Recasting the Dublin Regulation

An analysis of the impact of the M.S.S. and N.S./M.E. judgments on the recast of the Dublin Regulation

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Abstract

The purpose of the Dublin Regulation is to ensure that applications for asylum will be considered by one Member State, avoiding the phenomena of "asylum shopping" and "refugees in orbit". The Regulation consists of a hierarchy of criteria for determining the responsible state, however, this has also resulted in the principle of Mutual Trust between Member States, where all states are presumed to have the same levels of human rights by virtue of EU membership. Additionally, the Regulation also places a disproportionate amount of responsibility on the Member States that were the first point of entry into the EU. In 2011, two judgments were delivered by the ECtHR and the CJEU. These cases illustrated the consequences Mutual Trust can have on the principle of non-refoulement.

In the redrafting, it was hoped that the Dublin-III Regulation, which came into force in 2013, would reflect the significance of these cases. This paper looks at how the judgments impacted the recast of the Regulation, and what effect this had on the concept of Mutual Trust within the EU. This paper is a conceptual analysis of the two judgments, and a comparison between the Dublin-II and the Dublin-III. However, while new safeguards were put into place, the fundamental flaws of disproportionate responsibility sharing remain in the system. Through looking at David Miller's theory on national responsibility and remedial responsibility, I argue that the focus in allocating responsibility should be based on a state's capacities and on asylum seekers ties to specific states.

Key words: burden of Proof, burden Sharing, Common European Asylum System, The Dublin Regulation, Dublin-II, Dublin-III, Hierarchy of Criteria, M.S.S., Mutual Trust, Non-refoulement, N.S./M.E., remedial responsibility, sovereignty clause, early warning mechanism

Syftet med Dublinförordningen är att se till att asylansökningar behandlas av endast en medlemsstat, för att undvika fenomenen "asylsum shopping" och "refugees in orbit". Förordningen består av en hierarki av kriterier för att fastställa vilken stat som är ansvarig, men detta har också lett till principen om ömsesidigt förtroende mellan medlemsstaterna, där alla stater förutsätts ha samma nivå av mänskliga rättigheter på grund av sitt EU medlemskap. Dessutom lägger förordningen också en oproportionerligt stor del av ansvaret på de medlemsstater som är inträdesstater till EU. Under 2011 kom två domslut från ECtHR och CJEU domstolarna. Dessa fall illustrerade vilka konsekvenser principen om ömsesidigt förtroende kan få för principen om non-refoulement.

I det nya utkastet, hoppades man att Dublin-III förordningen, som trädde i kraft 2013, skulle återspegla betydelsen av dessa fall. Denna uppsats handlar om hur de två domsluten påverkade omarbetningen av förordningen, och vilken effekt det hade på begreppet ömsesidigt förtroende inom EU. Denna uppsats är en begreppsanalys av dessa två domslut, och en jämförelse mellan Dublin-II och Dublin-III förordningarna. Men samtidigt som nya säkerhetsåtgärder sattes på plats, är de grundläggande bristerna med oproportionerlig ansvarsfördelning fortfarande kvar i systemet. Genom att analysera David Millers teori om nationellt ansvar och avhjälpande ansvar, menar jag att ansvaret bör fördelas baserat på staters kapacitet och asylsökandes band till vissa stater.

Nyckelord: bevisbörda, bördefördelning, Gemensamma Europeiska Asylsystemet, Dublinförordningen, Dublin-II, Dublin-III, hierarki av kriterier, MSS, ömsesidigt förtroende, Non-refoulement, N.S./M.E., avhjälpande ansvar, suveränitetsklausulen, övervakningssystem

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Abbreviations

CEAS	Common European Asylum System
CJEU	The Court of Justice of the European Union
EASO	European Asylum Support Agency (EU agency)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EURODAC	European Dactyloscopy (EU fingerprint database for identifying asylum seekers)
M.S.S.	M.S.S. v. Belgium and Greece (judgment given by ECtHR)
N.S./M.E.	N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (UK and Ireland)
UK	United Kingdom
UNHCR	The United Nations High Commissioner for Refugees

1 Introduction

The European Union is well known for freedom of movement between member states. With the Schengen agreement, passport controls between Member States were abolished in a majority of the EU states. This gave EU citizens an increased freedom of movement. However, this resulted in restricted controls for third country nationals. Initially, the European Commission saw a potential problem with the acceptance of asylum seekers. It was recognized that since EU citizens would be able to move freely within the EU, so would third country nationals, including asylum seekers.[1]

The Commission wanted to prevent the occurrence of two phenomena: "asylum shopping" and "refugees in orbit". "Asylum shopping" meant that without internal borders, asylum seekers would be able to travel to and apply for asylum in multiple Member States, thereby increasing chances of receiving protection. "Refugees in orbit" meant that without internal borders, member states would avoid taking responsibility for asylum applications, potentially "bouncing" asylum seekers between states, no one ever taking responsibility for processing the application. The Commission decided to put into place a method of designating responsibility for processing asylum applications, in order to prevent the occurrence of these phenomena.[2]

For this reason, the Dublin Convention was put into place. This was the original document, and the predecessor to the Dublin Regulation. Its main purpose was to guarantee the processing of asylum applications by delegating responsibility to one Member State. The Convention was designed with a hierarchical ranking of criteria, in order to determine the responsible Member State. It was signed in June 1990 and came into force in 1997.[3] The Convention marks the beginning of a Common European Asylum System (CEAS). The hierarchical mechanism for allocating responsibility has

[1] Nicol, Andrew, "From Dublin Convention to Dublin Regulation: A Progressive Move" in Baldaccini,

[2] Guild, Elspeth (red.), *The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions*, Kluwer, The Hague, 1996, p. 113.

[3] Guild, 1996, p. 113.

received much critique for putting a disproportionate amount of pressure on Member States that make up the border of the EU.[4]

The Convention presented some significant drawbacks, and the Dublin-II Regulation (Dublin-II) replaced it in 2003.[5] However, the new regulation did not solve the fundamental issues of the convention, as it retained the basic structure and rules laid down.[6] Two new criteria in relation to unaccompanied minors and family reunification were added.[7] It also solved some of the procedural problems that had been created by time constraints.[8] One of the biggest changes with the Regulation came with the Treaty of Amsterdam, which gave the EU courts jurisdiction over the regulation. This meant that asylum seekers now had a way for their legal issues to be heard by the courts.[9] However, in 2008, the United Nations High Commissioner for Refugees (UNHCR) advised Member States to refrain from returning asylum seekers to Greece under the Dublin Regulation.[10]

The Commission once again proposed amendments to the Regulation in 2008.[11] Research in the field shows that it was hoped an important verdict, *M.S.S. v Belgium and Greece* (hereafter M.S.S.), given by the European Court of Human Rights (ECtHR) in 2011, would have an impact on the Dublin-III Regulation (Dublin-III), which came into force 19th July 2013.[12] One of the important changes that came with the new regulation is a paragraph that prohibits member states from transferring if there is risk of human rights violations.[13] The new regulation also put into place a monitoring

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[4] Bacic, Nika, "Asylum Policy in Europe – The Competences of the European Union and Inefficiency of the Dublin System", 8:8 *Croatian Yearbook of European Law and Policy* (2011), p. 72.

[5] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1, 25 Feb 2003, (hereafter the Dublin-II Regulation).

[6] Da Lomba, Sylvie, *The Right to Seek Refugee Status in the European Union*, Intersentia, Antwerp, 2004, p. 131.

[7] Da Lomba, 2004, p. 134.

[8] Da Lomba, 2004, p. 139.

[9] Nicol, 2007, p. 271.

[10] Bacic, 2011, 62.

[11] Bacic, 2011, p. 53.

[12] Moreno-Lax, Violeta, "Dismantling the Dublin System: M.S.S. v. Belgium and Greece", 1:31 *European Journal of Migration Law 14* (2012), pp. 28-31.

