charter, whereas the return of an individual to a State where they are at risk of torture or other cruel, inhumane, or degrading treatment or punishment is prescribed by Art. 19(2) of the Charter. Also, DR, cit., Art. 3(2) recalls such prohibition.

[79] See ECRE, *ECRE comments on the Asylum and Migration Management Regulation,* 2024, p. 30.

standards. Under these conditions, the sending Member State shall continue the responsibility check and, in the case that no Member State results responsible, the responsibility shifts to the determining Member State.[80]

Thus, the EU concept of trust diverges from the VCDR's forms of reciprocity. It requires Member States to place trust in each other's asylum determinations to prevent breaches of human rights standards as enshrined in the IRL, European Convention on Human Rights ("ECHR"), and Charter on Fundamental Rights of the EU ("Charter").[81] Differently, the VCDR norms mandate forms of reciprocity in the exchange of mission personnel, where the principle of good faith operates to preserve the strength of the system. This implies that Contracting States must cooperate to assure the success of the mission itself without any regard for human rights concerns.[82] The absence of reciprocity between Contracting Parties and the absence of mutual trust between Member States of the European Union have distinct legal consequences which give rise to two different scenarios.

As argued in the *E and S* decision, a staff member is no longer authorized to stay in the territory of the receiving State only when they are declared "*persona non grata*" or "not acceptable" pursuant to Article 9 VCDR.[83] This provision has become a key tool for States to protect themselves from unacceptable activities by members of diplomatic missions, such as the commission of criminal offences. Conversely, the principle of mutual trust does not apply when a Member State recognises systemic flaws in another Member State's refugee system or reception conditions and possible breaches of human rights in times of transfer.[84] Diplomatic law requires cooperation for the general interest of States to respect each other's sovereignty,[85] whereas European asylum law is based on respect for international human rights obligations.[86]

However, the *E and S* legal reasoning was focussed on the nature of the diplomatic cards and did not make any reference to the different aims of cooperation under the VCDR

[80] See D. THYM, *op. cit.*, 2023, p. 351; C. COSTELLO, *op. cit.*, 2015.
[81] See C. COSTELLO, *Dublin-Case NS/ME: Finally, an End to Blind Trust Across the EU?,* in *Asiel & Migrantenrecht,* 2012, p. 83 ff., G. MORGESE, *The Dublin System vis-à-vis EU Solidarity before the European Court of Justice: The Law, The Whole Law, and Nothing But The Law!*, in G.C. BRUNO, F.M. PALOMBINO, A. DI STEFANO, *Migration Issues before International Courts and Tribunals*, Rome, 2019, p. 381 ff.; D. THYM, *A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases*, in *European Journal of Migration and Law*, 2019, p. 166 ff.; S. IMAMOVIC, E. MUIR, *The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?,* in *European Papers*, 2017, p. 719 ff. From a jurisprudential approach, see CJ, *Jawo,* cit., paras 78 and 87; CJ, *C. K.,* cit., para. 59; CJ, 19 March 2019, joined cases nos. C-297/17, C-318/17, C-319/17 and C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland* and *Bundesrepublik Deutschland v Taus Magamadov*, EU:C:2019:219, para. 87.
[82] See W.G. GREWE, cit., p. 22 ff.
[83] CJ, *E and S*, cit., para. 40; VCDR, cit., Art. 9, para. 1, and para. 2.
[84] See CJ, *NS,* cit.
[85] See T. FARER, *op. cit.,* pp. 493-509.
[86] See C. SMYTH, *The Dublin Regulation, Mutual Trust and Fundamental Rights: No Exceptionality for Children?,* in *European Law Journal,* p. 109 ff.

and the Dublin systems.[87] In particular, the Dutch government[88] asserted that the constitutive nature of diplomatic documents allows third-country nationals to remain in the territory of the receiving State, creating a residential bond with the latter. [89] To the contrary, the Austrian government disputed the declaratory nature of such authorization, serving as nothing more than proof of the individual position of a national of another Member State.[90]

The Commission, in its written observations, departed from this dichotomy, i.e., the constitutive or declaratory nature of diplomatic charters.[91] Accordingly, a receiving State of a diplomatic mission is obliged to examine the application of diplomatic personnel since it would have some discretion to refuse them pursuant to Article 9 VCDR.[92] Nevertheless, its argument seems to be rather absurd, as it risks creating an additional automatism in the Dublin system. This approach would exempt the sending Member State from verifying any possible breach of Article 4 of the Charter and would increase the receiving Member State's discretion. Advocate General ("AG") Collins, in his opinion delivered on 9 March 2023, provided a textual interpretation of Article 2(l) DR as to include permits issued pursuant to international provisions. Member States shall, in his opinion, be held responsible for examining the staff members' applications due to the high margin of discretion in accepting the mission and the strong connection between the applicants and its territory.[93] Conversely, the CJ considered diplomatic cards to be the equivalent of a letter of acceptance of responsibility whenever the States have a relevant role under international provisions, such

[87] This consideration stems from the fact that the RAMM and the DR pursue the same goals, established back in the 1999 Tampere Conclusions.

[88] See CJ, *E and S*, cit., para. 37. Also, see Advocate General ("AG") Collins delivered on 9 March 2023, *E and S,* cit., EU:C:2023:189, para. 22, ("Opinion of AG Collins"), footnote 17, where the AG explained that Member State X has a monist approach, accepting international treaties that it has ratified as part of national law without the need for implementing national law.

[89] See Opinion of AG Collins, cit., paras 34-37.

[90] Ibidem*,* para. 26.

[91] Specifically, a constative document gives rise to rights such as the right to stay in the territory of the State, while a declaratory document is a measure serving to prove the individual position of a national of another Member State with regard to the provisions of EU law. In contrast, the applicants' defence saw this discrepancy as a crucial aspect since, in their view, the diplomatic cards had a declaratory nature. This implies that the latter solely recognize their diplomatic status cards. Therefore, Member State X issued those without assuming its responsibility to examine their applications. Therefore, they can present an application to the Netherlands and the latter became responsible for their examination.

[92] Under the VCDR, Contracting Parties must, first, mutually consent to the establishment of the mission pursuant to Article 2 VCDR, reaching, then, a final *agrément* under Article 4 VCDR. At this stage, the receiving State has the right to refuse the establishment of the mission without giving any further explanation to the sending State. The staff members are authorized to enter and remain in the receiving State's territory only after being accredited by the authorities of the receiving State. Moreover, the efficiency of the mission is guaranteed even after such appointment since Article 9 VCDR allows the receiving States to exclude the personnel declared as "*persona non grata*" or "not acceptable." In this regard, Contracting States have a margin of discretion in preventing third-country nationals from entering their territory at any stage of the procedure.

[93] Opinion of AG Collins, paras 18, 22, 37, 40 and 50. The VCDR, *op. cit.,* states under Art. 2 that "the establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent." See the official webpage of the IMMIGRATIE – EN NATURALISATIEDIENST, *Diplomatic Identification card,* 2014. As well, for further clarification, see the work of R.G. FELTHAM, *Diplomatic Privileges and Immunities*, in *Diplomatic Handbook*, London, 2004, VIII ed., p. 35 ff.

as being the receiving State of a diplomatic mission under the VCDR.[94] The CJ claimed that allowing a different determination of responsibility would have undermined the primary goal of the Dublin system.[95] The CJ clarified that neither the issuance of a diplomatic card nor the recognition of international protection would automatically allow for the possibility for the applicants to choose the country responsible for examining their application.

Hence, both the CJ and AG excluded the possibility for the applicant to choose the country to which it presented its request.[96] As *Abdullahi*, *CK*, and *Jawo* have demonstrated, the hierarchical and automatic application of the criteria does not always align with respect for human rights standards. [97] This potential for abuse underscores the need for ongoing dialogue between the national courts and the CJ, which has proven crucial in preventing such violations.[98] Thus, the ambiguous formulation of the Dublin criteria, mostly copied and pasted into the RAMM, continues to grant a high margin of discretion to the Member States. In this context, the *E and S* judgment appears to be a missed opportunity to explore the relationship between the Dublin criteria for the allocation of responsibility and the norms for the establishment of a diplomatic mission under the VCDR. Therefore, the CJ seems to limit its legal reasoning by introducing another automatism of the European asylum system, i.e., holding that the issuance of diplomatic cards is equivalent to a letter of acceptance in terms of assuming responsibility under the DR criteria. Rather, the European legislator, in the May 2024 measure, has maintained the situation unchanged by formulating the meaning of residence permits as previously provided in 2013.[99]

3.3. The allocation of responsibility with the residence document criterion

The *E and S* factual background brings out two possible interpretations. In the first scenario, if diplomatic cards fall under the definition prescribed under Article 2(l) DR, the issuing Member State would be responsible for examining the applicants' request pursuant Article 12(1) DR. On the other hand, if the diplomatic card does not fall under the definition in Article 2(l) DR, the Netherlands would be responsible for examining the application according to the Dublin criteria set out in Chapter III. Hence, the allocation of responsibility

---

[94] CJ, *E and S,* cit., para 44. In this regard, according to Article 10 VCDR, the Contracting States shall establish the duration of the staff mission by agreeing on the arrival and final departure dates.

