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The Shortcomings of Dublin II: Strasbourg's *M.S.S.* Judgment and its Implications for the European Union's Legal Order

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I. Introduction

The year 2011 was enframed by two essential judgments in the field of European asylum law; firstly by Strasbourg's verdict in *M.S.S.*¹ in January 2011, and secondly by Luxembourg's ruling in *N.S. and M.E.*² in December 2011. These two decisions vividly recalled that the European system of fundamental rights protection builds upon a multi-level regime of intertwining domestic, supranational and international mechanisms. The entanglement of human rights within this legal maze, however, appears to become a major legal issue, since the existence of two supreme legal systems (the European Union and the Council of Europe) and their respective courts (the Court of Justice of the EU and the European Court of Human Rights) leads to conceptual divergences³ in the protection of human rights.⁴ This divergence manifests itself most vividly in the area of the EU's Common Asylum Policy, in particular in context with the application of the so-called Dublin II-Regulation, which governs the member states' responsibility in examining asylum applications. Strasbourg's judgment in the *M.S.S.* case highlighted the existing deficiencies and shortcomings of this EU Regulation in the field of human rights protection in the event of removal of asylum seekers to another member state such as Greece, where they might face a serious risk of inhuman or degrading treatment in violation of Art. 3 ECHR. The subsequent order to suspend the transfer of asylum seekers to Greece might, however, lead to a clash of the member states' obligations under EU law and the Convention and an unwelcome interference by the ECtHR with the EU's autonomous legal order. This event and the subsequent *N.S.* case prompted the CJEU to react to *M.S.S.* and thus to clarify its relationship to the Convention and the Strasbourg Court. These two cases and their potential implications for Union law thence present the research focus of this study.

This contribution will therefore present the details and the most imminent consequences of the *M.S.S.* judgment, in particular with respect to the European Union and its member states (B); after that, it will depict the details of the *N.S.* case, especially its significance for the future application of the Dublin II-Regulation, the autonomy of EU law vis-à-vis ECtHR judgments, and the possible development of infringement proceedings and preliminary ruling procedures in asylum-related cases (C); beyond that, this contribution will provide an outlook on the question how the *M.S.S.* and *N.S.* cases will influence the future judicial interface between the Luxembourg and Strasbourg Courts and whether the *N.S.* judgment may be seen as a preparatory act for the EU's accession to the European Convention on Human Rights.

II. *M.S.S. v. Belgium and Greece*

1. Factual Background and Initial Procedures

¹ ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011.

² CJEU, *N.S. and M.E.*, Joined Cases C-411/10 and C-493/10, Judgment of 21 December 2011. Hereinafter only referred to as the "*N.S.* case".

³ See Sacha Prechal/Bert van Roermund, Binding Unity in EU Legal Order: An Introduction, in: Sacha Prechal/Bert van Roermund (eds.), *The Coherence of EU Law*, 2008, 7.

⁴ See Sonia Morano-Foadi/Stelios Andreadakis, The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence, *European Journal of International Law*, 22 (2011) 4, 1071.

During the last years, the situation for asylum seekers in Greece underwent dramatic and deteriorating changes. Given the current financial crisis and the location of Greece on the Union's external frontier, the Greek asylum system came under particularly heavy pressure and the conditions in Greek detention camps consequently involved a high risk of ill-treatment.⁵ After several domestic courts, such as the Austrian⁶ and the German Constitutional Courts,⁷ had decided that the transfer of asylum seekers under the Dublin II-Regulation was tantamount to a violation of Art. 3 ECHR, the Strasbourg Court had to react as well and withdrew its confidence in the European Union's power to protect fundamental rights in the area of asylum law in its *M.S.S.* judgment.⁸ Since the Dublin II-Regulation (as piece of European Union legislation) had been enacted by the EU, Strasbourg was confined to scrutinize the relevant member state action which was allegedly in violation of the Convention. Before the European Union's accession to the Convention, the ECtHR does not have any jurisdiction *ratione personae* over the EU and its legal order, which means that the actual implementation of the Dublin II-Regulation rests with the member states (which certainly remain responsible for any breaches of the Convention).

In this concrete case, the applicant *M.S.S.*⁹ had left Afghanistan and entered the European Union through Greece where he did not apply for asylum. He was detained by the Greek authorities and, after one week of detention, released and ordered to leave the country. After transiting through France, he arrived in Belgium and applied for asylum. According to the Dublin II-Regulation, Belgium was not responsible for examining the asylum application; moreover, as there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters under European Union law, the Belgian authorities were under no obligation to apply the sovereignty clause set forth in Art. 3 (2) of the Regulation. Consequently, Belgium decided not to allow the applicant to stay and issued an order directing him to leave Belgium. An application for interim measures to stop his deportation was subsequently declined by the ECtHR. After his transfer to Greece, *M.S.S.* informed the ECtHR through his lawyer that upon arrival, he had immediately been placed in detention in a building next to the airport, where he was locked up in a small space with twenty other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor. Due to these conditions, *M.S.S.* contacted his lawyer again to submit an individual application under Art. 34 ECHR against Belgium and Greece to the Strasbourg Court.¹⁰

2. Strasbourg's Judgment

In its ruling, the ECtHR determined that the deportation of *M.S.S.* by Belgium to Greece amounted to a violation of Art. 3 ECHR by both Belgium and Greece.¹¹ In this context, it is most intriguing that Strasbourg declared the acts of *two* contracting parties, which are at the same time EU member states, to be in violation of the Convention. This means that by simply applying the Dublin II-Regulation, i.e. EU law, Greece and Belgium directly and indirectly encroached upon the guaranteed rights provided for in Art. 3 ECHR.

Strasbourg took into account that those member states which form the external borders of the EU currently experience substantial difficulties in coping with the increasing influx of asylum seekers. Moreover, the ECtHR acknowledged that their special situation is further aggravated by the application of the Dublin II-Regulation and the subsequent retransfers of asylum

⁵ See e.g. UNHCR, Observations on Greece as a Country of Asylum, December 2009.

⁶ See VfGH, U 694/10 - U 1441/10, Judgment of 7 October 2010.