[13] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180/31, 29 June 2013, (hereafter the Dublin-III Regulation), art. 3(2).

system, to detect problems with the asylum procedures in Member States from early on.[14]

1.1 Summary of the Judgments

Two judgments from 2011 have been viewed as landmark cases highlighting the inadequacies of the Dublin system, and the issues caused by Mutual Trust, which is the concept that all Member States view each other as safe states, with equal protection levels and access to asylum procedures. The judgement of M.S.S.[15] and the joined case of *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (hereafter N.S./M.E.)[16] highlighted the inadequacies of the system, and the issues of Mutual Trust. Both cases concern transfers to Greece.[17]

The judgment of M.S.S. was given by the ECtHR on 21st January 2011. Following this ruling all transfers to Greece were halted as it became apparent that Greece was unable to handle the increasing pressures from immigration.[18] This case is not an isolated incident; it highlights a fundamental issue with the Dublin System: that more often than not, the responsibility for processing an application for asylum falls on the state that was the point of entry into the EU for the asylum seeker. These states, such as Italy, Malta and Greece, are geographically located closest to the border, and have disproportionate amounts of pressure placed on their asylum systems.[19]

In M.S.S., an Afghani national was transferred by Belgium to Greece, under the Dublin-II. He entered the EU through Greece in 2008 before travelling to Belgium in 2009 and applying for asylum. Belgium requested Greece to take over the asylum application, and despite poor conditions for asylum seekers in Greece, Belgium ordered the applicant to be transferred. Although Greece had not replied within the two-month

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[14] Dublin-III, art. 33.

[15] ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, appl. no. 30696/09, (hereafter M.S.S.).

[16] CJEU, Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, (hereafter N.S./M.E.).

[17] Brouwer, Evelien, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof", 9:1 *Utrecht Law Review* (2013), p. 135.

[18] Mallia, Patricia, "Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-Thinking of the Dublin II Regulation", 30:3 *Refugee Survey Quarterly* (2011), pp. 107-110.

[19] Nicol, 2007, pp. 265-267.

period set out in the Dublin-II, Belgium argued that it was not the responsible state.[20] Belgium claimed that they had no reason to believe Greece would not honour their obligations (Mutual Trust).[21] Despite lodging an appeal and arguing that he would be detained in poor conditions and feared being returned to Afghanistan, where an attempt on his life had been made by the Taliban,[22] Belgium transferred him to Greece.[23]

The applicant argued that his conditions of detention and living conditions in Greece were a violation of article 3 of the European Convention of Human Rights (ECHR), which prohibits inhumane and degrading treatment.[24] He also argued violation of article 2, the right to life, and article 13, the right to an effective remedy.[25] The court ruled that there was a violation of article 3 by Greece and Belgium. There was also a violation of article 13 by both countries. Both Belgium and Greece were ordered to pay fines of compensation to the applicant.[26]

The second judgment, N.S./M.E. is actually two cases joined for the proceedings against the United Kingdom and Ireland, and was given by the Court of Justice of the European Union (CJEU) on the 21st December 2011. N.S., an Afghani national, entered the EU through Greece in September 2008 and was arrested and detained by the authorities. He was unable to make an application for asylum. After attempting to leave Greece, he was arrested and expelled to Turkey. He escaped detention in Turkey and arrived in the UK January 2009, where he lodged an application for asylum. The Secretary of State for the Home Department of the UK requested Greece to take responsibility for the application under the Dublin-II. When Greece failed to respond, the UK took this an acceptance of responsibility. In July 2009 the applicant was notified that he would be transferred to Greece, which he argued was a violation of his rights. However, the UK claimed this was unfounded since Greece was on the list of safe countries. The applicant sought judicial review, and his transfer

[20] M.S.S., paras. 9-14.

[21] M.S.S., para. 17.

[22] M.S.S., para 267.

[23] M.S.S., paras. 27, 31, and 33.

[24] M.S.S., para. 205.

[25] M.S.S., paras. 265, 266, and 323.

[26] M.S.S., paras. 1-17, pp. 88-9.

was annulled.[27] The case was then examined by the High Court of Justice (England and Wales), who referred seven questions on the application of the Dublin-II to the CJEU[28]

In M.E. and others, five separate individuals from Afghanistan, Iran and Algeria travelled through Greece and were each arrested for illegal entry. They then travelled to Ireland and applied for asylum. Three of the two applied without admitting they had been in Greece. However, through the EURODAC system it was determined that all of the applicants had entered Greece but none claimed asylum there. All five applicants resisted transfer to Greece, arguing that procedures and conditions for asylum seekers in Greece were inadequate and that Ireland should take responsibility.[29] The High Court referred two questions on the application of the Dublin-II to the CJEU for preliminary ruling.[30]

The CJEU delivered on both these cases simultaneously as the questions for review were similar. The questions concern the application of article 3(2) of the Dublin-II, the "Sovereignty Clause".[31] The main question was whether the transferring member state was obliged to assess the conditions of the receiving state in regards to access to asylum procedures and protection. Secondly, if the receiving member state was not in compliance with its obligations, did it then fall on the transferring state to take responsibility for the application?[32] The CJEU adopted a similar position to that of the ECtHR in M.S.S., referring to the case as precedent.[33]

1.2 Problem formulation, aim and questions

The aim of this paper is to analyse the impact of the two judgments, M.S.S. and N.S./M.E, on the recast of the Dublin Regulation. The Dublin-III incorporated new mechanisms, which will be examined in the course of this paper. The main changes in the Dublin-III that I will focus on are the expanded and amended sovereignty clause, which created new obligations for Member States in assessing the situation prior to

[27] N.S./M.E., paras. 34-42.

[28] N.S./M.E., para. 50.

[29] N.S./M.E., paras. 51-2.

[30] N.S./M.E., para. 53.

[31] N.S./M.E., paras. 55, 70-74, 109, and 116.

[32] N.S./M.E., para. 53.

[33] N.S./M.E., para. 88-90, and 112.

transfers,[34] and the new "mechanism for early warning, preparedness and crisis management".[35] I will also examine the hierarchy of criteria, which is central to the Dublin system as it is the mechanism used to allocate responsibility. A main theme throughout this paper is the presumption of Mutual Trust throughout the EU, and how the judgments and the redrafting of the Regulation have affected this concept. I aim to show that while the changes to the system are a step forward, the redraft detracts away from the more fundamental redesign of the Regulation that is needed. The main question to be answered in this thesis is:

- *What impact did the two judgments, M.S.S. and N.S./M.E., have on the recast of the Dublin Regulation, and how does this come to bear on the rights of asylum seekers and the concept of Mutual Trust within the EU?*

1.3 Material and Restrictions

1.3.1 Primary Material

The primary sources used throughout this paper consist of the two versions of the Dublin Regulation, the previous Dublin-II and the current Dublin-III. The Dublin Regulation is part of the legislation of the CEAS. The text of both these documents will make up part of the primary material. I have chosen not to include the original Convention because it was not within the jurisdiction of the EU courts, and because the changes to the Dublin-II were not significant enough to add any substantial understanding to this paper. Including the Convention would not have enhanced the investigation. Additionally, the main focus in this paper is the impact of the two judgments from 2011, during the time the Dublin-II was in force. The Convention is not relevant here and outside the focus of the paper.

Article 3(2) of the Regulation previously stated that a Member State may process an application for which they are not the responsible, but it did not make it clear when it would be necessary to do so, nor did it impose any positive obligation.[36] In the current Regulation, article 3(2) has been expanded and clarified. It now states that while the first member state where an application was lodged should be responsible if no other

[34] Dublin-III, art. 3(2).

[35] Dublin-III, art. 33.

[36] Dublin-II, art. 3(2).

state can be determined on the basis of the criteria, there are some restrictions. The paragraph enforces a prohibition against Member States transferring to a second state if there is a risk of inhumane or degrading treatment.[37] An early warning mechanism was also added to the Regulation, which provides a mechanism for prevention and crisis management of problems with Member States' asylum systems.[38]

Additional primary material consists of two EU court judgements on the application of the Dublin-II. The first judgment, M.S.S., was given by the ECtHR on the 21st January 2011. Another important judgement, a joined case for the purposes of the proceedings, N.S./M.E. was given by the CJEU on the 21st of December 2011. These two judgments differ in more than one way. The first verdict, M.S.S., was given after the applicant had been returned to Greece and found his rights were violated.[39] The second case, N.S./M.E. was given after M.S.S., and is in response to preliminary questions from the UK and Ireland on the application of the Dublin-II, prior to transferring asylum seekers to Greece.[40]

I have limited myself to the use of these two judgements on the application of the Dublin-II because these have been viewed as landmark judgements, bringing the insufficiencies of the system to light and as potential catalysts for change.[41] With these cases it was made clear that the idea of mutual trust within the EU is not feasible anymore. Such judgments have made clear that through the principle of Mutual Trust, the Dublin-II was unable to prevent refoulement.[42] While transfers to Greece have been halted since the judgements, the newer text of the Dublin-III is based on the same principles as its predecessor.