[95] In particular, the previous Dublin system primarily sought to avoid limbo situations by determining the Member States responsible in an expeditious manner. DR, cit., the Preamble.

[96] The CJ and the AG both observed that the purpose of the DR would be undermined if third-country nationals enjoying the privileges and immunities under the VCDR could choose the Member State in which to lodge an application for international protection. This approach was based on the fact that the aim of the Dublin System is primarily to determine the Member State responsible under hierarchical criteria. It applies automatically and leaves no possible choice to the applicants. Hence, Member State X's responsibility determination would grant an expeditious assessment of the international application, within the aim of the Dublin System. See CJ, *E and S,* cit., para. 48; Opinion of Advocate General Collins, cit., para. 50.

[97] CJ, *Abdullahi,* cit., para 64; CJ, *CK,* cit., paras 83 and 84; CJ, *Jawo,* cit, para. 87.

[98] For instance, the *E and S* case could have been instrumental in establishing the minimum period of stay required to create a residential bond within the country of first entry.

[99] It is possible that the CJ chose to refrain from considering the Dublin criticalities since the upcoming RAMM still mandates a hierarchical application without considering the potential preference of the applicants.

was applied based on the criterion set forth in Article 12(1) DR regarding the issuance of a residence document to a third-country national. As the legal basis for Article 12(1)'s application, the CJ sounded for the first time on the legal meaning of "residence document" under Article 2(l) DR. The two articles have not been substantially changed within the RAMM context.[100] More in particular, the new RAMM works in "*continuity*" with the DR, maintaining the automatic application of the criteria in a fair and objective manner. [101] From a textual point of view, Article 2 DR's formulations exclude three main, elusive issues that have not been definitively dealt with by either the CJ or the 2024 European legislator. First, it does not specify which authorities are responsible for issuing such documents, but merely refers to a national authority. Second, there is no reference to the minimum or maximum period of stay that such authorization shall grant to third-country nationals. Lastly, there are no specifications regarding the features of such authorizations, such as whether they must include identification elements like photos, dates of birth, places of birth, or ages.[102]

As reasoned by the CJ and AG Collins, the DR criteria operated automatically, leaving no room for third-country nationals to choose the State to examine their applications.[103] The CJ's approach reveals the elephant in the room, i.e., the "country of first choice" rule. The application of the latter would implicate leaving out the possibility for the applicants to determine the country examining their request. The CJ's textual perspective disregards all the different authorizations a single Member State might issue with unusual implications.[104] National authorities from different Member States can furnish dissimilar diplomatic cards, perhaps without photographs allowing for visual identification, or an address of residence, period of stay, or other important features. Hence, the high margin of discretion left to national authorities is likely to result in significant divergences in regard to definition of a "residence document" under Article 2(13) RAMM.[105] Thus, the inclusion of diplomatic cards as such, without any specification as to the required features, will continue to raise the need for constant dialogue between national courts and the CJ.[106] The

[100] See footnote 37.
[101] RAMM, cit., Recital No.76.
[102] The last point was investigated in the previous section.
[103] See footnotes 10.
[104] The preliminary question in CJ, *E and S*, cit., para. 24, was formulated as whether "Article 2(l) of the [Dublin III Regulation must] be interpreted as meaning that a diplomatic card issued by a Member State under the [Vienna Convention] is a residence document within the meaning of that provision?".
[105] See CJ, *E and S,* cit., para. 23: "the answer to that question cannot be inferred directly from that provision, or from the system established by that regulation, or from the relevant rules of public international law. Furthermore, the case-law of the Court concerning that regulation does not provide further clarification in that regard and it appears that the practices of the Member States diverge on that point."
[106] In European asylum law, Member States have no obligation to harmonize their asylum policies, thereby causing the emergence of separate systems and the issuance of different types of documents. This area of law is composed of a fragmented legal framework, where secondary norms delegate significant responsibilities to national determination, effectively making EU asylum law an intergovernmental domain. Despite two phases of harmonisation, the European asylum system continues to exhibit significant deficiencies that have not been fundamentally addressed over the years. See C. MASSAROTTI, *Il principio di solidarietà nel diritto dell'Unione Europea*, in *Astrid,* 2019, p. 42 ff.; H. LAMBERT, *Transnational Judicial Dialogue, Harmonization and the Common European Asylum System*, in *International and Comparative Law Quarterly,* 2009, p. 519 ff.; A. MEYERSTEIN, *Retuning the Harmonization of EU Asylum Law: Exploring the Need for an EU Asylum Appellate Court*, in *California Law Review*, 2006, p. 1 ff; F. CHERUBINI, *Asylum Law in the*

CJ seemed to validate this normative vacuum so as to preserve the primary goal of the Dublin system, i.e., allocate responsibility to avoid cases of "asylum shopping"[107] and secondary movement to other countries.[108] In particular, the method for the allocation of responsibility aims to achieve the same objective both in the RAMM and DR Preambles, namely,[109] respect for the principle of *non-refoulment*[110] and the "full and inclusive" application of the GC51.[111]

In this context, the *E and S* preliminary question limits the CJ's interpretation to merely including diplomatic cards within the scope of the Article.[112] In fact, the factual circumstances could potentially implicate both States' responsibility depending on the specific criteria applied.[113] Hence, the Dublin system's primary goal was going to be achieved anyway. On the one hand, the diplomatic cards permit for the construction of a residential bond between the applicant and the Member State and, therefore, might easily fall into the definition of Article 2(l) DR.[114] As prescribed in the judgment, its legal formulation constitutes the legal basis for the application of Article 12(1) DR and would make it possible to hold Member State X responsible for examining the applications.[115]

European Union, New York, 2015, XX ed., p. 257 ff.; C. FAVILLI, *La politica dell'Unione in materia d'immigrazione e asilo. Carenze strutturali e antagonismo tra gli Stati membri*, in *Il Mulino – Rivisteweb,* 2018, p. 361 ff., 361 ff; V. MITSILEGAS, *Solidarity and Trust in the Common European Asylum System*, in *Comparative Migration Studies,* 2014, p.181 ff.

[107] The case of asylum shopping is understood as an applicant's tactic of lodging multiple applications with the aim of seeking asylum in the country offering the most attractive regime of protection. See M. SCHMITT, *The Dublin Regulation, A Nightmare for Asylum Seekers*, in *Sensus,* 2019; M. MOUZOURAKIS, *'We Need to Talk about Dublin': Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union*, in *Refugee Studies Centre,* 2014, p. 4 ff.; S. LAVENEX, *The Europeanization of Refugee Policies: Normative and Institutional Challenges*, in *Journal of Common Market Studies,* 2021, p. 851 ff. For a jurisprudential approach, see CJ, *Abdullahi,* cit., paras 40 and 41.

[108] The so-called "Dublin limbo" usually arises when transfer procedures occur. Member States either refuse to process such cooperation or exceed the limited time to expedite the procedure. For a further analysis on the point, *see* L. RIZZA, cit; ASILO IN EUROPA ("AE"), *Regolamento Dublino III,* 2013*;* E. XANTHOPOULOU*, Mutual Trust and Fundamental Rights in the Dublin System: A Role for Proportionality?,* in *EU Immigration and Asylum Law and Policy,* 2021; ECRE, *The implementation of the Dublin III Regulation in 2021,* 2022, p. 2 ff.*;* UNHCR, *Left In Limbo UNHCR Study On The Implementation Of The Dublin III Regulation Executive Summary*, 2014, p. 8 ff. For rulings over the point see CJ, 23 January 2019, case C-661/17*, M.A. and Others v The International Protection Appeals Tribunal and Others*, EU:C:2019:53 and CJ, *Jawo,* cit.