⁷ See e.g. BVerfG, 2 BvQ 68/09, Judgment of 23 September; BVerfG, 2 BvR 2603/09, Judgment of 13 November 2009; BVerfG, 2 BvR 2879/09, Judgment of 22 December 2009.

⁸ See Andreas von Arnould, Konventionsrechtliche Grenzen der EU-Asylpolitik – Neujustierungen durch das Urteil des EGMR im Fall *M.S.S. / Belgien und Griechenland*, Europäische Grundrechte-Zeitschrift, 38 (2011) 10-12, 239.

⁹ According to Art. 47 (3) Rules of the Court, applicants "who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the Court."

¹⁰ See ECtHR, *M.S.S. v. Belgium and Greece* (2011), paras 9-53.

¹¹ The ECtHR also found violations of Art. 13 ECHR in conjunction with Art. 3 ECHR by Belgium and Greece; due to the different context of these findings, however, they will not be explicitly discussed in this study. See ECtHR, *M.S.S. v. Belgium and Greece* (2011), paras 265-322 (violations of Art. 13 ECHR by Greece) and paras 369-397 (violations of Art. 13 ECHR by Belgium).

seekers by other EU member states. Nonetheless, with regard to the absolute character of Art. 3 ECHR,¹² these circumstances cannot absolve a contracting party of its obligations under the Convention.¹³

The ECtHR repeated that it had already considered in other cases¹⁴ that the abovementioned conditions found in Greek detention centres amounted to degrading treatment in breach of Art. 3 ECHR.¹⁵ Given the particular vulnerability of *M.S.S.* caused by his migration and the traumatic experiences prior to its arrival in Europe,¹⁶ the Strasbourg Court considered the detention conditions as unacceptable.¹⁷ Furthermore, it ruled that the Greek authorities also violated Art. 3 ECHR by neglecting their responsibilities under the European Reception Directive¹⁸ and held them responsible, because of their inaction, for the situation in which the applicant has found himself for a couple of months, namely living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. In the view of the ECtHR, such living conditions also fell within the scope of Art. 3 ECHR.¹⁹

Strasbourg's examination of Belgium's indirect violations of Art. 3 ECHR proves to be more complex than the preceding scrutiny regarding Greece, as it pierces right into the intricate interplay of international law and the European Union's legal order. At the outset, the ECtHR had to take recourse to its findings in *Bosphorus*, where it held that state action taken in compliance with EU law is justified as long as the Union is considered to protect fundamental rights, both substantially and procedurally, in a manner which can be considered at least equivalent to that for which the Convention provides.²⁰ Yet, such equivalent protection would only be presumed in cases where the respective state has no discretion at all in implementing a legal act.²¹ The ECtHR clarified that, according to its *Bosphorus*-presumption, the contracting parties nevertheless remain responsible under the Convention for all actions and omissions of their authorities under their domestic law or under their international legal obligations. Conversely, a state would be entirely responsible under the Convention for all acts falling outside its strict international legal obligations vis-à-vis other organizations, most notably where it was permitted to exercise discretion.²² The court then scrutinized the "sovereignty clause" in Art. 3 (2) of the Regulation and concluded that, under this provision, the Belgian authorities could have refrained from removing the applicant, if they had considered that Greece was not capable of fulfilling its obligations under the Convention. As a result, Strasbourg opined that the impugned measure, namely the removal of *M.S.S.* from Belgium to Greece, did not strictly fall within Belgium's obligations under EU law, which also meant that the presumption of equivalent protection did not apply in the case at hand.²³

The ECtHR therefore concluded that Belgium should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters.²⁴ Beyond that, Strasbourg noted that numerous reports and materials indicated the practical difficulties in the application of the Dublin regime in Greece and that the European Commission has already made proposals to strengthen the protection of fundamental rights of asylum seekers by implementing a temporary suspension of transfers under the Dublin II-Regulation. Such a step would have avoided the removal of asylum seekers to member states which are unable to guarantee a sufficient level of fundamental rights protection.²⁵ As a consequence, the applicant's transfer by Belgium to Greece was tantamount to a violation of Art. 3 ECHR and, accordingly, Belgium was held responsible for its indirect violation of the Convention.

¹² See also ECtHR, *Chahal v. United Kingdom*, Appl. No. 22414/93, Judgment of 15 November 1996, para 76.

¹³ See ECtHR, *M.S.S. v. Belgium and Greece* (2011), para 224.

¹⁴ See ECtHR, *S.D. v. Greece*, Appl. No. 53541/07, Judgment of 11 June 2009, paras 49-54; ECtHR, *Tabesh v. Greece*, Appl. No. 8256/07, Judgment of 26 November 2009, paras 38-44; ECtHR, *A. v. Greece*, Appl. No. 12186/08, Judgment of 22 July 2010, paras 57-65.

¹⁵ See ECtHR, *M.S.S. v. Belgium and Greece* (2011), para 231.

¹⁶ See *ibid.*, para 232.

¹⁷ See *ibid.*, para 233.

¹⁸ See Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, OJ L 31/18, 6 February 2003.

¹⁹ See ECtHR, *M.S.S. v. Belgium and Greece* (2011), paras 263-264.

²⁰ See ECtHR, *Bosphorus v. Ireland*, Appl. No. 45036/98, Judgment of 30 June 2005, para 155.

²¹ See *ibid.*, paras 156-157.

²² See ECtHR, *M.S.S. v. Belgium and Greece* (2011), para 338.

²³ See *ibid.*, para 340.

²⁴ See ECtHR, *M.S.S. v. Belgium and Greece* (2011), para 345.

²⁵ See *ibid.*, paras 347-350.