1.3.2 Secondary Material

For my selection of secondary material, the most important sources I have used are articles from peer-reviewed journals, which discuss the importance of the two judgments, M.S.S. and NS/ME. These articles, discussed in Chapter 3, "Earlier Research", present academic views on these judgments and the Dublin Regulation.

[37] Dublin-III, art. 3(2).

[38] Dublin-III, art. 33.

[39] M.S.S., paras. 33-42.

[40] N.S./M.E., paras. 50 and 53.

[41] Brouwer, 2013, p. 135.

[42] Mallia, 2011, pp. 125-6.

These sources reflect the significance of the judgments and their impact on the redrafting of the Dublin Regulation, as well as the situation for asylum seekers in the EU. While many articles were written prior to the Dublin-III entering into force, it is now interesting to see how the judgments have affected the new regulation. Authors who have written articles on the impact of the judgments include: Patricia Mallia, Violeta Moreno-Lax, Cathryn Costello, Evelien Brouwer, Juha Ratio and Nica Bacic. Some newer books do have chapters dedicated to the more recent events and changes in the Dublin Regulation, such as Juha Ratio's chapter "A Few Remarks to Evaluate the Dublin System and the Asylum Acquis", in The Future of Asylum in the European Union: Problems, Proposals and Human Rights (2011).

I have used a variety of books that discuss the topic of the CEAS in general, and the issue of mutual trust and shortcomings of the Dublin System. These books function as a good background for the subject and illustrate the issues that were brought about with the original Convention, as well as its successor. I have used these books to explain in brief the history of the Dublin Regulation. Some earlier books, such as Elspeths Guild's *The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions* (1996) were useful in looking at the reasons why the Dublin System was established. Additional books include, Sylvie Da Lomba's *The Right to Seek Refugee Status in the European Union* (2004), Andrew Nicol's "From Dublin Convention to Dublin Regulation: A Progressive Move" in *Whose Freedom, Security and Justice?: EU Immigration and Asylum law and Policy* (2007), and Agnès Hurwitz's *The Collective Responsibility of States to Protect Refugees* (2009).

The primary sources that are the focus of this thesis are all official European Union sources available to the public. This means that the information is not sensitive and is intended for public use. The two judgments, M.S.S., and N.S./M.E. do not disclose the identities of the applicants. The names of the applicants are omitted, and no information is given which could identify the applicants or is otherwise sensitive. Additionally, the majority of sources I have used are published books and journal articles. I have not used a lot of other types of sources, such as NGO reports, because the topic of this thesis is judicial and so the primary sources consist of official legal documents and the majority of secondary sources are published books or peer-reviewed articles written by academics in the field of law.

2 Theory and Method

2.1 Theory: David Miller

In this section I will present the theoretical views of David Miller on the topic of global justice and national responsibility. The issue of collective responsibility and identifying and allocating responsibility is central to Miller's book *National Responsibility and Global Justice* (2007). Not just responsibility for protecting refugees and processing the claims of asylum seekers, but also the responsibility of richer nations to aid the world's poor, and even the collective responsibility of nations in rectifying past wrong-doings, such as colonialism.[43] The concept of allocating responsibility is relevant to the issue of burden sharing. Miller argues that citizens of a nation can be held collectively responsible for past wrongs or even situations where they have the ability to act, by virtue of a shared identity.[44] Miller argues that "national responsibility, clearly, is a species of collective responsibility: individuals share in it only by virtue of their membership of those large communities we call nations".[45]

Central to Miller's work is the importance of viewing individuals as both agents and patients. As agents, people are able to make choices and can also be held responsible for their actions, but as patients they can be subject to certain situations and circumstances beyond their control.[46] Miller defines two types of responsibility: outcome responsibility and remedial responsibility. Outcome responsibility views people as agents, who can take responsibility for the results of their actions. However, remedial responsibility views people as patients and asks who should take on the burden of aiding those whose rights have been violated.[47] Remedial responsibility is important to the Dublin Regulation and the allocation of responsibility for asylum-seekers within the EU, as the issue we are trying to solve is essentially 'who should take on the remedial responsibility for each asylum seeker, and in what way should we determine this responsibility?' A procedure for determining this is necessary. Miller's theory on

[43] Miller, David, *National responsibility and global justice*, Oxford University Press, Oxford, 2007.

[44] Miller, 2007, pp. 111-114.

[45] Miller, 2007, p. 81.

[46] Miller, 2007, p. 5.

[47] Miller, 2007, p. 81.

identifying remedial responsibility highlights the different ways we can allocate responsibility to remedy a situation.[48]

Miller explains that because remedial responsibility can only work if someone is willing to accept it, it becomes difficult to allocate, and even well meaning actors may not take on responsibility. Remedial responsibility is a special responsibility that has to be identified and allocated to the individual(s) best able to fulfil the obligation. Miller argues that societies need to have mechanisms in place to identify and assign responsibility.[49] The Dublin Regulation is essentially such a mechanism for allocating remedial responsibility, whether or not it is an efficient and fair mechanism.

Miller proposes a "connection theory" of remedial responsibility, where an actor who is linked to the harmed person in one of six ways can be considered remedially responsible. The first three ways correspond to forms of responsibility and the second three ways correspond more to the relationship of the agent to the patient's situation. Some focus on moral reasons, whereas others merely pick out the agent who is best suited for non-moral reasons to provide the remedy.[50] Miller also points out that none of the types of connection have priority over the others, instead the justification is the need to remedy the situation and to identify the agent responsible to do so.[51] The six ways of allocating remedial responsibility as identified by Miller are:

1. Moral Responsibility: The agent who is morally responsible for someone's condition is also remedially responsible for it. To be considered morally responsible for someone's condition, the agent must have acted in a way that was morally wrong, causing the situation.[52]
2. Outcome Responsibility: An actor can be outcome responsible for someone's condition without being morally responsible for it. This could occur if the action that was the cause was morally neutral or even justified. The actor who is outcome responsible can take on remedial responsibility if he is also responsible for rectifying the situation. Miller argues that there is a moral reason for doing this. If we gain benefits from our actions, we should also bear the costs. If the

[48] Miller, 2007, pp. 100-104.

[49] Miller, 2007, pp. 98-9.

[50] Miller, 2007, p. 99.

[51] Miller, 2007, p. 100.

[52] Miller, 2007, p. 100.

costs are heavy, then remedial responsibility may fall on the outcome responsible agent.[53]

3. Causal Responsibility: There are cases where an agent can be the cause of someone's deprivation without being outcome responsible. Although it sometimes can be difficult to separate causal responsibility from outcome or moral responsibility, it generally occurs when an actor causes an event without being able to predict it. For example, if someone turns a corner, accidently causing someone to fall, he should make sure that person is unharmed. The person who is causally responsible may also be in the best place at the time to help the person and therefore remedially responsible.[54]
4. Benefit: If an actor has had no causal role, but benefited in the process that caused another person harm, such as gaining new resources, he can be remedially responsible. He is not responsible for the cause in any of the ways identified above, but he is still connected to the situation. It is sufficient that he is an innocent beneficiary who would not have benefited unless someone else was deprived to make him remedially responsible. There is also a moral reason for him to take on remedial responsibility because he was unjustly benefited (although he did not behave unjustly). Miller argues that this connection is not as strong, since we would not always expect innocent beneficiaries be obliged to provide the remedy unless there is no other party able to. However, sometimes the person who benefitted is also most capable of remedying the situation without significant cost, due to their advantage. Benefitting from a process that deprived others creates a special connection. By virtue of this, there is reason to be remedially responsible in some cases.[55]
5. Capacity: Miller points out that capacity is an obvious way to identify the remedially responsible agent. Whichever agent has the greatest capacity to remedy the situation may be remedially responsible because of this unique position. This may be someone present at the place and time where the harm occurs, or the person who has the resources available to provide the remedy. Either way, someone who is most capable is in a uniquely advantaged position to provide the remedy. This person does not have any other connection to the

[53] Miller, 2007, pp. 100-101.

[54] Miller, 2007, pp. 101-102.