[109] I.e., the formulation of uniform refugee status and a common procedure for its determination. See DR, cit*.,* Recital No. 3 and RAMM, cit*..,* Recital No. 37.

[110] See C. COSTELLO, *op. cit.*, 2015. See also RAMM, cit., Recital No. 36.

[111] Ibidem and DR, cit., Recital No. 3.

[112] The Dutch court, with potentially far-reaching implications, framed the issue narrowly, assuming that the broad definition in Article 2(l) DR could encompass all types of documents, regardless of their specific characteristics. The Dutch government, in its intervention, talked about the European legislator's willingness to include all types of documents. See Opinion of AG Collins, cit., para. 23.

[113] Ibidem, cit., paras 10,11 and 12, where he clarified that on 30 August 2019, Member State X first rejected the take charge requests, considering the Netherlands responsible for the examination under Article 14 DR. On 25 September 2019, Member State X accepted the request. Hence, there was not a final risk of uncertainty.

[114] See CJ, *E and S,* cit*.,* para. 21 and Opinion of AG Collins, cit*.,* para. 50.

[115] More in particular, Member State X has a high degree of connection with the applicants due to the establishment of the mission and the issuance of diplomatic cards. As a result, such connection arises not only based on the wording of Article 4 of the Vienna Convention, as the Austrian government claimed in its legal arguments, but mostly as a result of the period of stay of the applicants in Member State X's territory. See CJ, *E and S,* cit., paras 37 and 41. In this view, see also Opinion of AG Collins, cit., para. 48.

It should be noted, however, that the CJ's previous jurisprudence did not deal with situations where the application of Article 12 DR is conditional upon the granting of authorization under international norms. Instead, in the notable *Jafari* judgment,[116] the CJ interpreted the meaning of Article 12 DR in the context of irregular immigration.[117] According to para. 1, if the applicant is in possession of a valid residence document, the responsibility for examining the application for international protection lies with the Member State that issued the document. Moreover, para. 2 determines the responsibility of the Member State that issued the visa unless it was issued on behalf of another Member State under a representation agreement. In this regard, the concept of residence document and visa was examined by the definition provided under Article 2(m) DR so as to determine the responsibility of the "entry" Member State.[118]

The CJ went beyond its textual interpretation considering the specific definition furnished under EU law, the general scheme of the Regulation, and the circumstances of the case at stake.[119] The Dublin wording suggests that, while the provision may have been intended as a positive step for the rule of law, its implementation has demonstrated limitations and challenges in effectively achieving its intended goals. Specifically, the theoretical boundaries of law-based integration in contemporary Europe indicate that while there may be legal frameworks in place, they may not always translate smoothly into practical application or operational effectiveness.[120] Hence, the different interpretations of

---

[116] See CJ, *Jafari*, cit., For doctrinal debate over the point see also I. GOLDNER LANG, *Towards Judicial Passivism in EU Migration and Asylum Law?,* in T. ĆAPETA, I. GOLDNER LANG, T. PERIŠIN, *The Changing European Union: A Critical View on the Role of Law and Courts*, Oxford, 2020, p. 175 ff.; S. MORGADES-GIL, *Humanitarian visas and discretionary choices in the EU: Policies on visas and on international protection*, in *Spanish yearbook of international law,* 2019, p. 273 ff.; S. MORGADES-GIL, cit.*,* 2015, p. 433 ff.

[117] In this regard, "the entry and/or stay criteria" are prescribed under Art.13 DR. Specifically, when it is established, based on evidence and detailed circumstances, that the applicant has illegally crossed the border of a Member State by land, sea, or air from a third country, that Member State shall be responsible for examining the application for international protection. In that case, the CJ dealt with the issue of competence, once again, upholding the non-derogation of the first entry rule even when there is a large influx of migrants. See CJ, *Jafari,* cit., paras 47, 50, 53, and 58.

[118] In particular, the Jafari sisters arrived in the territory of a second Member State at a time of heavy migrant flows by crossing the borders of a first Member State. See CJ, *Jafari,* cit., para. 57. See also C. DI STASIO, *Il "Sistema Dublino" non è derogabile: note a margine della sentenza della Corte di giustizia del 26 luglio 2017, causa C-646/2016, Jafari*, in *dirittifondamentali.it*, 2017, p. 1 ff.

[119] CJ, *Jafari,* cit., para. 58. Also, see opinion of AG Collins, cit., paras 47 and 48.

[120] See also F. FERRI, *op. cit,* 2018*;* D. THYM, *Judicial Maintenance of the Sputtering Dublin System on Asylum Jurisdiction: Jafari, A.S., Mengesteab and Shiri,* in *CMLR*, 2018, p. 549 ff.; M. WESTLUND, *The Road Less Travelled in EU Asylum Law: The CJEU's Restrictive Way Of Reasoning And How A Different Approach Could Strengthen Human Rights*, in *Nordic Journal of European Law,* 2023, p. 34 ff.; I.G. LANG, *op. cit.*, 2020; M. ČEPO, *Illegal Migration Through The Practice Of The Court Of Justice Of The European Union And The Consequences For The Republic Of Croatia*, in *EU and Comparative Law Issues and Challenges Series* ("ECLIC"), 2019, p. 197 ff.; V. MORENO-LAX, cit., 2017, p. 605 ff.; A. E. KÜÇÜKSU, *Adjudicating Asylum as a Technical Matter at the European Court of Justice: Neglecting Human Rights When the CEAS Appears to be in Jeopardy*, in E. KASSOTI, N. IDRIZ (eds.), *The Informalisation of the EU's External Action in the Field of Migration and Asylum. Global Europe: Legal and Policy Issues of the EU's External Action*, 2022; P. BIONDI*, Compliance with Fundamental Rights Demands Shared Responsibility In: The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis,* in E. KASSOTI, N. IDRIZ (eds.), *op. cit.,* p. 263 ff.

the term "visa" provided under the distinct national laws of the Member States and in the European act were irrelevant to the interpretation of the norm.[121]

Despite the divergent factual backgrounds, the CJ could have considered the *Jafari* legal reasoning to avoid any reference to the definition of diplomatic cards under national systems. The *E and S* decision represented a crucial possibility for the CJ to outline the common constitutive elements of the residence document under EU law. Rather, the Court created an automatism that relies on a national authority's determination, i.e., the issuance of a diplomatic card under VCDR amounts to an acceptance of responsibility under the DR.[122] The judgment could have provided an answer to those situations where the applicants possess other national documents under international and European regimes.[123] In such cases, the *E and S* outcome would not apply generally, but rather it could specifically delimit the residence document definition to the issuance of diplomatic cards.[124]

The allocation of responsibility can be aggravated when the applicants possess expired residence permits or visas issued under divergent legislative systems.[125] This consideration stems from the fact that the CJ claimed Article 12(1) DR applied on the basis that the diplomatic cards were still valid at the time of their request.[126] It is clear the diplomatic cards shall fall under the definition of Article 2(l) DR, and therefore, under the scope of Article 2(13) RAMM. However, it would be interesting to see the criteria applying in a

---

[121] On the *Jafari* judgment see also D. THYM, E. TSOURDI, *Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions*, in *Maastricht Journal of European and Comparative Law,* 2017, p. 605 ff.

[122] See V. STOYANOVA, E. KARAGEORGIOU, *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis*, in *International Refugee Law Series,* 2018; J. BEQIRAJ, K. GADD, B. GRABOWSKA-MOROZ, *Authority, Legitimacy and the Rule of Law in EU Migration Policy*, *Reconnect,* 2021, p. 2 ff.

[123] Furthermore, the CJ did not consider other possible options for the DR responsibility allocation criteria. First, the Netherlands might have been held responsible under the rule set forth in Article 3(2) DR as the country where the claimants presented their applications for the first time. Moreover, the Netherlands' responsibility would have arisen pursuant to the criterion set forth under Article 21(1) DR, third subparagraph, if the request to Member State X to take charge had not been made within the periods laid down in the first and second subparagraphs. In this case, the periods would have been three months from the time that the application was lodged or within two months of Eurodac's receipt of a "hit" data record. The responsibility is assigned to avoid a situation of limbo when that State or others cannot not be identified as responsible based on the criteria outlined in Chapter III. Secondly, the Dutch government would have been required to process the examination if the transfer had not taken place within six months as prescribed under Article 29(2) DR of the Regulation. To the contrary, Member State X's responsibility might have arisen also if there had been no formal proof of Member State X's responsibility as prescribed under Article 21(1), subparagraph 5, DR.