3. Aftermath: A Clash of Obligations and New Rules for European Asylum Law?

In a manner of speaking, the *M.S.S.* judgment represents Strasbourg's test case in which the court had to apply its settled case-law on the transnational dimension of the Convention, first developed in the *Soering* case,²⁶ to a situation where EU member states had to implement EU asylum law allegedly in violation of the Convention.²⁷ Thus it became evident that the transfer of asylum seekers to a country where they might face a serious risk of ill-treatment amounts to an indirect violation of Art. 3 ECHR, if the member state enjoys a margin of discretion in deciding whether or not to apply the sovereignty clause of Art. 3 (2) of the Dublin II-Regulation. Moreover, Strasbourg indirectly revealed that the overall concept of the Regulation is based on serious shortcomings, such as the idea that asylum-seekers may rely on equal access to fundamental rights protection and justice in each member state.²⁸ Therefore, it had to condemn the strict application of Art. 3 (1) of the Dublin II-Regulation by Belgium with respect to Greece.²⁹ This *modus operandi* has placed a substantial burden upon EU member states when acting under the provisions laid down in the Dublin II-Regulation and has elucidated that Union membership alone does not provide a sufficient guarantee to ensure the principle of *non-refoulement*.³⁰ Additionally, Strasbourg's decision in January 2012 to suspend the transfer of a Sudanese asylum seeker from Austria to Hungary on the basis of an interim measure underlines the fact that an increasing number of EU member states do not comply with their obligations under the Convention.³¹

Yet, this is the exact legal crossroads where the member states could hypothetically face major problems between their obligations under the Convention on the one hand and under EU law on the other hand. Since the Dublin-II Regulation principally obliges the member states to return asylum seekers to the member state of first arrival, an extensive exercise of the sovereignty clause or any refusal to act in accordance with the provisions of the Regulation, however, would undermine the *effet utile* of the European Union's legal system and constitute a breach of EU law, which may lead to infringement proceedings under Art. 258 TFEU. Consequently, it is – at least theoretically – possible that the member states could be caught between a rock and a hard place, in particular in situations similar to the *M.S.S.* case: either they transfer asylum seekers to unsafe countries in accordance with Art. 3 (1) of the Dublin II-Regulation and breach the Convention, or they violate EU law by applying Art. 3 (2) of the Dublin II-Regulation in every case an asylum seeker would face a serious risk of ill-treatment in the receiving state. The question remains how the member states can escape this dilemma and the potential clash of obligations when they have to decide whether to exercise their discretion under the sovereignty clause.

The most important message of Strasbourg's *M.S.S.* judgment is that the EU's asylum regime is in dire need of something stronger and more convincing than the sovereignty clause in Art. 3 (2) of the Dublin II-Regulation, in order to remedy the Regulation's cumbersome effect on EU border member states³² and the imminent dilemma of obligations for the member states. Obviously, it is the discretionary dimension of this provision which brings about the most pressing legal issues within the multi-level maze of European human rights protection in the field of asylum law. It was precisely the sovereignty clause which allowed Strasbourg to circumvent a direct conflict with the Luxembourg Court by referring to the discretion afforded to the member states under Art. 3 (2) of the Dublin II-Regulation³³ and to the fact that Belgium could have avoided a breach of the Convention by simply exercising its right under this very provision.³⁴

The first and most immediate consequence of *M.S.S.* is its regulatory effect on the future behaviour of the other EU member states. Even though the *stare decisis* doctrine has never been accepted in international law³⁵ and Strasbourg's decisions are

²⁶ See ECtHR, *Soering v. United Kingdom*, Appl. No. 14038/88, Judgment of 7 July 1989.

²⁷ See von Arnould (2011), 239.

²⁸ See Geoff Gilbert, *Is Europe Living Up to Its Obligations to Refugees?* *European Journal of International Law*, 15 (2004) 5, 971.

²⁹ See Marc Bossuyt, *Belgium Condemned for Inhuman or Degrading Treatment Due to Violations by Greece of EU Asylum Law*, *European Human Rights Law Review*, 16 (2011) 5, 589.

³⁰ See Patricia Mallia, *Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-Thinking of the Dublin II Regulation*, *Refugee Survey Quarterly*, 30 (2011) 3, 125 et seq.

³¹ See ECtHR, *Application v. Austria*, Appl. No. 2283/12, Interim Measure of 11 January 2012.

³² See *ibid.*, 126.

³³ See von Arnould (2011), 241.

³⁴ See ECtHR, *M.S.S. v. Belgium and Greece* (2011), paras 339-340.

³⁵ See Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, 2005, 25.

only binding *inter partes*,³⁶ the persuasive power of the *M.S.S.* judgment should be a certain “guideline” for the other EU member states³⁷ when deciding to remove asylum seekers under the Dublin II-Regulation. Accordingly, it can no longer be accepted that states fail to draw the consequences of judgments finding violations of the Convention by another state when the same legal problem exists in their own legal order. One might say that the binding effect of Strasbourg’s interpretation goes beyond the principle of *res judicata* in the strict sense.³⁸ Furthermore, this quasi-*res judicata* effect of *M.S.S.* can be based on the fact that the EU member states partake in the Dublin regime which in turn relies on the member states’ compliance with the Convention.³⁹

Other possible consequences, however, are less tangible and require further analysis for clarification. The first problem in this context is the aforementioned hypothetical question whether and how the member states can escape arising treaty conflicts between their obligations under the Convention and those under European Union law. Given the current situation in Greece, asylum cases similar to *M.S.S.* will eventually end up before the ECtHR which will once again decide that the transfer of asylum seekers to Greece is in violation of the Convention. The second problem in this regard is the question whether the ECtHR’s judgment in *M.S.S.* will turn the member states’ *discretion* under the sovereignty clause in Art. 3 (2) of the Dublin II-Regulation into a *duty* to examine asylum applications⁴⁰ in all cases where the removal of an asylum seeker to the state actually responsible under Art. 3 (1) of the Dublin II-Regulation would expose individuals to a serious risk of ill-treatment. This course of action would be in accordance with the hitherto existing case-law of domestic Constitutional Courts⁴¹ and the principle of solidarity and the fair sharing of geographically and thus unequally distributed burdens between the member states, by virtue of Art 80 TFEU. Such a duty, externally imposed by the ECtHR would, however, interfere with the Union’s internal legal order and therewith encroach upon the autonomy of EU law.⁴²

In February 2011, the pressure of the *M.S.S.* judgment put on the EU’s asylum regime⁴³ led to a reaction by the European Parliament. Members of Parliament inquired how the European Commission would react to Strasbourg’s decision and whether “it would take action against Greece and against any other member states which similarly fail to look after asylum-seekers properly.”⁴⁴ Furthermore, the CJEU was requested to deliver a preliminary ruling on the question whether the member states are now obliged to exercise the sovereignty clause before transferring asylum seekers to Greece.