[55] Miller, 2007, p. 102-103.

cause of the situation. Miller argues that when more than one agent is capable, the most capable will take on responsibility, or it can be divided between them. Miller reasons that responsibility should be divided "from each according to his abilities, to each according to his needs".[56] The priority is to aid the person in need, so it makes sense to pick the agent most capable. However, Miller points out that in regards to the capacity principle, two factors could contradict each other: how effective an agent may be at remedying the situation, and how much cost the agent must bear to provide it. This may mean choosing either effectiveness or cost over the other.[57]

6. Community: The last connection to identify remedial responsibility is through community ties. This can cover a wide variety of bonds linking people and groups, e.g. family, friendship, religion, nationality, etc. Such communitarian relationships are independent and prior to the deprivation. These relationships involve special obligations to members when one is in need of assistance, so it seems obvious to look for agents linked in this way. Miller brings up the example of a missing child, where the family, neighbours and local community take part in the search, despite having no special capacity or being causally responsible for the disappearance. By being connected through community ties they have a special relationship and therefore carry the responsibility. Being connected through community ties can mean having certain knowledge and skills that will help relieve the condition, e.g. language or cultural background. In this case community can be connected to capacity, but this is a special case, so it makes sense that community is an independent source of remedial responsibility.[58]

This gives us an explanation of the ways we can identify and allocate remedial responsibility. So far this does not determine which criterion should get priority in a situation where more than one can apply. At times different criteria can conflict with one another. Miller provides two possible explanations to solve this dilemma. Firstly, we could rank the criteria in order of priority, and find the agent who best fits the strongest criteria. This works best for the first three criteria. If we can identify a morally responsible agent, we hold them remedially responsible, if not we move on to outcome

[56] Miller, 2007, p. 103.

[57] Miller, 2007, p. 104.

[58] Miller, 2007, p. 104.

responsibility, and failing that, we move on to causal responsibility. However, Miller argues that this does not work as well when we consider the last three of the criteria.[59] Moral responsibility can exist to different degrees, and perhaps one of the second three would be stronger in this case. If the agent who is morally responsible did not cause the situation deliberately but only carelessly or accidently, and an agent with a greater capacity to remedy the situation exists, it would make sense to choose capacity over moral responsibility. We should not forget that what is of greatest priority is to provide the relief to the person who has been harmed, rather than enforcing moral responsibility. Miller argues then that it is not plausible to say that the first three criteria, moral, outcome and causal responsibility will always carry more weight than capacity, benefit and community.[60]

Miller claims that the second way to solve the dilemma would be to challenge his idea of remedial responsibility. He argues that we could define the two categories of remedial responsibility as firstly of making redress to the wronged party, and secondly, bringing aid to a person in need. The first four ways to identify responsibility represent making amends for an injustice and the second two ways represent ways to determine who should bring aid to the people in need.[61] Despite this, Miller defends the idea of remedial responsibility as defined above.[62]

In some cases, it may be difficult to establish the different levels of responsibility. They may not be so easy to separate and in complex cases it may not be apparent how the deprivation came about, and allocating remedial responsibility may be equally difficult.[63] Miller argues that this is exactly why we need formal mechanisms for allocating responsibility. Without these, all parties will find a reason to deflect the burden of responsibility onto someone else. Miller argues that when we create such mechanisms, we need to consider all the plausible agents, and subsequently assess how strongly each is connected to the individual(s) in need. Remedial responsibility can either be allocated to the agent who is most closely connected, or be divided between agents.[64]

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[59] Miller, 2007, p. 105.

[60] Miller, 2007, pp. 105-6.

[61] Miller, 2007, p. 106.

[62] Miller, 2007, p. 106.

[63] Miller, 2007, p. 107.

[64] Miller, 2007, p. 107.

Miller argues that the right to migration cannot be justified unconditionally on the grounds of human rights to freedoms alone.[65] However, migration may be warranted on the basis of other human rights that cannot otherwise be fulfilled. Nevertheless, as members of richer nations we can be responsible to the world's poor, which may entail taking in people in need.[66] Immigrants who are refused entry to a state should be given fair grounds for refusal.[67] As we have seen, Miller argues that there are six ways to allocate responsibility to remedy a situation. We can be responsible because we are causally linked to the situation, but in the case of taking in asylum seekers, states could be remedially responsible based on other connections, such as capacity or community ties, from the perspective of Miller's connection theory.

2.2 Method

The method used in this paper is content analysis as well as comparison. In *Content Analysis for the Social Sciences and Humanities*, Ole Holsti defines content analysis as "any technique for making inferences by objectively and systematically identifying specified characteristics of messages".[68] An analysis of the judgments will be used to determine their significance in catalysing change. In his book, *Content Analysis an Introduction to its Methodology*, Klaus Krippendorff identifies six questions we need to ask when we use the method of content analysis. These questions are:

1. Which data are analysed?
2. How are they defined?
3. What is the population from which they are drawn?
4. What is the context relative to which the data are analysed?
5. What are the boundaries of the analysis?
6. What is the target of the inferences?[69]

[65] Miller, 2007, p. 213.

[66] Miller, 2007, p. 230.

[67] Miller, 2007, p. 239.

[68] Holsti, Ole R., *Content Analysis for the Social Sciences and Humanities*, Addison-Wesley, Reading (UK), Mass., 1969, p. 14.

[69] Krippendorff, Klaus, *Content Analysis an Introduction to its Methodology*, 2. ed., Sage, Thousand Oaks, Calif., 2004.

To analyse the Dublin-II and Dublin-III, specifically the hierarchy of criteria for determining responsibility, the sovereignty clause (art. 3(2)) as well as new the early warning mechanism, a comparative method will be used. I am also going to use the method of qualitative content analysis concerning themes such as remedial responsibility, responsibility allocation, Mutual Trust, and burden sharing. A central theme in this paper is that of responsibility allocation, especially the idea of fair and effective burden sharing throughout the EU. Miller's theory is especially important because he argues that nations can be held collectively responsible. The method is to analyse the importance of the concept of responsibility and obligations towards asylum seekers on a nations territory.

I will analyse the concept of responsibility as presented in the court judgements of M.S.S. v. Belgium and UK, and in the joint judgment of N.S/M.E. These judgements have highlighted the existing problems with the automatic application of the Dublin Regulation, and the courts have asserted that this was against obligations towards article 3 of the ECHR (see chapters 4.1 and 4.2). These judgements demonstrated the shortcomings of the Dublin-II. In relation to the concept of responsibility and obligations in the judgments, I will also analyse the content of the Dublin-III Regulation. Since these judgements, the issues of responsibility and mutual trust, as well as burden sharing within the EU have become apparent. The judgments illustrated that an automatic application of the Dublin Regulation is not always compatible with the ECHR. Therefore I will also use a context analysis method with the Dublin-III, especially concerning how the concepts of obligation and responsibility sharing have been incorporated, as well as in what ways these might still be lacking.

3 Earlier Research

Both M.S.S. and N.S./M.E. have had a significant impact on the concept of Mutual Trust within the EU. Academics writing on the subject of the Dublin Regulation have speculated as to what extent these rulings would impact on the drafting of the Dublin-III. Such articles will be examined more closely in this chapter. Important to note is that research on the latest Regulation is still relatively limited due to its recent entry into force in 2013. Much of the research on the Dublin-III was on the proposal as well as speculating on potential impacts of the judgments.

Both Patricia Mallia and Violeta Moreno-Lax have written articles on the impact of the M.S.S. case, following the verdict in 2011. M.S.S. has been central in bringing the inefficiencies of the system to light, and it was hoped that this case would have an impact on the drafting of the most recent version of the Regulation. Patricia Mallia's article "Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-Thinking of the Dublin II Regulation", discusses the role of the ECtHR judgement in the application of the Dublin-II and the court's role in safeguarding fundamental rights.[70] Mallia argues that the ECtHR has acted as a guarantor of human rights, as well as a promoter for change. Additionally, she maintains that this judgement makes it clear that the premises of the Dublin system can no longer stand. She argues that a stronger mechanism than the sovereignty clause is needed, as the spirit of solidarity is lacking between EU Member States.[71]

Violeta Moreno-Lax's article on M.S.S. illustrates the importance of trust in the EU, and the risks posed to the non-refoulement principle. However, the Dublin Regulation establishes the principle of Mutual Trust within the EU, treating all EU states as equal and safe. It has been taken fore granted that all Member States are safe and uphold the same level of protection and access to asylum procedures, argues Moreno-Lax. M.S.S. has brought to light that in reality this is not the case. She contends

[70] Mallia, Patricia, "Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-Thinking of the Dublin II Regulation", 30:3 *Refugee Survey Quarterly* (2011), p. 107.