[124] See J. BEQIRAJ, K. GADD, B. GRABOWSKA-MOROZ, *op. cit.*

[125] In these circumstances, the Member State responsible for examining the application for international protection must be determined in the following order pursuant Article 12, para. 1, DR. First, the Member State responsible is the one that issued the residence permit conferring the longest period of residence or, if the time validity is identical, the Member State that issued the residence permit whose expiration date is the latest. Under para. 3, the two criteria apply to visas in a way which depends on their nature. In particular, when the visas are of the same nature, the responsibility determination goes to the Member State that issued the visa with the latest expiration date. Where the visas are different, the Member State that issued the visa with the longest validity period or, where the visas are of identical validity, the Member State that issued the visa with the latest expiration date is responsible.

[126] See CJ, *E and S,* cit., para. 36.

case where that permit is no longer valid due to, for instance, the end of the diplomatic mission or some other situation arising from international norms. From the application of Article 12(4), subparagraph 2, the Member State responsible will be the one who issued such permit, which expires within two years.[127] Under Article 29(4) RAMM, the expiration period has been extended to three instead of two years for residence documents and eighteen months instead of six for visas. The 2024 legislator has included permits that have expired, or which were "annulled, revoked or withdrawn".[128] Therefore, it might be interesting to understand whether further jurisprudence can include or exclude residence documents or visas which are no longer valid under international norms.

3.4. Possible alternatives to the "country of first entry" rule

So long as the European legislator fails to provide the essential criteria for identifying residence documents, the application of Article 29(1) RAMM will be anchored to uncertainty.[129] The vague definition of Article 2(13) RAMM, following the Article 2(l) DR formulation, will result in a slow determination process, requiring continuous referrals to the CJ for further interpretation.[130] As the Council of State claimed, the definition is just as impossible to grasp at the EU level as it is at the international and national levels.[131] Moreover, the leading doctrine on EU asylum law has repeatedly emphasised further challenges other than the residence documents definition, such as the transfer procedure,[132] sovereignty and humanitarian clauses,[133] the need for solidarity in European asylum law,[134]

---

[127] DR, cit., Article 12, para. 3.

[128] The new RAMM criterion seem to avoid any time limit, making its application possible after the deadline prescribed under Article 29(4) RAMM. See RAMM cit., Article 29, para. 4.

[129] RAMM, cit., Article 29, para. 4.

[130] For instance, this broad formulation could cause legal ambiguity when multiple Member States have issued permits under their own national legislation. Given this context, situations may arise where several Member States attempt to jeopardize the application of the RAMM criteria by denying that their national permits fall within the scope of Article 2(13) RAMM. Such a scenario could legitimize Member States in initiating transfer procedures under Article 29 DR within the time-limits, raising secondary movement implications and human rights concerns. See UNHCR, cit., 2022; M. DE FILIPPO, *The Allocation Of Competence In Asylum Procedures Under Eu Law: The Need To Take The Dublin Bull By The Horns*, in *Revista De Derecho Comunitario Europeo*, 2018, p. 41 ff.; J. P. BREKKE, G. BROCHMANN, *Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation*, in *Journal of Refugee Studies*, 2015, p. 145 ff.

[131] CJ, *E and S*, cit., para. 23.

[132] See among others D. THYM, *Secondary Movements: Overcoming the Lack of Trust among the Member States*?, in *EU Immigration Law and Policy,* 2020.

[133] See among others S. MORGADES-GIL, cit., 2015, p. 433 ff.

[134] See among others G. MORGESE, *op. cit.,* 2017; ECRE, *Solidarity: The eternal problem. Recent developments on solidarity in EU asylum policies: ECRE's analysis and recommendations*, 2023, p. 3 ff.; V. MITSILEGAS, cit., 2014, p. 181 ff.*;* A. NATO, *La cittadinanza sociale ai tempi della crisi economica*, Bari, 2020, I ed., p. 17 ff.; ID., *La politica d'asilo dell'Unione europea tra crisi e sovranismi: quale futuro per il principio di solidarietà?,* in *La Cittadinanza europea,* 2023, p. 191 ff.; S. GIUBBONI, *I modelli sociali nazionali nello spazio giuridico europeo*, in *Il Mulino*, 2012, p. 395 ff.; B. NASCIMBENE, A. PASCALE, *The prospects for solidarity and international protection in the EU after the activation of temporary protection*, in D. C. J. GORTÁZAR ROTAECHE*, El derecho internacional público en la frontera de los derechos humanos*, 2023, p. 245 ff.

and for urgent reform.[135] This approach is not attributable to a negligent attitude. Instead, the elusive formulation of the secondary rules governing the CEAS commits the doctrine to academic research on the interpretation and investigation of its basic principles, leaving no room for detailed questions, such as the compatibility of diplomatic cards with the Article 2(l) DR residence document.

Some leading scholars have tried to look for alternatives to the "country of first entry" rule, since this criterion fails to take into account human rights concerns and individual assessments.[136] In the *E and S* case, the CJ shunned its analysis, but for purposes of comprehension, it is important to deepen the understanding of its difficulties. In particular, the "country of first entry" rule is fundamental to understanding the consequence of the automatic application of the Dublin criteria. In this regard, it is important to recall the relevance of the solidarity principle as being the legal basis for developing the CEAS secondary tools.[137] Today, its *de facto* compulsory nature leaves much room to manoeuvre for the Member States and the Commission.[138] It seems that the European legislator wanted to emphasize that there is no room for choice.[139] Indeed, the broad definition of Article 2(13) RAMM allows Member States to control, through their national legislation, whether an application falls under their responsibility.

In this scenario, the "country of first entry" rule is defined as the antithesis of solidarity since it causes only a few States, the countries where the applicant first entered the Union,

---

[135] More in particular, the Commission discussed for a new "Dublin IV" proposal (COM/2016/0270 final - 2016/0133 (COD). On the point see, among others, D. THYM, *Reforming the Common European Asylum System*, Konstanz, 2022, p. 11 ff.; M. SCHMITT, cit., 2019; B. GARCÉS-MASCAREÑAS, cit., 2015; D. KLAIBER, *A Critical Analysis of the Dublin-IV Proposal with Regards to Fundamental and Human Rights Violations and the EU institutional battle: How can we overcome this outdated Dublin model?*, in *Nordic Journal of European Law*, 2019, p. 38 ff.

[136] See E. GUILD, C. COSTELLO, M. GARLICK, V. LAX, V. S. CARRERA, *Enhancing the common European asylum system and alternatives to Dublin*, in *CEPS,* 2015; R. DICKSON, *Migration law, policy and human rights: the impact of crisis in Europe,* London, 2022; C. COSTELLO, *op. cit.*, 2015.

[137] In the EU legal understanding, solidarity is accomplished through the States' trust of each other's determination processes and the mutual recognition of the decisions resulting from such processes. Therefore, EU asylum law is constructed upon a high degree of inter-state cooperation. For instance, if one Member State is considered responsible under the RAMM criteria, another can deny its own responsibility since, under Article 16(1) RAMM, the responsibility is attributable to only one State. See V. MITSILEGAS, cit., 2014; A. LIGUORI, *The Externalization of Border Controls and the Responsibility of Outsourcing States under the European Convention on Human Rights*, in *Rivista di diritto internazionale*, 2018, p. 1228 ff.; G. MORGESE, *op. cit.,* 2019, pp. 86 and 93.

[138] The new solidarity mechanism is still too complicated and burdensome and entails an elaborate procedure to be carried out in order to proceed to its current activation. See footnote 49. See also B. NASCIMBENE, A. DI PASCALE, *Le frontiere nel diritto dell'Unione europea: norme, evoluzione, significato*, in *Confini, migrazioni e diritti umani*, 2022, p. 97 ff.; A. DI PASCALE, cit., 2024; F. BUONOMENNA, *La nuova governance delle migrazioni e dell'asilo. Il futuro del diritto e delle politiche migratorie EU*, in *Il futuro del diritto e della politica migratoria europea: Frontiere, solidarietà, diritti umani*, Bari, 2024.