III. The Implications of *M.S.S.* for the EU’s Legal Order

1. The Echoes of *M.S.S.* in Luxembourg

Without doubt, Strasbourg’s judgment in *M.S.S.* was a major milestone in the development of European asylum law. Nevertheless, the Luxembourg Court was recently called upon to decide on the facts of the joined cases of *N.S.* and *M.E.*, which greatly resemble those of the *M.S.S.* case and helped overcome the shortcomings of Dublin II for the time being. As in *M.S.S.*, the concerned individuals *N.S.* and *M.E.* had entered the EU via Greece without applying for asylum, and had then travelled on to the United Kingdom and Ireland, respectively.⁴⁵ The difference to *M.S.S.*, however, lies in the fact that – presumably in anticipation of Strasbourg’s decision – the applicants have not been transferred to Greece. In fact, the *Court of*

³⁶ See Jens Meyer-Ladewig, EMRK Handkommentar, 2011, Art. 46 para 15, and Christoph Grabenwarter, Europäische Menschenrechtskonvention, 2009, § 16 para 9.

³⁷ See Ulrike Brandl, *M.S.S. gegen Belgien und Griechenland und Folgewirkungen für andere Dublinstaaten und für Griechenland*, Fremden- und asylrechtliche Blätter, (2011) 1, 10.

³⁸ See Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference, 3 July 2009, 6 et seq.

³⁹ See Brandl (2011), 10.

⁴⁰ See Matthias Lehnert/Marei Pelzer, *Der Selbsteintritt der Mitgliedstaaten im Rahmen des EU-Asylzuständigkeitsystems der Dublin II-Verordnung*, Neue Zeitschrift für Verwaltungsrecht, 29 (2010) 10, 615.

⁴¹ See footnotes 6 and 7.

⁴² See e.g. CJEU, Opinion 1/91, EEA I, Opinion of 14 December 1991.

⁴³ See *Bossuyt*, Belgium Condemned, 597.

⁴⁴ European Parliament, Judgment by the European Court of Human Rights in the Case of *M.S.S. v. Belgium and Greece*, Parliamentary Questions of 10 February 2011, E-001222/2011.

⁴⁵ See CJEU, Joined Cases C-411/10 and C-493/10, *N.S./Secretary of State for the Home Department and M.E. and Others/Refugee Applications Commissioner*, Judgment of 21 December 2011, paras 34-50 (N.S.) and 51-53 (M.E.).

*Appeal of England and Wales*⁴⁶ and the *High Court of Ireland*⁴⁷ opined that “decisions on certain questions of European Union law were necessary for [them] to give judgment [...]”⁴⁸ As a consequence, these courts requested the Luxembourg Court to give a preliminary ruling, *inter alia*, on the question whether the member states are under any duty to exercise the sovereignty clause under Art. 3 (2) of the Dublin II-Regulation in order *not* to violate any fundamental rights of asylum seeking individuals.

2. Luxembourg’s Judgment

The British and Irish Courts referred seven different questions to the CJEU, of which, however, only four are directly relevant for the scope of this contribution. Furthermore, as these four questions address overlapping and similar legal issues, the CJEU’s respective answers will be considered together and scrutinized under the two subsequent headings.

a. The Sovereignty Clause and the Scope of EU Fundamental Rights

By their first question, the domestic courts asked Luxembourg whether a decision made by a member state under the sovereignty clause of Art. 3 (2) of the Dublin II-Regulation to examine an asylum application for which another member state is primarily responsible, were to fall within the scope of European Union law. The principal objective of this question is to ascertain whether the member states must comply with the provisions of the Charter in deciding whether to exercise the sovereignty clause, especially within the light of Art. 6 (1) TEU and Art. 51 (1) ChFR.⁴⁹

It is beyond doubt that pursuant to Art. 1 ECHR, the EU member states are obliged to secure to everyone within their jurisdiction the rights and freedoms enshrined in the European Convention on Human Rights, as all of them are contracting parties to this international treaty. The obligation of the member states to ensure and guarantee fundamental rights as enshrined in EU law, however, proves to be a more elusive matter. According to the wording of Art. 51 (1) ChFR, EU fundamental rights are only binding upon the member states “when they are implementing Union law”. The question remains, though, what this wording exactly means and under what circumstances the member states actually “implement Union law”.

In its arguments, the CJEU clearly took recourse to the opinion of Advocate General Verica Trstenjak in which she had referred to the “Explanations Relating to the Charter of Fundamental Rights”,⁵⁰ and argued that, under the first sentence of Art. 51 (1) ChFR and the CJEU’s case-law in *Wachauf*,⁵¹ the member states are bound by the requirements of the protection of fundamental rights when they implement Union law and that they must also apply Union law in conformity with those requirements.⁵² Moreover, the Advocate General inferred from the CJEU’s judgment in the *ERT* case⁵³ that, if the member states restrict fundamental freedoms as guaranteed by the Treaties, this course of action must satisfy the requirements of fundamental rights protection as enshrined in the EU’s legal order.⁵⁴

The Luxembourg Court therefore concluded that the decision made by a member state under Art. 3 (2) of the Dublin II-Regulation whether to examine a claim for asylum is to be regarded as a national measure implementing European Union law, must be answered in the affirmative. Despite the margin of discretion afforded to the member states in making the decision whether to examine an asylum application, decisions taken by the member states on the basis of Art. 3 (2) of the Dublin II-Regulation are to be regarded as implementing measures within the meaning of Art. 51 (1) ChFR.⁵⁵ This means

⁴⁶ See CJEU, Case C-411/10, N.S./Secretary of State for the Home Department, Reference for a Preliminary Ruling from the Court of Appeal (England & Wales) (Civil Division) of 18 August 2010, OJ C 274/21, 9 October 2010.