[71] Mallia, 2011, p. 126.

that the presumption of safety should not outweigh the realities of the situation, and close examination of the particular circumstances in individual cases is necessary.[72]

Moreno-Lax argues that the Dublin-II failed to take into account present realities. However, she claims that while the changes proposed in 2008 for its successor were in the right direction, they were lacking in many respects. She argues that the Council and the member states need to create a system that is respectful of asylum-seekers rights.[73] Additionally, Moreno-Lax adds that while rapid transfers have been the priority of the Dublin system, this is not realistic, because although Member States have relied on the principle of Mutual Trust, there are significant differences in the level of protection throughout the EU. Moreno-Lax concludes that it is debatable whether the Dublin Regulation as it stands should be considered the cornerstone upon which to continue to build the CEAS.[74]

Juha Ratio's chapter "A Few Remarks to Evaluate the Dublin System and the Asylum Acquis" in *The Future of Asylum in the European Union* (2011), discusses the proposal for the Dublin-III. Because Ratio's chapter is from 2011, his analysis includes only the proposal for the Dublin-III.[75] Ratio argues that the current system needs many amendments, although the Commission has shown its intention to make the system more effective.[76] He claims that different interpretations of the regulation have caused confusion and malfunctioning of the system and that there is need for harmonisation and common definitions.[77] Ratio argues that since the Dublin Regulation was previously open to interpretation by national courts, it is vital that the newer Regulation is explicit so as to avoid confusion. But interpretations of the court are not enough; a unifying legislation is needed. Ratio maintains the need for transparency in the system. He concludes that it is ultimately up to the Member States to take further steps. Ratio identifies the fear of over-strengthening the federal aspects of the EU as a potential obstacle in creating a fair system.[78]

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[72] Moreno-Lax, 2011, p. 28.

[73] Moreno-Lax, 2011, p. 30.

[74] Moreno-Lax, 2011, p. 31.

[75] Ratio, Juha "A Few Remarks to Evaluate the Dublin System and the Asylum Acquis", in Goudappel, Flora A. N. J. & Raulus, Helena S. (red.), *The Future of Asylum in the European Union: Problems, Proposals and Human Rights*, T.M.C. Asser Press, The Hauge, 2011.

[76] Ratio, 2011, pp. 116-117.

[77] Ratio, 2011, p. 122.

[78] Ratio, 2011, pp. 122-123.

Nika Bacic's article "Asylum Policy in Europe – The Competences of the European Union and Inefficiency of the Dublin System" from 2012 examines the proposal for the Dublin-III, for improvements of the responsibility-sharing mechanism. Bacic argues that the EU missed the chance to create an "efficient and balanced responsibility-sharing system", providing better protection to asylum seekers.[79] However, Bacic points out that the Council did not accept all the points of the proposal, and that the most important aspects of the proposal were rejected.[80] Bacic concludes that the new regulation does not strengthen the protection for asylum seekers rights.[81]

Bacic indentifies two major issues with the proposal for the Dublin-III Firstly, the level of protection for human rights is not sufficient by international standards. Full and fair examination of asylum claims is not guaranteed. Bacic argues that the EU has neglected the harsh impacts procedures can have on asylum seekers. Additionally, Bacic claims that the EU relies on the presumption of Mutual Trust, but that much remains to be changed before the CEAS truly exists.[82]

Secondly, Bacic points out that the new temporary suspense mechanism is not sufficient as it does not deal with the fundamental flaws of the system, and will only ever be temporarily effective.[83] Instead Bacic argues for a fair distribution of Member States' responsibilities, based on the principle of solidarity. Responsibility should be based on ties to a particular state, and where these are lacking Bacic advocates for freedom of choice of asylum seekers.[84] Bacic is in favour of a drastic rewriting of the Dublin Regulation.[85] He believes that as a whole, the EU is not overburdened, but that the problem lies in disproportionate responsibility sharing.[86]

Cahtryn Costello's article "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", from 2012, discusses the impact of judgements such as M.S.S. on the drafting of the new regulation.[87] Costello also examines the importance of the non-refoulement principle within EU asylum law. She argues that the

[79] Bacic, 2011, p. 43.

[80] Bacic, 2011, pp. 69-70.

[81] Bacic, 2011, p. 70.

[82] Bacic, 2011, pp. 70-71.

[83] Bacic, 2011, p. 71.

[84] Bacic, 2011, p. 72.

[85] Bacic, 2011, p. 73.

[86] Bacic, 2011, p. 72.

[87] Costello, Cathryn, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", 12:2 *Human Rights Law Review* (2012).

ECtHR has played a fundamental role in scrutinising border controls and securing the right to seek protection. Costello discusses the impact of judgments in prohibiting collective expulsions, and contends that the ECtHR's jurisdictional scope is evolving and a potential for improving access to protection does exist.[88]

Costello claims that the Member States have manipulated the conceptions of jurisdiction and responsibility in order to hinder access to protection. She argues that Member States use "legal fictions" to control their border zones and asylum procedures.[89] In reference to the Dublin Regulation specifically, Costello upholds that states have expanded the area of protection so that transfers are assumed to be safe. The importance of recent court cases reinforces individual Member States' responsibilities. Despite continuing EU legislative reform, Costello argues that a fundamental change to the Dublin Regulation is necessary, and deems the Dublin-III a failure.[90]

Evelien Brouwer's article "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof" discusses both M.S.S. and N.S./M.E. Her focus is on the burden of proof during the asylum procedure, and whether this rests on the state or the asylum seeker himself.[91] Brouwer points out that in M.S.S., Belgium was condemned for both direct and indirect refoulement. It was indirect because Belgium returned M.S.S. to Greece, where he was threatened with expulsion to Afghanistan, and direct because in Greece he was exposed to inhumane and degrading treatment.[92] Brouwer concludes that an asylum seeker should not be expected to bear the burden of proof, and that the transferring state should take on a more active role in assessing the receiving state's asylum procedures and access to protection.[93]

Additionally, while Belgium argued that there was not enough information available to be aware that Greece would not fulfill its obligations, Brouwer supports the court's view that there was adequate information in order to make an informed decision.[94] In the CJEU case, Brouwer highlights that Member States are obliged to assess the consequences of applying Mutual Trust on the non-refoulement principle,

[88] Costello, 2012, p. 338.
[89] Costello, 2012, p. 339.
[90] Costello, 2012, p. 339.
[91] Brouwer, 2013, p. 135.
[92] Brouwer, 2013, p. 141.
[93] Brouwer, 2013, p. 142.
[94] Brouwer, 2013, p. 140.

prior to transfers to another state.[95] She points out that the CJEU does not encourage Member States to rely on the principle of Mutual Trust too much.[96]

Brouwer concludees that while asylum seekers have some responsibility to present evidence of inhumane or degrading treatment where possible, the responsibility ultimately lies with the transferring state. M.S.S. demonstrates that it is not always possible for asylum seekers to bring forward evidence against a transfer. Brouwer concludes that states must make sure that procedural guarantees exist for asylum seekers to submit evidence against their transfer.[97] She claims that the application of Mutual Trust in EU asylum law has created the need for two things: "the further harmonization of human rights standards within the EU, but also of the necessity to allow exceptions to mutual trust".[98]

[95] Brouwer, 2013, p. 143.

[96] Brouwer, 2013, p. 143-4.

[97] Brouwer, 2013, p. 145.

[98] Brouwer, 2013, p. 146.

4 Investigation

4.1 M.S.S. v. Belgium and Greece

The M.S.S. judgment is given by the ECtHR and was delivered on the 21st January 2011. This is a judgment on the Dublin-II Regulation, and the court acknowledges that the system is based on establishing an area of "freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community".[99] However, the ECtHR recognizes that the Regulation is based on the presumption that all member states respect the principle of non-refoulement, and are safe countries with adequate levels of protection and access to asylum procedures, i.e. the principle of Mutual Trust.[100] The ECtHR views the proposal for an early warning mechanism (discussed in chapter 4.5 "The Early Warning Mechanism") as an important change for two reasons: limiting the pressure placed on Member States with a high number of applicants, such as border states, and ceasing the transfer of asylum seekers to member states without adequate levels of protection.[101]

The ECtHR court points out that in 2007 the European Commission requested the CJEU to examine the Greek reception conditions for refugees. The CJEU found that Greece had not fulfilled obligations.[102] However despite such information, Belgium supported its position, claiming that there had been no evidence to discredit the Greek asylum system prior to the transfer of M.S.S. The ECtHR presented the argument given by the Belgium Aliens Appeal Board in 2009, which is as follows:

> "The general information provided by the applicant in his file mainly concerns the situation of aliens seeking international protection in Greece, the circumstances in which they are transferred to and received in Greece, the way they are treated and the way in which the asylum procedure in Greece functions and is applied. The material establish no concrete link showing that the deficiencies reported would result in Greece violating its non-refoulement obligation vis-à-vis aliens who, like the applicant, were transferred to Greece ... Having regard to the above, the applicant has not demonstrated that the enforcement of the impugned decision

[99] M.S.S., para. 68.