[139] The new RAMM provision, Article 17(1) RAMM, obliges third-country nationals to apply and register their applications in the country of first entry. Contrary to the previous DR formulation, the new rule no longer applies as a Member State obligation. Instead, it has been strengthened by directly requiring applicants to present their requests in that specific country. See B. NASCIMBENE, A. DI PASCALE, *Le frontiere nel diritto dell'Unione europea: norme, evoluzione, significato*, in *Confini, migrazioni e diritti umani*, 2022, p. 97 ff.

to bear most of the burden.[140] An effective block to the transfer procedure is permitted under only a few circumstances, i.e., where human rights concerns are raised (*Jafari*) or upon an individual assessment (*CK*).[141] At present, mutual trust is merely a necessary condition for guaranteeing the minimum standards for asylum applicants. [142]

In 2015, the imperative call for reform saw the "country of first choice" rule as a valuable legal tool to allocate migrants when they oppose fingerprinting at their first screening.[143] However, the migrants' inability to indicate a preference regarding their destination is an issue that requires significant consideration. The urgency of these changes is underscored by the ongoing challenges and the need for a more efficient and fair asylum system. The rule might have allowed applicants to express their preferences not only at the first stages of the allocation procedure, such as the moment of lodging their application or the first screening process, but also at the final stages. This would permit the secondary movement of an applicant at any time during the procedure, including after the recognition of the status.[144] However, as the CJ and AG pointed out in the *E and S* judgment, this alternative is generally seen as conflicting with the aims of the CEAS.[145]

A different perspective from which to initiate a further reform on EU asylum law could entail looking into the international legislative vacuum. The IRL provides a substantial definition of "refugee" in Article 1 of the GC51 and the principle of *non-refoulment* in Article 33 GC51.[146] In particular, it does not prescribe the procedural rules to reach a uniform definition of "refugee." Such procedural aspects might be a fundamental to develop the EU asylum area in light of the solidarity principle.[147] The legal objectives end up clashing with the highly sensitive nature of the asylum system, leading the actors involved, i.e., Member States and institutions, to perform their functions while considering

---

[140] See C. FAVILLI, cit., 2020; B. NASCIMBENE, A. DI PASCALE, *State Sovereignty vs. Migrants' Individual Rights: Looking for a New Balance*, in *Eurojus*, 2020, p. 205 ff.

[141] See E. XANTHOPOULOU, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?*, Oxford, 2020, I ed., p. 30 ff.

[142] See RAMM, cit., Recital No. 2 and Art. 1.

[143] See Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration' (COM(2015) 240 final). See also S. CARRERA, D. GROS, E. GUILD, cit., 2015; B. NASCIMBENE, cit., 2016, p. 101 ff.

[144] See S. PEERS, *The Dublin Regulation: Is the End Nigh? Where Should Unaccompanied Children Apply for Asylum*?, in *EU Law Analysis*, 2016.

[145] The Court's decision to decline to address the issue, when considering this alternative, was justified with the aim of guaranteeing an expeditious allocation mechanism. From a political point of view, northern States tend to disincentivize the secondary movement of migrants in order to shirk their responsibilities. At present, the highest form of free movement is only feasible for individuals under international protection who have acquired long-term resident status, defined as five years of continuous legal residency in the country of initial reception. See Directive 2011/51/EU of the European Parliament and of the Council amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection Text with EEA relevance.

[146] See B. NASCIMBENE, *Asilo e statuto di rifugiato*, in *Convegno «Lo Statuto costituzionale del non cittadino*, 2009.

[147] See C. FAVILLI, cit., 2018, p. 361 ff.; B. NASCIMBENE, *Carta dei diritti fondamentali, applicabilità e rapporti fra giudici: la necessità di una tutela integrata*, in *European Papers-A Journal on Law and Integration*, 2021, p. 81 ff.

their own political needs.[148] Indeed, in an area lacking harmonization, both more restrictive and more favourable national rules are more likely to be tolerated.

In any case, the CJ's intervention would be necessary but not sufficient in promoting a holistic and integrated strategy to safeguard fundamental rights at various levels of governance in the EU.[149]

In this context, the Luxembourg judges could play a pivotal role in identifying minimum standards of cooperation through an evolving jurisprudence.[150] However, the lack of harmonization in the area allows "sovereigntist" Member States to maintain their *status quo*, leaving the southern States to deal with the asylum crises.[151] A valuable alternative might entail increasing the EU's competencies, moving towards a greater centralization of governance. A more pronounced role for the Commission, for example, would achieve a high degree of harmonisation and limit the uncooperative behaviour of Member States towards the border Member States.[152]

Various doctrinal alternatives shall be contextualized to understand how and why the different responses to the traditional Dublin criteria could be implemented. The first option, the "country of first choice" rule,[153] would lead to an elimination of the competence criteria established in the 1990 Dublin Convention.[154] Taken from a general perspective, the revolutionary nature of the rule contrasts with the wishes of Member States to retain their sovereignty under asylum law. [155] The free movement of third-country nationals is viewed as a threat to national authority since it would facilitate secondary movement, thereby raising the burden-sharing responsibility between Member States.[156] The application of this rule in the *E and S* decision would have created a situation where some third-country nationals are allowed to choose their country of preference while others could not.[157] This alternative encounters several difficulties in its implementation since it would, in certain cases, produce unfairness to the detriment of more attractive countries.[158]

---

[148] See C. FAVILLI, cit*.,* 2018.

[149] It highlights the significance of both national and EU-level judicial authorities in this process. Thus, the problems and future prospects are connected to the efficient safeguarding of fundamental rights, including matters of legal standardisation, discrepancies in national procedures, and the developing character of fundamental rights case law. See B. NASCIMBENE, cit., 2021.

[150] See B. NASCIMBENE, cit*.,* 2016, pp. 101.

[151] See A. NATO, *op. cit.,* 2020.

[152] See A. NATO, *op. cit.,* 2020.

[153] See Opinion of AG Collins, cit., para. 50.

[154] See V. PETRALIA, *La presunzione di sicurezza degli Stati dell'Unione europea nel sistema di Dublino: recenti sviluppi,* in *Federalismi.it*, 2017, p. 14 ff.

[155] See S. QUADRI, *Sovranità funzionale e solidarietà degli Stati a tutela dei diritti dei migranti*, in *Il Mulino – Rivisteweb*, 2019, p. 663 ff.

[156] See S. MORGADES-GIL, cit*.,* 2015, p. 433-434; M. CONDINANZI, A. LANG, B. NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, Milano, 2006; B. NASCIMBENE, A. DI PASCALE, *The "Arab spring" and the extraordinary influx of people who arrived in Italy from North Africa*, in *European Journal of Migration and Law,* 2011, p. 341 ff.

[157] For example, individuals with privileges and immunities under the VCDR could choose in which Member State to apply for international protection, while those who have residence documents based on different legal grounds would not have this choice.

[158] Likewise, this alternative might lead to the overburdening of several Member States with respect to others who would not have to countenance a concrete sharing of responsibility in line with the principle set forth in

A second possible approach requires the issuance of a humanitarian visa before the applicants' arrival on the territory of the "countries of first entry.[159] This visa would allow applicants to enter the chosen Member State in a safe, orderly, and regular manner, avoiding the "journeys of hope" that often end in tragedy. However, this option could lead to an overburdening of the EU border countries, the reluctance of Member States to carry out this first screening in an expeditious manner, or the risk of absconding refugees.[160] Yet, this solution will cause an increase in uncertainty in determination and limbo situations for asylum seekers.[161]

The most feasible response is the application of the principle of mutual recognition[162] of positive asylum decisions of a Member State within the legal system of another Member State. [163] Application of this principle will break the territorial link[164] between the examination of applications and the reception/integration of beneficiaries for a significant number of years, increasing the right of movement within the territory of the Member States.[165] The mutual recognition of positive asylum decisions, and the consequent possibility of "transferring" protection from State to State, maintain the current Dublin criteria but, at the same time, the enlargement of third-country nationals' freedom of movement to other Member States without territorial limitations and constraints.[166] This legal alternative will, therefore, strengthen the Dublin criteria by allocating responsibility

---

Article 80 TFEU. A more lenient application of the rule could entail taking greater account of the applicants' previous life paths and aspirations as an alternative to the free choice of the country of presentation. See C. FAVILLI, *op. cit.*, 2017, p. 279 ff.; C. FAVILLI, cit., 2018.