⁴⁷ See CJEU, Case C-493/10, M.E. and Others/Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, Reference for a Preliminary Ruling from High Court of Ireland of 15 October 2010, OJ C 13/18, 15 January 2011.

⁴⁸ CJEU Joined Cases C-411/10 and C-493/10, N.S./Secretary of State (2011), para 49.

⁴⁹ See CJEU, Joined Cases C-411/10 and C-493/10, N.S./Secretary of State for the Home Department, Opinion of Advocate General Trstenjak of 22 September 2011, para 69.

⁵⁰ See Explanations Relating to the Charter of Fundamental Rights, OJ C 303/32.

⁵¹ See CJEU, Case 5/88, *Wachauf*, Judgment of 13 July 1989, para 19.

⁵² See CJEU Joined Cases C-411/10 and C-493/10, N.S./Secretary of State (2011), Opinion of Advocate General Trstenjak, para 77.

⁵³ See CJEU, Case C-260/89, *ERT*, Judgment of 18 June 1991, paras 41-45.

⁵⁴ See CJEU Joined Cases C-411/10 and C-493/10, N.S./Secretary of State (2011), Opinion of Advocate General Trstenjak, para 77.

⁵⁵ See CJEU, Joined Cases C-411/10 and C-493/10, N.S./Secretary of State (2011), para 68.

that, when making a decision under Art. 3 (2) of the Dublin II-Regulation, the member states do in fact implement EU law and, more importantly, they are bound by the Charter, in particular by the provisions and duties set forth in Art. 4 and 19 (2) ChFR when transferring asylum seekers to another state.⁵⁶

After Luxembourg's verdict, the member states will be left with a twofold obligation in the field of asylum law and in the event of removal or transfer of asylum seekers: firstly, as contracting parties to the Convention, they are obliged to comply with Art. 3 ECHR and the pertinent judgments delivered by the Strasbourg Court. Secondly, despite their broad discretion in this area, decisions made by the member states on the basis of Art. 3 (2) of the Dublin II-Regulation also amount to an implementation of European Union law and are thus encompassed by the provisions of the Fundamental Rights Charter. This means that a removal of asylum seekers to a country where they might face a serious risk of ill-treatment not only breaches the Convention (as Strasbourg has held in *M.S.S.*), but also the EU's Charter of Fundamental Rights and therewith – under Art. 6 (1) TEU – primary law.⁵⁷

b. An Obligation to Exercise the Sovereignty Clause?

Given the member states' hypothetical dilemma of conflicting obligations under EU law and the Convention, the referring courts principally asked by their second, third and fourth questions whether the member states are obligated under the Charter and EU fundamental rights to exercise their rights under the sovereignty clause, if it were established that the transfer of asylum seekers to the member state primarily responsible for the application would expose them to a serious risk of fundamental rights violations.⁵⁸ Through these questions, the domestic courts basically requested the CJEU to clarify the issue of incompatible obligations within the boundaries of European Union law and therewith to remove this considerable burden from the member states. Moreover, a clear and concluding judgment on this particular matter by Luxembourg would expectedly circumvent any further interference with the European Union's legal autonomy by the Strasbourg Court.

At the outset of its judgment, the CJEU reconfirmed that the Common European Asylum System is based on the principle of *non-refoulement* as enshrined in the Geneva Convention,⁵⁹ which must be respected by virtue of Art. 18 and 19 (2) ChFR and Art. 78 TFEU.⁶⁰ As a consequence, the member states and their authorities must not only interpret their national law in accordance with EU law in general, but also secondary EU law in compliance with EU fundamental rights. Due to the mutual confidence in all member states that they observe fundamental rights as set forth in the Geneva Convention and the European Convention on Human Rights, it must be assumed that the treatment of asylum seekers in the member states complies with the requirements of these legal documents. Only because of this mutual confidence, the Dublin II-Regulation could be adopted in order to increase legal certainty for asylum seekers and to accelerate proceedings.⁶¹ Yet, if there are substantial grounds for believing that the conditions in a member state will result in inhuman or degrading treatment within the meaning of Art. 4 ChFR, the transfer of asylum seekers under Art. 3 (1) of the Dublin II-Regulation would be incompatible with this provision.⁶² Subsequently, the Luxembourg Court referred to the ECtHR's judgment in *M.S.S.* and concluded that in situations such as in *N.S.* or *M.S.S.*, the member states *may not* transfer asylum seekers to the member state responsible for examining the asylum application, if systemic deficiencies in that member state amount to real risks of inhuman or degrading treatment within the meaning of Art. 4 ChFR.⁶³

In the light of these findings, Luxembourg held that European Union law precludes the member states from conclusively presuming that the member state originally responsible for examining an asylum application under Art. 3 (1) of the Dublin II-Regulation observes the fundamental rights of the EU.⁶⁴ Beyond that, the existence of systemic deficiencies, resulting in

⁵⁶ See *ibid.*, para 69.

⁵⁷ See von Arnould (2011), 242.

⁵⁸ See CJEU, Joined Cases C-411/10 and C-493/10, *N.S./Secretary of State* (2011), paras 70-72.

⁵⁹ See CJEU, C-31/09, *Nawras Bolbol*, Judgment of 17 June 2010, para 38.

⁶⁰ See CJEU, Joined Cases C-411/10 and C-493/10, *N.S./Secretary of State* (2011), para 75.

⁶¹ See *ibid.*, paras 77-80.

⁶² See *ibid.*, para 87.

⁶³ See *ibid.*, para 94.

⁶⁴ See *ibid.*, para 105.

inhuman or degrading treatment, entails that the member state which should carry out the transfer of the asylum seeker, must continue to examine the criteria of the Regulation in order to establish whether these criteria enable another member state to be identified as responsible for the examination of the asylum application.⁶⁵ However, if it becomes necessary, the member state in which the asylum seeker is present, must itself examine the asylum application in accordance with the sovereignty clause of Art. 3 (2) of the Dublin II-Regulation.⁶⁶ This means that, even though not explicitly stated in the judgment, situations such as in *M.S.S.* or *N.S.* obligate the member state in which the asylum seeker is present to exercise the sovereignty clause and to become the member state responsible for examining the application. In other words, Luxembourg has heeded Strasbourg's opinion in the *M.S.S.* judgment and has effectively transformed the *discretion* of the sovereignty clause into a *duty* to examine an asylum application, if the conditions in the member state originally responsible are tantamount to inhuman or degrading treatment within the meaning of Art. 4 ChFR.