[100] M.S.S., para. 69.

[101] M.S.S., para. 78.

[102] M.S.S., para. 84.

would expose him to a risk of virtually irreparable harm".[103]

Belgium claims that the applicant did not provide enough information to demonstrate that Greece would violate its obligations. But to what extent should the applicant be responsible for demonstrating that his rights are at risk in the second state? A Member State should be able to make itself aware of the conditions for asylum seekers and refugees in the second state prior to transfer. Enough information exists that Belgium could have been aware of the situation in Greece. Multiple reports have been written by NGOs, which the ECtHR lists, and the Belgian Minister of Migration and Asylum Policy had also received a letter from the UNHCR in April 2009 detailing the circumstances in Greece, and advising against transfer.[104] Additional arguments of the Belgian Aliens Appeal Board is as follows:

> - Greece is a member of the European Union, governed by the rule of law, a Party to the Convention and the Geneva Convention and bound by Community legislation in asylum matters;
> - Based on the principle of intra-community trust, it must be presumed that the State concerned will comply with its obligations (reference to the Court's case-law in K.R.S. v. the United Kingdom (dec.), no. 32733/08, ECHR 2008-...);
> - In order to reverse that presumption the applicant must demonstrate in concreto that there is a real risk of his being subjected to treatment contrary to Article 3 of the Convention in the country to which he is being removed;
> - Simple reference to general reports from reliable sources showing that there are reception problems or that refoulement is practised or the mere fact that the asylum procedure in place in a European Union Member State is defective does not suffice to demonstrate the existence of such a risk.[105]

Belgium relies strongly on the principle of Mutual Trust in its argument. Belgium argues that because Greece is a member of the EU, and thus a party to the relevant legislation, it must be assumed that the state would comply with its obligations. Without additional information from the applicant to disprove this presumption, it is argued by the Aliens Appeal Board that there is not enough evidence to demonstrate a risk. The ECtHR provides a comprehensive list of NGO reports describing the problems with the

[103] M.S.S., para. 148.

[104] M.S.S., paras. 194-5.

[105] M.S.S., para. 150.

asylum procedure in Greece[106] and cites evidence that the Belgian Minister of Migration and Asylum Policy had received information from the UNHCR, urging them not to transfer asylum seekers to Greece:

> "The UNHCR is aware that the Court, in its decision in K.R.S. v. the United Kingdom ... recently decided that the transfer of an asylum seeker to Greece did not present a risk of refoulement for the purposes of Article 3 of the Convention. However, the Court did not give judgment on compliance by Greece with its obligations under international law on refugees. In particular, the Court said nothing about whether the conditions of reception of asylum seekers were in conformity with regional and international standards of human rights protection, or whether asylum seekers had access to fair consideration of their asylum applications, or even whether refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR believes that this is still not the case."
>
> It concluded:
>
> "For the above reasons the UNHCR maintains its assessment of the Greek asylum system and the recommendations formulated in its position of April 2008, namely that Governments should refrain from transferring asylum seekers to Greece and take responsibility for examining the corresponding asylum applications themselves, in keeping with Article 3 § 2 of the Dublin Regulation."[107]

Belgium had substantial information regarding the situation in Greece prior to transferring M.S.S., although the applicant was unable to present the Belgian authorities with clear proof that he would face a risk if transferred. The ECtHR maintains that a real risk of refoulement by the Greek authorities exists, often indirectly through Turkey. The court points out that the authorities have deported asylum seekers collectively, sometimes including asylum seekers who have not yet completed their application, or whose applications have not yet been processed. It was established that several asylum seekers sent to Turkey were returned to Afghanistan with no consideration of asylum applications.[108]

The information presented shows that Mutual Trust is not realistic. This assumption causes problems and ideally Member States should be obliged to investigate the situation in another member state before deciding to transfer. It should not remain up to the asylum applicant to provide evidence against transfer, which Belgium argued.

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[106] M.S.S., para. 160.

[107] M.S.S., paras .194-5.

[108] M.S.S., para. 192.

An asylum seeker is already in a vulnerable position, and may not have the same access to information or procedures to present his claims. The ECtHR reaffirms the absolute obligation provided in article 3 of the European Convention of Human Rights (ECHR), which prohibits inhumane and degrading treatment.[109] Both Greece and Belgium were in violation of article 3 of the ECHR. Belgium was in violation for transferring an asylum seeker to a Member State where he would be exposed to risk of inhumane and degrading treatment. Although Member States located most closely to the geographic border of the EU experience more pressure than other member states, causing significant problems in the reception of asylum seekers, the ECtHR determined that this cannot absolve a state of its obligations under article 3 of the ECHR.[110]

The ECtHR did not accept the Greek Government's claim that difficult circumstances in the state should be considered when examining the applicant's complaints.[111] Like Belgium, Greece argued that much of the responsibility for the applicant's wellbeing lay in his own hands. Greece argued that the applicant should have demonstrated an interest in improving his situation, but that his actions showed he did not wish to remain in Greece.[112] Greece claimed that it was against the principles of the ECHR to find in favour of the applicant, because neither the right to accommodation or political asylum are guaranteed within. They also feared that the ruling would encourage other similar applications, and place excessive positive obligations on the state's welfare system. Additionally, they argued that accommodation is a political not judicial decision, and in anyway not an issue for the court to determine.[113]

Additionally, evidence from NGOs is presented that as well as being deprived of material support from authorities, asylum seekers in Greece are also deprived of the right to provide for themselves. The ECtHR considers the extreme poverty that results to be treatment contrary to article 3 of the Convention, brought about by the unlawful action of the state.[114] This is the situation of a large number of asylum seekers in Greece, so the court sees no need to question the applicant's allegations.[115] The Greek

[109] M.S.S., para. 218.
[110] M.S.S., para. 223.
[111] M.S.S., para. 224.
[112] M.S.S., para. 242.
[113] M.S.S., para. 243.
[114] M.S.S., para. 246.
[115] M.S.S., para. 255.

Government argued that the applicant should have done more to improve his own situation, and that ultimately he is responsible.[116]

The court rejected the argument of the Greek Government. According to the court, it is not the obligation of the applicant to take action to improve his situation and provide for his essential needs.[117] The ECtHR is also of the opinion that if the Greek Authorities had examined the asylum application immediately, the applicant's suffering could have been greatly limited.[118] Contrary to what the Greek Government argued, the court considered the inaction of the Government to be an indication of their lack of regard for the applicant's vulnerability, and to be responsible for the situation of the applicant.[119]

Aside from article 3 complaints, which are the main focus in the judgment, the applicant had also complained that there was no effective remedy in Greek law for article 2 and article 3. Article 12 of the ECHR states that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.[120]

The applicant also complained that the asylum procedure of Greece was so insufficient that he faced the risk of refoulement to his country, without a proper examination of his application, violating both articles 2 and 3 of the ECHR. Article 2 states that:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.[121]

The applicant alleged that his fears were real and constituted threat to his personal security and freedoms. Prior to fleeing Afghanistan, he had escaped an attempt on his life from the Taliban due to his work as an interpreter for international air force. After his departure, his contacts back home advised him not to return, as the situation

[116] M.S.S., para. 256.
[117] M.S.S., para. 259.
[118] M.S.S., para. 262.
[119] M.S.S., para. 263.
[120] M.S.S., para. 265.
[121] M.S.S., para. 266.

remained insecure.[122] The applicant had very real fears, and therefore he had applied for asylum in Greece.[123]

However, despite his situation, the Greek Government argued that he did not suffer any of the consequences of an inadequate asylum system. It was argued that he could not be considered a victim as such under the Convention.[124] The Government argued that the authorities had followed the correct procedure, but that the applicant was negligent. In support of this, the Government argued that the applicant remained in Greece and was never deported, even though he had attempted to leave the country.[125] They argued that the applicant's claims were unsupported and that Greek legislation is in line with international asylum law, including the non-refoulement principle.[126] The Greek Government did confirm that the authorities had not yet examined the application for asylum.[127]

The court concluded that the Belgian authorities should have refrained from transferring the applicant, and should have investigated the situation in Greece. The ECtHR judges Belgium's actions to be incompliant with its international obligations. Additionally, the ECtHR maintains that the presumption that protection levels in Member States are equal should not apply in this case.[128] The court also discredits Belgium's argument that because the applicant failed to voice his fears of being transferred during his interview that the government was not aware of the situation and risks present if he was transferred.[129] The ECtHR concluded that the Belgian authorities were aware of the situation, and that in general an applicant for asylum should never be expected to bear the entire burden of proof. The ECtHR stated that, "in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception."[130]

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[122] M.S.S., para. 267.
[123] M.S.S., para. 268.
[124] M.S.S., para. 271.
[125] M.S.S., para. 273.
[126] M.S.S., para. 274.
[127] M.S.S., para. 275.
[128] M.S.S., para. 340.
[129] M.S.S., para 346.
[130] M.S.S., para 352.