[159] See F. CHERUBINI, *op. cit.*; G. MORGESE, *op. cit.*, 2020.

[160] See S. FRATZKE, *Not adding up: The fading promise of Europe's Dublin system*, in *Migration Policy Institute Europe,* 15; B. GARCÉS-MASCAREÑAS, cit., 2015, p. 135 ff.; S. PEERS, V. MORENO-LAX, M. GARLICK, E. GUILD, *The Dublin III Regulation,* in ID., *In EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, London, 2015, pp. 345-428; K. HAILBRONNER, D. THYM, *EU Immigration and Asylum Law: A Commentary,* Beck, 2016, II ed.

[161] It is, for example, problematic to decide where applicants should wait for such a determination, as Member States could implement policies of arbitrary detainment of migrants awaiting determination by setting up hotspots and return centres.

[162] If the principle of mutual trust is about how regulatory tools are used, then mutual recognition is about the product, the result, or the outcome of such a process. Therefore, it is essential to avoid blind mutual trust to allow the creation of a common European procedure for determining refugee status and the concrete application of mutual recognition of a positive asylum decision. The current Dublin system provides for mutual recognition of negative decisions only, with the possibility of transferring an asylum seeker whose determination has already taken place in one State. See over the point V. MITSILEGAS, cit., 2014; ECRE, *Mutual recognition of positive asylum decisions and the transfer of international protection status within the EU,* 2014, p. 5 ff.

[163] See M. DI FILIPPO, cit., 2015, pp. 47, 56-58; B. NASCIMBENE, cit., 2016; V. CHETAIL*, Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System*, in *European Journal of Human Rights,* 2016, p. 584 ff.; C. FAVILLI, *op. cit,* 2017.

[164] For a better understanding, see the previous section on the VCDR provisions.

[165] See ECRE, cit*.,* 2014, p. 14; V. MITSILEGAS, *Humanizing solidarity in European refugee law: The promise of mutual recognition*, in *Maastricht Journal of European and Comparative Law,* 2017, p. 721 ff.

[166] See N. LASSEN, J. VAN SELM, J. DOOMERNIK, *Study on the transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum*, in *Publications.europa.eu,* 2004, p. 1 ff.; S. PEERS, *Transfer of international protection and European Union law*, in *International Journal of Refugee Law,* 2012, p. 527 ff.; E. GUILD, C. COSTELLO, M. GARLICK, V. LAX, V. S. CARRERA, cit.

to the Member State with which the applicant actually has a strong connection.[167] Indeed, positive recognition would avoid cases of overlapping responsibilities, such as the one under analysis, since the applicants would be able to have their claims assessed based on objective criteria.[168] The system will reduce Member States' discretion, thereby avoiding any attempt of circumventing its efficiency. Hence, the principle of mutual recognition would first and foremost strengthen the freedom of movement of refugees in accordance with objective criteria.[169]

Nevertheless, it should be clarified that the 2013 legislator did not fail in its duties, as the Dublin system aims to ensure that at least one State can assume responsibility. The criticism stems from the static and apathetic approach the Court wanted to follow in its legal reasoning in the *E and S* case. Again, the preliminary question limited the assessment to the mere definition of diplomatic cards, and it did not extend the interpretative framework to other possible documents in national, European, and international legal systems. Thus, it appears that the approach of the Luxembourg judges was within the boundaries of interpretation of Article 2(l) of the Dublin Regulation, leaving open basic questions for future interpretations.[170] Indeed, while the Member States refuse to apply horizontal cooperation which would favour an intergovernmental approach, the 2024 European legislator failed its attempts to find a valuable alternative to the Dublin criteria. This situation calls for a judicial intervention to stress the concrete need for harmonisation. The current legal framework and its visible criticalities are likely to violate international and European standards not only in times of extreme crisis but also in normal situations.

4. The novelty of the *E. and S* case

The *E and S* judgment represents a decisive step in the interpretation of the traditional Dublin criteria and their relationship with other normative frameworks, such as the VCDR. Specifically, the preliminary question allowed the CJ to address two systematic implications of the DR. First, the continuous attempt to evade the responsibility allocation system.[171] Second, the need to improve the legal understanding of the Dublin criteria. In fact, the CJ did not develop any strong basis for claiming Member State X's responsibility

[167] See C. JANSSENS, *op. cit*.
[168] See ECRE, cit., 2014, p. 5 ff.
[169] See A. ADINOLFI, *Riconoscimento dello status di rifugiato e della protezione sussidiaria: verso un sistema comune europeo?,* in E. TRIGGIANI (ed.), *Europa e Mediterraneo*. *Le regole per una società integrata,* Napoli, 2010, p. 237 ff.; C. TEITGEN-COLLY, *The European Union and Asylum: An Illusion of Protection*, in *CMLR*, 2006, p. 1503 ff.
[170] Even if the Court's limited analysis is possibly due to the restrictive wording of the same question posed by the national courts, the judges could still have clearly defined other fundamental aspects regarding residence documents, such as their constituent elements, the required level of connection between the applicant and the host country, and the competent issuing authorities. Such clarifications would have allowed a tangible examination of the underlying issues, which is not the declaratory or constitutive nature of diplomatic cards but rather the existence of an objective residential link that the Dublin system requires for its application. See Opinion of AG Collins, cit., para. 44.
[171] In this regard, the Austrian Government claimed that diplomatic cards were subject only to the VCDR provisions since they merely attest to the applicants' status. Following this reasoning, Member State X was not responsible for examination under Article 12 DR since such documents did not establish any residential bond within the State's territory. Thus, the applicants were able to present their application to the Netherlands.

but arrived expeditiously at its conclusion. Neither did it clarify specific aspects that the European legislator considered to be irrelevant. For instance, the Court failed to examine whether there shall be a minimum or maximum period of stay to justify Member State X's responsibility.[172]

The "residence document" criterion calls for a contextual interpretation[173] to preserve the provision's aim in cases of multiple interpretations.[174] In this regard, the *E and S* decision constitutes a missed opportunity for the Luxembourg judges to delve into the meaning of Article 2(l) DR. The narrow interpretation does not aim to shape the new Article 2(13) RAMM with an equivalent formulation. The Court did not express what kind of authorization released by national authorities have to be included under the definition, nor did it clarify the elements that allowed the diplomatic cards' inclusion.[175] The only additional value is the exclusion of a classification of documents on the basis of their nature, i.e., whether they are declaratory or constitutive. As AG Collins observed, residence documents shall not be classified on the basis of whether they grant rights and duties for the applicant or merely identify their status.[176] In this view, such categorization would undermine the European legislator's goal of including all types of documents, despite their features.

This exclusion/denial stems from the different legal substance between the residence permits issued to citizens or permanent residents under Directive No. 68/360 (the "Directive") and the DR.[177] In this regard, the CJ recalled the *Royer* decision concerning the entitlement of citizens of one Member State to enter and reside in the territory of another.[178] The 1976 decision clarified that the right of EU nationals to enter and reside in another Member State is not conditional upon respect of possible bureaucratic formalities. Instead, EU nationals can enter and reside in another Member State's territory pursuant to

---

[172] See CJ, *E and S,* cit., para. 44.

[173] See CJ, 12 January 2023, case C-154/21, *Österreichische Post (Informations relatives aux destinataires de données personnelle,* EU:C:2023:3*,* para. 29; CJ, 22 June 2023, case C-579/21, *Pankki S*, EU:C:2023:501, para. 38.

[174] See CJ, 7 March 2018, case C-31/17, *Cristal Union*, EU:C:2018:168, para. 41.

[175] Ibidem*,* para. 36. Particularly, Member State X's authority issued those documents to a third-country national, even though those permits were functional for the establishment of the diplomatic mission procedure. Hence, it seems reasonable to assume that the efficient performance of the functions of diplomatic missions requires that a mission's staff be permitted not only to enter but also to stay on the territory of the receiving State.

[176] See Opinion of AG Collins, cit., para. 42.

[177] Ibidem, para. 35.