3. Legal Ramifications for the EU and the Member States

Luxembourg's *N.S.* ruling less than a year after Strasbourg's *M.S.S.* judgment may be considered a judicial masterpiece. Through this judgment, the CJEU managed to kill two birds with one stone: not only did it guarantee the protection of fundamental rights of asylum seekers in precarious situations (especially when being removed to another country, but also succeeded in resolving a potential treaty conflict of the member states' conflicting obligations under EU law and the Convention, and in maintaining the autonomy of the Union's legal order vis-à-vis the external influence of the ECtHR. Beyond that, the *N.S.* judgment will also have a significant impact on the system of preliminary rulings and infringement proceedings in asylum-related cases.

a. From Discretion to Duty – Resolving the Dilemma of Conflicting Obligations

Luxembourg's paramount tactical merit in resolving the (theoretically) impending clash between the member states' obligations under EU law and the Convention was to consider any decision by a member state on the basis of Art. 3 (2) of the Dublin II-Regulation as an implementation of Union law for the purposes of Art. 6 (1) TEU and Art. 51 (1) ChFR.⁶⁷ Hereby the CJEU established that the exercise of the sovereignty clause falls within the scope of European Union law which means that the provisions Charter of Fundamental Rights are applicable in all cases in which a member state may decide to examine an asylum application for which another member state is originally responsible. In the next step, Luxembourg bridged the gap between the Charter and the Convention by referring to Art. 4 ChFR, which is identical to Art. 3 ECHR and thus has, by virtue of Art. 52 (3) ChFR, the same and corresponding meaning and scope as Art. 3 ECHR. In other words, although the CJEU did not explicitly mention Art. 52 (3) ChFR in its *N.S.* judgment, this provision obliges the Luxembourg Court to continuously adopt Strasbourg's settled case-law and thence to construe Art. 4 ChFR as a "normative bridge"⁶⁸ between the Charter and the Convention in order to avoid any judicial divergences between the CJEU and the ECtHR.⁶⁹

It is therefore the consistency which Art. 52 (3) ChFR intends to ensure between the Charter and the Convention,⁷⁰ that helped overcome the member states' conflicting obligations under EU law and the Convention after *M.S.S.* *In concreto*, Luxembourg has harmonized the member states' conflicting obligations to the extent that, if the transfer of an asylum seeker to the member state primarily responsible under Art. 3 (1) of the Dublin II-Regulation were to infringe Art. 3 ECHR because of the risk of inhuman or degrading treatment, there would generally also be an infringement of the Charter of Fundamental Rights, in particular a violation of Art. 4 and Art. 19 (2) ChFR.⁷¹ By transforming the margin of discretion in the sovereignty clause into a duty to examine an asylum application in cases such as *M.S.S.* or *N.S.*, the Luxembourg Court has effectively

⁶⁵ See *ibid.*, para 107.

⁶⁶ See *ibid.*, para 108.

⁶⁷ See *ibid.*, para 69.

⁶⁸ See von Arnould (2011), 242.

⁶⁹ See Olivier De Schutter, Art. 52, in: EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter (2006), 401.

⁷⁰ See Explanations Relating to the Charter of Fundamental Rights, OJ C 303/33.

⁷¹ See CJEU, Joined Cases C-411/10 and C-493/10, *N.S./Secretary of State* (2011), Opinion of Advocate General Trstenjak, para 157.

adjusted the interpretation and application of the Dublin II-Regulation to be in conformity with the Convention and Strasbourg's case-law. At the end of the day, this *modus operandi* has led to a situation where EU law and the Convention are construed in convergence with each other and in a virtually identical fashion, which alleviates the member states from the burden of conflicting obligations. Hence, the member states are highly recommended to suspend the transfer of asylum seekers to Greece in the future in order to act in accordance with *both* EU law and the Convention.

b. The Autonomy of European Union Law

Luxembourg's line of argumentation in *N.S.* was certainly not exclusively guided by the principle of sincere cooperation under Art. 4 (3) TEU which requires the EU's institutions to interpret and apply Union law in conformity with international law in order to aid the member states in discharging their international obligations. More importantly, the harmonization of the Charter with the corresponding Convention rights and the according transformation of the sovereignty clause's discretion into a duty in certain cases have actually provided the legal basis to uphold the EU's legal autonomy towards Strasbourg's external interferences in cases such as *M.S.S.* In *Opinion 1/91*, the CJEU held that international courts must not be given jurisdiction to interpret and apply European Union law in a binding fashion, since such jurisdiction is likely to adversely affect the autonomy of the Union's legal order.⁷² Of course, before the EU's accession to the Convention, Strasbourg does not have jurisdiction *ratione personae* over the Union and its legal order and is consequently precluded from holding the EU directly responsible for human rights violations. Furthermore, the ECtHR regards the domestic law of the parties involved – which would be the Dublin II-Regulation in asylum cases – as part of the facts and does not assume the role of a “fourth instance”⁷³ which would “deal with errors of fact or law allegedly committed by a national court”.⁷⁴ In the *M.S.S.* case, Strasbourg simply analyzed the margin of discretion afforded to member states under Art. 3 (2) of the Dublin II-Regulation in order to assess the responsibility of Belgium under the Convention.⁷⁵ One might therefore wonder how the autonomy of EU law could be endangered by Strasbourg's verdict in *M.S.S.* As a matter of fact, Strasbourg did not *directly* interfere with the EU's legal order and its autonomy, since it solely referred to the discretion afforded to a *member state* under EU law and the *member state's* responsibility for protecting the human rights of *M.S.S.* As in *Matthews*⁷⁶ or *Bosphorus*,⁷⁷ Strasbourg did not say a single word about potential human rights violations rooted in EU law and elegantly circumnavigated this matter by emphasizing the member state's discretion under the Dublin II-Regulation. Nevertheless, as aforementioned, the extensive use and application of the sovereignty clause by the member states would undermine the system established by the Dublin II-Regulation and thus violate EU law.⁷⁸ This means *in concreto* that Strasbourg *indirectly* interfered with the autonomy of EU law by evoking the abovementioned conflicting obligations of the member states between European Union law and the Convention. The member states – albeit in an unrealistic move – could have decided to honour their obligations under the Convention and hence to exercise the sovereignty clause in any case similar to *M.S.S.* or *N.S.* Such a course of action would have compromised the EU's Common Asylum System and thus crippled the effective cooperation between the Union and the member states. The CJEU succeeded in averting this potential disaster for the European Union's legal system and its autonomy by following the Strasbourg Court's case-law in *M.S.S.* and by fully harmonizing the member states' obligations under EU law and the Convention in the *N.S.* case.