The objections given by the Greek Government were rejected. The court held that there had been a violation of article 3, because of the detention conditions, the living conditions, as well as the risk of his expulsion to Afghanistan. The court also rejected the argument given by the Belgian government.[131] This judgment is especially important as much of Belgium's argument had relied on the presumption of mutual trust: that since Greece is a Member State of the European Union, it must be presumed that the state would comply with their obligations. The judgment rejects the argument of Belgium, and in essence this rejects the idea that Mutual Trust can continue to exist between Member States.

4.2 N.S. v the UK and M.E. and others v Ireland

The N.S./M.E. judgment of 21 December 2011 is a CJEU court judgment. The judgment concerns two separate cases: N.S., who claimed asylum in the United Kingdom, and M.E and others, who claimed asylum in Ireland. This judgment came after M.S.S. and is more concise. In N.S./M.E., the CJEU refers to M.S.S.[132] The most significant different between M.S.S. and N.S./M.E. is that the ECtHR judgment was made after Belgium had transferred the applicant to Greece, and penalises the two states for their unlawful actions. Whereas the CJEU judgment was made after the authorities of the UK and Ireland had referred a list of questions on the application of the Dublin-II to the court, in reference to asylum seekers whose transfer to Greece has been halted.[133]

This concern of the judgment is the interpretation of article 3(2) of the Dublin-II Regulation, and the fundamental rights of the EU.[134] Article 3(2) provides that each Member State may examine an application for asylum even if it is not responsible according to the Regulation.[135] Both the UK and Ireland referred questions to the CJEU for preliminary ruling after the asylum seekers argued there was a real risk their rights would be violated if returned to Greece. The Court of Appeal (England and Wales) referred seven questions to the CJEU for preliminary ruling, which dealt with two main issues.[136] The first issue was whether a Member State is required to take responsibility

[131] M.S.S., paras. 1-17, pp. 88-90.

[132] N.S./M.E., paras. 88, 89, 90, 112.

[133] N.S./M.E., paras. 50 and 53.

[134] N.S./M.E., para 1

[135] Dublin-II, art. 3(2).

[136] N.S./M.E. para 50.

for processing a claim for asylum if a risk exists of violating the fundamental rights of and asylum seeker when transferred.[137] The second issue referred was whether the duty of a Member State to observe EU fundamental rights ceases when the asylum seeker is transferred to the state responsible under the Regulation.[138]

The High Court of Ireland referred two questions to the CJEU for preliminary ruling. The first question was whether a transferring Member State is obliged to assess the compliance of the receiving Member State with its human rights obligations under EU law.[139] The second question was if the receiving Member State were found not to be in compliance with its obligations, would the transferring Member State be obliged to accept responsibility for the application under article 3(2) of the Regulation?[140]

The court replied that article 3(2) grants Member States a discretionary power.[141] The court highlights that the Regulation was created in order to speed up the asylum process in the interest of both asylum seekers and Member States.[142] For the purpose of this, the principle Mutual Trust is understandable.[143] However, the court admits that in practice there are major operational problems with this.[144] If there were cause to believe that there were substantial flaws with a Member State's asylum system, then the transfer would be incompatible.[145] The court answers that if it is not possible to transfer an asylum seeker to the Member State responsible because of risk to the asylum seeker's fundamental rights, then the asylum seeker shall be transferred to the next state that can be identified as responsible under the Regulation.[146] However, if no other state can be identified as responsible, then the Member State in which the asylum seeker is present must itself examine the application.[147]

The court points out that if the Regulation were to require complete Mutual Trust, it would undermine the safeguards indented to ensure compliance with

[137] N.S./M.E. para 50(1).
[138] N.S./M.E. para 50(2).
[139] N.S./M.E. para 53(1).
[140] N.S./M.E. para 53(2).
[141] N.S./M.E. para 65.
[142] N.S./M.E. para 79.
[143] N.S./M.E., para. 80.
[144] N.S./M.E., para. 81.
[145] N.S./M.E., para. 86.
[146] N.S./M.E., paras. 96-7.
[147] N.S./M.E., para. 98.

fundamental rights by the Member States.[148] The court concludes that EU law prohibits the conclusive presumption that the Member State identified as responsible under the Regulation observes its fundamental human rights obligations.[149] This assumption is unrealistic because in practice, flaws and complications are bound to occur when a uniform asylum system is placed on all Member States. Throughout the judgment, the concepts of Mutual Trust and responsibility are reiterated. Additionally, solidarity between Member States is a concept that comes up in the judgment. The court reminds us of the importance of solidarity in the asylum system, and "promoting a balance of efforts between Member States".[150] Additionally, the court reiterates that "asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States".[151]

The conclusion of M.S./N.E. is that an asylum seeker cannot be transferred to the Member State responsible for examining his application if there is a real risk that he will suffer inhumane and degrading treatment there. In this case the applicants opposed their transfer to Greece because they were at risk of such treatment. The court highlights that the CEAS is based on Mutual Trust: the presumption that other Member States comply with their obligations and have the same level of protection, but this is not definite. In practice, other Member State's asylum systems may be flawed. The court concludes that there are substantial grounds to believe that an asylum seeker transferred to Greece would face a risk of inhumane or degrading treatment.

4.3 The Sovereignty Clause

Article 3(2) of the Dublin Regulation has been commonly known as the "sovereignty clause".[152] This clause is used as an exception where a Member State may choose to process an asylum claim, even if it is not the state responsible under the Regulation. In February 2013, the European Refugee Fund recommended Member States to respect the sovereignty clause as a duty when a transfer is incompatible with obligations under

[148] N.S./M.E., para. 100.

[149] N.S./M.E., Cost 2, p. 20.

[150] N.S./M.E., para. 12.

[151] N.S./M.E., para. 93.

[152] Hurwtiz, 2009, pp.103-4.

international law.[153] However, the sovereignty clause is a discretionary clause, which in practice is rarely applied by the Member States.[154] Under the Dublin-II this clause imposed no actual obligation, and was by no means strong enough to prevent violations of asylum seekers' fundamental rights. According to Agnès Hurwitz in The Collective Responsibility of States to Protect Refugees (2009), the sovereignty clause under the Dublin-II was useful where the Convention was not. However, she claims that the clause was much too extensive, which demonstrated the failures of the system to fairly and effectively allocate responsibility.[155] The sovereignty clause under article 3(2) in the Dublin-II reads as follows:

> By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State, which has been requested to take charge of or take back the applicant.[156]

This paragraph does not enforce any positive obligation to guard against asylum seekers being transferred to a Member State where their rights are at risk. It does not create any positive obligation for states to take over responsibility for an asylum application. Additionally, this paragraph did not create any positive obligation for states to assess the conditions for asylum seekers in the second state before transfers. However, the updated paragraph has been rewritten and amended, and reflects the understanding that asylum procedures may not be adequate by virtue of EU membership alone. The sovereignty clause of the current Regulation, article 3(2) in the Dublin-III, reads as follows:

> Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.
>
> Where it is impossible to transfer an applicant to the Member State primarily designated

[153] European Refugee Fund, *Dublin II Regulation: Lives on Hold, European Comparative Report,* 2013, p. 11.
[154] European Refugee Fund, 2011, p. 6.
[155] Hurwitz, 2009, p. 111.
[156] Dublin-II, art. 3(2).