[178] See CJ, 8 April 1976, case 48/75, *Jean Noël Royer*, EU:C:1976:57 (*"Royer*"). The judgment regarded, also, the interpretation of a provision under Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation. For a better understanding, of European citizenship, see also N. N. SHUIBHNE, *EU Citizenship Law*, Oxford, 2023; A. ADINOLFI, N. LAZZERINI, *Una Unione di cittadini : la costruzione della cittadinanza europea attraverso la partecipazione e la formazione,* Milano, 2024; G. DI FEDERICO, L. CECCHETTI, *The European citizenship as a factor of integration*, in F. BALESTRIERI, B. DE BONIS, F. FUNARI, *L'Europa in divenire Cittadinanza, immaginari, lingua, cultura*, 2020, p. 83 ff.; K. KRŪMA, *Functions of EU Citizenship*, in *EU Citizenship, Nationality and Migrant Status*, 2014, p.167 ff. On free movement, see L. H. SINGER, *Free Movement of Workers in the European Economic Community: The Public Policy Exception*, in *Stanford Law Review,* 1997, p. 1283 ff.; C. JANSSENS, *op. cit*.

the norms governing the Treaty or, as the case may be, the provisions adopted for its implementation.[179] It followed that Member States' authorities had to grant a right of residence to any person who fell within the categories set out under the Directive and who was able to prove, by producing the specified documents, that they fit within one of these categories.

Even if it is true that the *Royer* judgment falls into a separate material and legal context, the Court's avoidance of any plausible evolutive interpretation reveals a legislative vacuum. Namely, Article 2(l) DR does not list categories of documents, thereby making the application of Article 12(1) vague. In this regard, the CJ excluded a possible reference to the *Royer* judgment by simply stating that the Regulation does not list a category of documents. In point of fact, the 2013 European legislator did not provide a classification of documents under the DR, which thus resulted in the need for future legislative intervention. Indeed, the provision of the document-specific element could have limited, at least, national determination in individualizing the procedure and features of such documents.[180] This small step could have been crucial in minimizing the intergovernmental approach in the asylum area.

Likewise, in the *Royer* case, the CJ claimed the applicants' right to reside in the territory of a Member State was based on the direct effect of the EEC Treaty provision.[181] Such rights are conferred directly by the Treaty without any need to accomplish legal formalities, such as the issuance of a permit under a Directive. Article 4 of the Directive

---

[179] See Opinion of AG Collins, cit., paras 18 and 40.

[180] For instance, the staff member had a stronger connection with Member State X, where he worked and lived with his family for a period of time thanks to the establishment of diplomatic relations. Thus, the residential bond could have been described by considering the period of stay in the territory of a State, the personal status of the applicants, or the family life created or strengthened in that Member State. On the concept of family life see CJ, 5 June 2018, case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385, para. 51.

[181] See CJ, *Royer,* cit., paras 31-39. See, also, on direct effect D. GALLO, *Direct effect,* Oxford, 2024, forthcoming; D. GALLO, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa,* Milano, 2018; ID., *Challenging EU Constitutional Law: The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure*, in *European Law Journal,* 2019, p. 434 ff.; ID*., Rethinking Direct Effect and Its Evolution: A Proposal*, in *European Law Open,* 2022, p. 576 ff.; ID., *L'effetto diretto quale dottrina fondante dell'ordinamento dell'Unione europea,* in *Rivista Internazionale Di Filosofia Del Diritto,* 2020, p. 537 ff.; ID., *Effetto diretto del diritto dell'Unione europea e disapplicazione, oggi*, in *Osservatorio sulle fonti,* 2019, p. 1 ff.*;* L. CECCHETTI, *Unravelling horizontal direct effect in EU law: the case of the fundamental right to paid annual leave between 'myth'and 'practice*', in *Yearbook of European Law*, 2023, p. 42 ff.; ID., *L'efficacia diretta delle direttive negli ordinamenti nazionali, oggi: questioni ancora aperte alla vigilia del 50° anniversario della sentenza van Duyn*, in *Eurojus*, 2023, p. 151 ff.; ID., *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte*, in *AISDUE*, 2023, p. 775 ff.; P. CRAIG, G. DE BURCA, *EU Law. Text, Cases, and Materials,* Oxford, 2020. From a jurisprudential evolution *see* CJ, 5 February 1963, case 26/62, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos*, EU:C:1963:1; CJ, 27 March 1963, case 28-30/62, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*, EU:C:1963:6; CJ, 9 February 1994, case C-91/92, *Paola Faccini Dori v Recreb Srl*, EU:C:1994:45; CJ, case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114; CJ, 4 December 1974, case 41/74, *Yvonne van Duyn v Home Office*, EU:C:1974:133; CJ, 8 April 1976, case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, EU:C:1976:56.

obliged Member States to release documents as proof of the applicants' rights.[182] Hence, the Directive merely determined the practical details of the exercise of the rights deriving from the Treaty. Generally speaking, directives do not have the ability to confer rights to individuals since they are addressed to Member States and need an act of transposition.[183] The rights stemming from a Directive can be invoked by an individual before the national courts against a State if the provisions are clear, precise, and conditional.

Following the CJ's legal reasoning, the *E and S* legal framework differs mainly in consideration of the operation of the doctrine of direct effect. In the case at stake, as framed by the CJ, the applicant had to claim rights from international norms, particularly "the privileges and immunities coming from the VCDR". In reality, these rights are granted by national norms which govern the procedures for the issuance of diplomatic cards, thereby implementing the VCDR disposition. Hence, it is true that the backgrounds of the two cases differ, but in regard to two different legal contexts, i.e., the national and European frameworks. The *Royer* context regarded rights arising from the Treaty within the context of the EU legal order, while, in *E and S*, the privileges and immunities are prescribed under the VCDR; however, these privileges and immunities are applied by various national legal systems by means of diverging implementing measures.

The CJ pointed out another aspect, namely, the different status of the individuals involved. In *Royer*, the right was invoked by EU citizens within the European legal framework. E and S were third-country nationals staying in the EU territory based on their diplomatic status. In this regard, Article 20(1) TFEU defines third-country nationals as those who are not citizens of the European Union and who do not enjoy the right of free movement as provided in Article 2(5) of Regulation (EU) No. 2016/399 (Schengen Borders Code). The Court's legal reasoning missed a central point, however. The VCDR is aimed at setting the rules for establishment of diplomatic missions, not prescribing a right of residency or to stay in a territory. Such considerations are left to national determination, making the system a more State-centric operation. In order to verify the rights of residency, the CJ should have talked about the rights and duties stemming from the national legislation implementing the VCDR. Therefore, the CJ's reasoning on the doctrine of direct effect is illuminating, but purely out of context, since the problem lies at the core of the legislation at stake.[184]

Whether those rights derive directly from the Treaties and whether they existed regardless of the issuance of a residence permit is irrelevant to the analysis at stake. In this regard, the Court did not clarify the rights and duties emanating from the diplomatic cards but relied on national law determinations.[185] In the present judgment, Member State X's

[182] See CJ, *Royer,* cit., para. 77.
[183] See TFEU, Art. 288.
[184] In fact, the Dublin Regulation does not grant any types of rights either under Article 2(l) DR, defining the meaning of such documents, nor in Article 12(1) DR, allocating responsibilities. It follows that a consistent formulation of the meaning of "residence document," including the rights and duties which arise from it, would have allowed for a precise application of the Dublin criteria. Therefore, this approach might have avoided the need for "reading across" different types of sources, bringing the determination to the EU level.
[185] See CJ, *E and S,* cit., para. 40.

handbook on diplomatic privileges and immunities provides that the possession of a diplomatic identity card grants the privileges and immunities specified in the Vienna Convention. [186] This card furnishes diplomatic personnel and their family members with a lawful basis to establish residency within said Member State. Thus, diplomatic cards entitle the applicants to enter and travel within the Schengen States, together with the passport issued by their own national authority, attesting to their right to stay in the territory of Member State X for the period specified.[187] Furthermore, the responsibilities determination would not have differed from what was stated by the CJ. The legal formulation of "residence document," pursuant to Article 2(l) DR, does not include any reference to the types of rights and duties. To the contrary, it refers merely to any authorization granted by national authorities despite its legal implications. Hence, Article 12(1) DR would have continued to apply.

In the primary proceedings, the defendants contended that diplomatic cards should not be included under the definition of Article 2(l) DR, given that individuals whose legal status is regulated by the VCDR are similarly exempt from the provisions of Directive 2003/109/EC of 25 November 2003, which pertains to the long-term residency status of nationals of third countries.[188] However, it is important to note that the DR does not offer a similar exemption in its provisions, nor does it include any derogatory rules regarding the consequences of issuing a diplomatic card to ascertain which Member State must review an application for international protection. Additionally, it should be noted that while Directive 2003/109/EC does not specifically address individuals who do not intend to establish permanent residency in the Member States, it does not preclude the issuance of residence documents under Article 2(l) of the Dublin III Regulation.