c. Infringement Proceedings and Preliminary Rulings in Future Asylum Cases

The systemic deficiencies within the Greek asylum system will not remain without consequences for Greece. Even before *M.S.S.*, the European Commission has already responded to the situation by instigating infringement proceedings against

⁷² See CJEU, Opinion 1/91, EEA I (2011), para 35.

⁷³ See David Harris/Michael O'Boyle/Colin Warbrick, *Law of the European Convention on Human Rights*, 2009, 14.

⁷⁴ ECtHR, *García Ruiz v. Spain*, Appl. No. 30544/96, Judgment of 21 January 1999, para 28.

⁷⁵ See ECtHR, *M.S.S. v. Belgium and Greece* (2011), para 339.

⁷⁶ See ECtHR, *Matthews v. United Kingdom*, Appl. No. 24833/94, Judgment of 18 February 1999.

⁷⁷ See ECtHR *Bosphorus v. Ireland* (2005).

⁷⁸ See Christian Filzwieser/Andrea Sprung, *Dublin II-Verordnung*, 2010, 74.

Greece under Art. 258 TFEU for not complying with the substantial requirements of the Dublin II-Regulation and fundamental rights.⁷⁹ Yet hitherto, Greece could avert legal consequences by passing several Presidential Decrees,⁸⁰ which were deemed as apt to transpose the EU's relevant asylum directives and therewith to overcome existing deficiencies in fundamental rights protection. As a consequence, the infringement proceedings against Greece were stayed.⁸¹ As *M.S.S.* and *N.S.* have shown, however, these efforts did not suffice to remedy further alleged breaches of human rights in Greek detention centres. It remains to be seen whether the Commission will continue to tackle the worsening situation in Greece via legal avenues, e.g. through infringement proceedings. Moreover, the developments after *M.S.S.* and *N.S.* also involve significant legal ramifications for the other member states. Before Luxembourg's judgment in *N.S.*, an extensive exercise of the sovereignty clause or any refusal to act in accordance with the provisions of the Regulation would have constituted a breach of EU law and therewith led to infringement proceedings under Art. 258 TFEU.⁸² After *N.S.*, however, things are quite different: given the systemic deficiencies for asylum seekers in Greece, the transfer of individuals to the member state originally responsible for examining the application might lead to infringement proceedings, if the receiving state fails to protect the fundamental rights as set forth in the Charter (e.g., Art. 4, 18 and 19 (2) ChFR). It is also uncertain whether the Commission will initiate infringement proceedings against the member state removing asylum seekers to Greece in cases similar to *M.S.S.* or *N.S.* in order to pre-empt the Strasbourg Court from holding this very member state responsible for violating Art. 3 ECHR.

With respect to preliminary ruling proceedings under Art. 267 TFEU, the *N.S.* judgment leaves the domestic courts with a duty to request a preliminary ruling in cases similar to *M.S.S.* or *N.S.* Such a duty may be based on Art. 267 (3) TFEU, which requires those domestic courts against whose decisions there is no judicial remedy under national law, to bring a matter before the CJEU, or on Luxembourg's settled case-law such as *Foto-Frost*, which precludes domestic courts from declaring Union acts invalid.⁸³ This means that, on the one hand, if the domestic courts share the same doubts as the *Court of Appeals of England and Wales* and the *High Court of Ireland* did in *N.S. and M.E.* in similar cases, they must request a preliminary ruling from the CJEU on this matter; on the other hand, if they conclude that such cases involve other preliminary questions, they are equally required to request a preliminary ruling from Luxembourg. *E contrario*, the national courts must not ignore the results of *N.S.* and persist on the opinion that there is no doubt regarding the interpretation and application of Art. 3 (2) of the Dublin II-Regulation in cases similar to *M.S.S.* and *N.S.*⁸⁴

IV. The *N.S.* Case as a Preparatory Act for Accession?

The CJEU's judgment in *N.S.* has clearly demonstrated that the Charter of Fundamental Rights can improve the judicial dialogue between Strasbourg and Luxembourg during the transition period until the EU's formal accession to the Convention. Via Art. 52 (3) ChFR, the ECtHR's case-law is applicable to EU law even before the actual accession takes place. But beyond that, the CJEU's judgment in *N.S.* also shed some light on the future relationship between Luxembourg and Strasbourg *after* accession.⁸⁵ The CJEU's reaction in *N.S.* can be seen as a preparatory step for accession, heralding an even more intense and accelerated rapprochement of the two European courts in the years to come. By harmonizing the member states' obligations under EU law and the Convention, Luxembourg did not only maintain the autonomy of European Union law. Luxembourg also veered towards a legal status post-accession, where it will review the member states' obligation

⁷⁹ See CJEU, Case C-72/06, Commission/Greece, Judgment of 19 April 2007, and CJEU, Case C-130/08, Commission/Greece, Action brought against Greece on 31 March 2008, OJ C 128/25, 24 May 2008.

⁸⁰ See e.g. Presidential Decree 220/2007 (on the Transposition into the Greek Legislation of Council Directive 2003/9/EC from January 27, 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers); Presidential Decree 90/2008 (on the Minimum Requirements Regarding the Procedures by which Member States Grant or Revoke Refugee Status); and Presidential Decree 96/2008 (Adjusting Greek Legislation to the Provisions of Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons who otherwise Need International Protection for other Reasons).

⁸¹ See CJEU, Case C-130/08, Commission/Greece, Order of the President of the Court of 22 October 2008, OJ C 69/32, 21 March 2009.

⁸² See Filzwieser/Sprung (2010), 74.

⁸³ See CJEU, Case 314/85, Foto-Frost, Judgment of 22 October 1987, para 15.

⁸⁴ See Ronald Frühwirt/Joachim Stern, Vorabentscheidungsverfahren und einstweiliger Rechtsschutz, *juridikum*, (2010) 3, 278.

⁸⁵ See *Brandl, M.S.S. gegen Belgien und Griechenland und Folgewirkungen* (2011), 11.

under the Convention in conformity with the subsidiarity principle of Art. 35 (1) ECHR, which affords the Union the opportunity of preventing or redressing alleged violations before those allegations are submitted to Strasbourg.⁸⁶ In other words, the CJEU ensured that, after accession, it would have the opportunity to deal with a case involving alleged fundamental rights violations and to remedy them before any applications might reach Strasbourg.

Moreover, after accession, the EU can be held responsible alongside the member states for alleged human rights violations, in particular by means of the “co-respondent mechanism”. Art. 3 (2) of the Draft Accession Agreement⁸⁷ states that the EU may become co-respondent to the proceedings if it appears that an alleged human rights violation calls into question the compatibility of a Convention right at issue with a provision of Union law, notably where that violation could have been avoided only by disregarding an obligation under EU law. This would only be the case, however, if an EU law provision leaves no discretion to a member State as to its implementation at the national level.⁸⁸ But as Strasbourg has correctly pointed out in *M.S.S.*, the Dublin II-Regulation affords the member states discretion whether to exercise the sovereignty clause.⁸⁹ *Prima facie*, due to this margin of discretion, the EU could consequently not be held responsible as co-respondent in cases similar to *M.S.S.* Yet, one might hypothetically argue that, given the fact that the extensive use and application of the sovereignty clause by the member states would violate Union law,⁹⁰ this margin of discretion is simply reduced to a “quasi-discretion” or no discretion at all, resulting in a clash of the member states’ obligations under EU law and the Convention. In such a case in which EU law virtually compels the member states to transfer asylum seekers to other member states where they might face inhuman or degrading treatment in violation of Art. 3 ECHR, the EU, as the legislator of the Dublin II-Regulation, could be held responsible as co-respondent in proceedings before the Strasbourg Court. This means that if Luxembourg had not transformed the “quasi-discretion” under Art. 3 (2) of the Dublin II-Regulation into a duty to exercise the sovereignty clause in conformity with the Convention in cases similar to *M.S.S.* or *N.S.*, the EU could have ended up as co-respondent for the alleged violation of human rights in Strasbourg sooner rather than later after accession. The *N.S.* judgment and the harmonization of the member states’ obligations under EU law and the Convention might thus be seen as a well-conceived maneuver to precociously avoid a judgment against the Union after accession.

E. Conclusion

Although the *M.S.S.* judgment principally concerns Greece, it also has wider legal ramifications for the European Union and its member states. Most importantly, Strasbourg has made clear that EU membership alone does not guarantee the sufficient protection of asylum seekers when being transferred to Greece under the provisions of the Dublin II-Regulation. Even in cases where Greece is in fact responsible for examining asylum applications under Art. 3 (1) of the Regulation, Art. 3 ECHR and the potential risk of inhuman or degrading treatment of asylum seekers in Greek detention centres now imposes the duty on the member states to suspend the retransfer of asylum seekers to Greece. Moreover, Strasbourg ascertained that in such a situation, the member states must exercise the sovereignty clause of Art. 3 (2) of the Dublin II-Regulation and examine asylum applications themselves. An extensive use of the sovereignty clause, however, could supposedly undermine the *effet utile* of the Regulation and EU law in general, which would put the member state in a legal dilemma of choosing between their obligations under the Convention and those under European Union law. Furthermore, such a duty, externally imposed by the ECtHR presumably interferes with the autonomy of Union law.

These developments prompted the Luxembourg Court to react in order to solve these problems. In its *N.S.* judgment, the CJEU took the chance and held that decisions made by the member states on the basis of Art. 3 (2) of the Dublin II-Regulation amount to an implementation of EU law and are thus encompassed by the provisions of the Charter. Beyond that,

⁸⁶ See ECtHR, *Selmouni v. France*, Appl. No. 25803/94, Judgment of 2 July 1999, para 74.

⁸⁷ See Council of Europe, Steering Committee for Human Rights – Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights, CDDH(2011)009, 14 October 2011.

⁸⁸ See Draft Explanatory Report to the Draft Agreement on Accession, CDDH(2011)009, 14 October 2011 para 42.

⁸⁹ See ECtHR, *M.S.S. v. Belgium and Greece* (2011), paras 338-340.

⁹⁰ See Filzwieser/Sprung (2010), 74.

it confirmed Strasbourg's argument that situations such as in *M.S.S.* or *N.S.* obligate the member state, in which the asylum seeker is present, to exercise the sovereignty clause and to become the member state responsible for examining the application. The CJEU has therewith harmonized the member states' conflicting obligations between the Convention and Union law by construing these two legal orders in convergence with each other. This means that the member states are now obligated to suspend the transfer of asylum seekers to Greece under *both* the Convention and EU fundamental rights. This full harmonization of EU law with Strasbourg's jurisprudence is consequently in line with maintaining the EU's legal autonomy as well. One might also argue that Luxembourg's course of action can be considered a preparatory act for the EU's accession to the Convention, as harmonizing EU law with the Convention might prevent the Union from being held responsible for alleged human rights violations after accession. Eventually, it remains to be seen whether the Commission will also take action against alleged violations of human rights, for instance by instigating infringement proceedings against Greece to bring it in line with its human rights obligations.