The *Jafari* decision[189] demonstrated the need of a contextual interpretation avoiding, however, any further interpretation of its relationship with another legal system.[190] Conversely, in the *E and S* judgment, the Court undertook a dynamic approach by uncovering a new legal aspect of the Dublin system, i.e., its relationship with the international legal system. In this respect, the *E and S* decision marks an important turning point in the interpretation of Article 12(1) DR when dealing with international applications regarding diplomatic officials. Nevertheless, the broad definition of residence document does not resolve the responsibility issues.[191]

---

[186] Ibidem, cit., para. 45.
[187] Regulation (EC) No. 562/2006 ("Schengen Borders Code"), Art. 19, para. 2 and point n. 4.3 of Annex VII.
[188] Ibidem, para. 27.
[189] The *Jafari* decision made a significant step in the interpretation of Article 12 by stating that judges must consider "all the situations entailing lawful entry into the territory of the Member States, since, in the normal course of events, the lawful entry of a third-country national into that territory is based either on a visa or residence permit, or on waiver of the need to obtain a visa." See CJ, *Jafari*, cit., para. 86 and the previous section 3.3.
[190] See CJ, *Jafari*, cit., para. 100.
[191] For instance, the jurisprudential interpretation does not clarify its application in case of multiple documents issued by different Member States. The Court neither explicitly stated the CEAS norms even application when dealing with the international legal system.

It must be recalled that the responsibility of the CJ is to reply to the question referred without any possibility of uncovering new legal aspects that are not required to resolve the issue in point. Still, the current Dublin system does not provide any legal alternative to the "country of first entry" rule. On the one hand, the Court failed to consider any possible alternative in the *E and S* decision. On the other, the RAMM formulation maintains the traditional DR criteria. According to the main doctrine, the principle of mutual recognition of positive asylum decisions is the strongest alternative, which enlarges the applicant's freedom of movement and restricts the possible abuse of the system. Therefore, even if the Dublin system's goal is to allocate responsibility, jurisprudence might be the introductory pathway to empowering the applicant's freedom of movement within European borders and require the Member States to try to cooperate in constructing the procedure.

5. Conclusion: a critical appraisal on the residence document criterion and the future challenges

The *E and S* decision could have led to a better understanding of the meaning of "residence document" under Article 2(l) DR and, therefore, the scope of application of Article 12(1) DR. The Luxembourg judges mandated the allocation of responsibilities within the Dublin automatic application, underlining the importance of an expeditious determination. In this scenario, the vague 2024 formulation continues to legitimize the high margin of discretion of Member States in controlling the entry and stay of third-country nationals in their territory. Namely, the "residence document" criterion was neither changed by the legislator, nor interpreted in a detailed way by the CJ. The New Pact demonstrated the legislator's unwillingness to rethink the automatic mechanism of responsibilities allocation. On the other hand, the CJ excluded any possible alternatives to the Dublin criteria by expressly stating that the "country of first choice" rule undermines the goal of the System.[192]

As already recalled, the RAMM criteria work on the same method of and in continuity with the traditional "Dublin" allocation mechanism.[193] The Preamble stresses the need for a rapid determination so as "to guarantee swift and effective access to fair and efficient procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection".[194] The method continues to be based on fair and objective criteria facilitating a prompt determination of the responsible Member State, leaving no room for further discretion.

In the CJ's view, the "residence document" definition is so broad as to include diplomatic cards issued in accordance with the VCDR.[195] The CJ did not limit Member States' room for manoeuvre in determining which authorization shall or shall not grant the

[192] In the Court's view, a third-country national who is a member of a diplomatic mission under VCDR could not have applied for international protection in any Member State of their choosing. See Opinion of AG Collins, *op. cit.,* para. 50.
[193] DR, Recital nos. 4 and 5.
[194] RAMM, cit., Recital No. 37.
[195] Ibidem.

"residential" feature. Hence, national authorities can determine if a permit falls under the scope of Article 2(l) DR and, therefore, if they shall be seen as responsible under Article 12(1) DR.[196] This legal context does not stop States from evading their responsibilities, nor does it establish any form of control of the European institutions. Therefore, Member States continue to hide inside the "European fortress" with the intention of creating a state-centric relationship.[197] This approach legitimates their unwillingness to consider human rights or individual circumstances when assessing international applications or applying the traditional Dublin criteria.

The CJ, through its legal formulation, implied another automatism which is capable of undermining the scope of the Regulation. The issuance of a diplomatic card amounts to accepting responsibility.[198] In the Court's view, this will allow an expeditious assessment of the responsibilities in light of the Dublin goals. If Article 12(1) DR had not been found to be applicable, the Netherlands would have had to verify whether other criteria might apply in order to allocate the responsibility. Hence, such an outcome might have led to a slowdown of the process, and, at least for the CJ, a breach of its "goals." Yet, speeding up the process would not necessarily mean achievement of the CEAS objectives, at least not all of them. Human rights concerns, such as the respect of "*non-refoulment*", might be overcome easily, even more so if the CJ has to deal with unique circumstances. For instance, the *C.K.* and *Jawo* decisions demonstrated that accelerating the procedure does not always result in respect for all the international obligations.[199] The allocation of responsibilities generates human rights implications that cannot be ignored for the sole purpose of reaching one of the goals of the System, i.e., allocation of responsibility. In fact, in the specific case, such approach did not result in the compromising of the applicants' rights. However, it could have been the case if the applicants had had special health issues or family needs.

There should, instead, be a balance between the need for determining the Member State responsible and respect of human rights. Hence, the *E and S* decision is surely an initial step in the contribution towards the open doctrinal debate which challenges the blind application of the Dublin criteria. In this regard, the CJ's understanding should have been key in determining the specific features of such documents or a list of categories that shall be prescribed under national provisions. Instead, it left open the need for better

[196] Such outcome also applies in the current System since the 2024 legislator adopted the same textual formulation under Article 2(13) RAMM.

[197] See A. B. ARMSTRONG, *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, in *Chicago Journal of International Law,* 2020, p. 332 ff.

[198] See section 3.2.

[199] More in particular, in *Jawo,* the CJ stated that "it is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State […]. In those circumstances, the application of an irrebuttable presumption that the fundamental rights of the applicant for international protection are observed in the Member State which, pursuant to the Dublin III Regulation, is designated as responsible for examining the application is incompatible with the duty to interpret and apply that regulation in a manner consistent with fundamental rights." See CJ, *Jawo,* cit., para. 82-84. The CJ underlined in *C.K.,* para. 61, that "the EU legislature intended, by adopting that regulation, to make the necessary improvements, in the light of experience, not only to the effectiveness of that system, but also to the protection granted to asylum seekers under that system". See also CJ, *Jafari,* cit., para. 54, 55 and 73.

interpretation. Therefore, if it is true that Member State X had the discretion to approve the entrance and stay within its territory, the only way to evade its responsibility under the Dublin criteria would have been to limit such to the circumstances specified in the international framework. Namely, the refusal is contingent upon the commission of offences and the preservation of the public interest once the mission is established. In addition, the coordination of the international provisions within the EU legal framework gets more complicated in an area so fragmented as asylum law. For instance, if third-country nationals benefiting from the privileges and immunities granted by the VCDR could select the Member State in which to apply for international protection, the receiving State might not coincide with the Member State responsible for the examination. Hence, the CJ failed to consider this intricate scenario, i.e., where the VCDR operates, avoiding any coordination between the VCDR and the Dublin system.

In this context, the Court's approach aligns with the previous apathetic case law on responsibility determination. The static approach merely allows the achievement of the system's primary purpose without providing a further response to the automatic application of the criteria or the need for the fair sharing of responsibility. Moreover, the RAMM does not alter the traditional method for responsibility allocation, nor does it consider applicant preferences. The *E and S* decision demonstrates that the maintenance of a broad definition of residence document generates confusion in the responsibility determination, risking slowing down the process and creating limbo situations. Thus, the "residence document" criterion is still problematic in its application. These legislative vacuums might, therefore, potentially lead to the need for future dialogue between national courts and the CJ in the context of Article 267 TFEU.