> as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhumane or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.
>
> Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.[157]

The new paragraph now imposes positive obligations on Member States to examine an application for asylum when an asylum seeker cannot be transferred to the responsible state, and when no other state can be designated as responsible. This provides exceptions to Mutual Trust, as there may be situations where there are fundamental flaws in the asylum seeker posing risks to his rights. But it is debatable whether this new clause is sufficient to prevent transfers to states where asylum procedures are inadequate. The clause itself does not impose any positive obligation to assess the asylum system in the receiving sate. The clause prohibits transfers where there are "substantial grounds for believing that there are systemic flaws in the asylum procedure".[158] However, "substantial grounds for believing" does not necessarily mean that a state is obliged to actively investigate the standards of a receiving state and be assured that they are adequate prior to transferring. However, this clause is a step in the right direction.

One other difference with article 3(2) is the addition of what was previously article 13 in the Dublin-II. The first paragraph of article 3(2) now gives the responsibility to the first Member State where an application for international protection was lodged, when no other state can be determined as responsible. One of the fundamental flaws of the Dublin system since it was put into place has been the allocation of responsibility to the first Member State an asylum seeker enters and makes an application for asylum to. The majority of asylum seekers enter the EU through same Member States, Italy, Malta, Greece and Cyprus etc. These states geographically make

[157] Dublin-III, art. 3(2).

[158] Dublin-III, art. 3(2).

up the border to the EU. Designating responsibility this way gives a small number of Member States the majority of the responsibility, without attention to their capacity to take in and host asylum seekers.

4.4 Hierarchy of Criteria

The mechanism with the Dublin Regulation for allocating responsibility to Member States is the Hierarchy of Criteria. Under this section, (articles 5-14 in the Dublin-II, and articles 7-15 in the Dublin-III) the criteria for allocating responsibility are listed in order of priority. The order of priority of each criterion is uniform in all situations. The applicable criterion that is highest up in the list identifies the responsible state. From the Convention to the current Regulation, the hierarchy of criteria has not changed much. Bellow is a summarised version of the hierarchy in the Dublin-II, followed by a summarised version of the changes to the hierarchy in the Dublin-III.

Hierarchy of Criteria in the Dublin-II:

1. Unaccompanied minors: If the asylum seeker is an unaccompanied minor, then the Member State responsible is where his family is legally residing, or if there is none, the state where he has applied for asylum.[159]
2. Family members residing as refugees: If the asylum seeker has a family member residing as a refugee in one of the Member States, then that Member State is responsible for examining the application.[160]
3. Family members whose application is pending: If the asylum seeker has a family member whose application for asylum is still pending decision in one of the Member States, then that Member State is responsible for examining the application.[161]
4. Residence permits and visas: If the asylum seeker has obtained a valid residence permit or holds a valid visa document, then the Member State responsible for issuing the document will take on responsibility for the asylum application. If the asylum seeker has more than one residence permit or visa, then the Member

[159] Dublin-II, art. 6.

[160] Dublin-II, art. 7.

[161] Dublin-II, art. 8.

State issuing the document with the longest period of residency shall take the responsibility, or with the latest expiry date if the visas/permits are for the same length of time.[162]

5. Irregular entry or stay: If an asylum seeker has irregularly crossed the border to a Member State, through land, sea or air from a third country, the Member State first entered is responsible for examining the application. This responsibility ceases after 12 months. If an asylum seeker who has entered a Member State irregularly has previously been living in another Member State for at least 5 months, then that Member State will take on the responsibility for processing the application.[163]
6. Visa waived entry: If a third-country national enters a Member State where his need for a visa is waived, then that Member State will be responsible for examining the application.[164]
7. Application in international transit area of an airport: If the application for asylum is submitted in the transit area of an airport of a Member State, that state is responsible.[165]
8. If no Member State can be designated as responsible on the basis of the above criteria, then the fist Member State where the application for asylum was made is the state responsible for examining it.[166]
9. Family procedure: If several family members have lodged applications for asylum in the same Member State, then the responsibility for examining the applications goes to the Member State which would be responsible for the largest number of family members according to the criteria above. Otherwise the Member State responsible for the oldest of the asylum seekers according to the criteria shall take on the responsibility for the whole family.[167]

Hierarchy of Criteria in the Dublin-III:

[162] Dublin-II, art. 9.

[163] Dublin-II, art. 10.

[164] Dublin-II, art. 11.

[165] Dublin-II, art. 12.

[166] Dublin-II, art. 13.

[167] Dublin-II, art. 14.

1. Unaccompanied minors: This criterion has not changed much. Added to this criterion is the issue of married minors, where the spouse is not legally present. The Member State responsible in this case is that where a family member or adult responsible for the minor is legally present. Additionally, if there is a relative to the minor's family that is able to take care of him legally present in a Member State, that state shall accept responsibility. Reuniting a minor with family members or relatives is decided on the basis of what is in the minor's best interest. If no family or relative exists, then the Member State responsible is that where the minor has lodged his application for asylum.[168]
2. Family members who are beneficiaries of international protection: The main change to this criterion is that if an asylum seeker has family members in a Member State who are beneficiaries of international protection (not just refugee status as previously), that Member State shall take on responsibility to process the application.[169]
3. Family members who are applicants for international protection: This criterion remains the same.[170]
4. Family procedure: This criterion remains the same, however it has been given a higher ranking in the Dublin-III. In the Dublin-II it was the 9th and final criterion, but in the Dublin-III it holds the 4th position.[171]
5. Residence documents or visas: The content of the article remains the same.[172]
6. Irregular entry or stay: This criterion has not been changed.[173]
7. Visa waived entry: This criterion remains the same.[174]
8. Application in international transit area of an airport: This criterion has not been changed.[175]

The hierarchy in the Dublin-III is largely the same as it was in the Dublin-II. Not many changes have been made, and it still retains the same fundamental structure that was the

[168] Dublin-III, art. 8.
[169] Dublin-III, art. 9.
[170] Dublin-III, art. 10.
[171] Dublin-III, art. 11.
[172] Dublin-III, art. 12.
[173] Dublin-III, art. 13.
[174] Dublin-III, art. 14.
[175] Dublin-III, art. 15.

basis for much criticism. There are a few small changes, for example under the criterion for unaccompanied minors, some specifications have been added. The main change in the hierarchy is under family members. A Member State is now responsible for an asylum application if the applicant has a family member legally residing in its territory who is a beneficiary of international protection, not just of refugee status as previously. Under the Dublin-II this criterion was only valid if family members had refugee protection. Another significant change is the ranking of the criterion for multiple family members applying at the same time. This criterion is now 4th in the hierarchy, instead of being 9th (last) as it was previously.

In the revised hierarchy, the criterion that was under article 13 in the Dublin-II has now been removed. This article read, "Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it". This article has now been moved to art. 3(2), and is part of the "Sovereignty clause" in the Dublin-III. This does not impact the hierarchy much; it is the paragraph under this that makes a difference (see Chapter 4.3).

The Hierarch of Criteria is essentially a mechanism for identifying remedial responsibility. In Miller's theory of national responsibility, he outlined the six ways we can identify and allocate remedial responsibility (see Chapter 2). Remedial responsibility means the responsibility and agent bears to remedy the situation, and to bring aid to a person in need. The six ways Miller identifies are all ways the agent can be connected to the situation and be held responsible to supply the remedy. Miller argues that the aim of allocating remedial responsibility is not to reprimand an agent for his actions, but that the justification is to supply the remedy to the person in need. What this means is that the actor held remedially responsible should be most capable of supplying an effective remedy.

One positive thing about the hierarchy is that it does give some weight to community ties in the way of family. However, I would argue that this could be expanded to include other ties. The irregular entry or stay criterion is one that is used often and is not linked in any way to a state being capable of supplying an effective remedy. The state is geographically located in a way that makes it most accessible to third country nationals irregularly entering the EU. This should not make a state responsible, as it does not mean the state would be more capable of supplying the remedy, other than the asylum seeker being physically present on its territory. National

responsibility means sharing the burden in a fair way, and not deflecting it elsewhere, placing unrealistic burdens on states less capable of taking on responsibility.

4.5 The Early Warning Mechanism

In the new Dublin Regulation "A mechanism for early warning, preparedness and crisis management" has been added as article 33. This mechanism is intended as preparation for and prevention of similar situations to that of Greece occurring in the future. The European Asylum Support Office (EASO), an agency of the EU, gathers information on the CEAS, which it presents to the Commission. If this information makes it clear that there is a risk that the application of the Dublin Regulation may be placing too much pressure on a particular Member State's asylum system or that there are issues with the asylum system, the commission will draw up a preventive action plan for that state. A state may also draw up its own action plan and present it to the commission.[176]

Under article 33, the Member State whose asylum system is affected is obliged to take all measures to deal with the situation and ensure that deficiencies are identified and addressed before the system deteriorates.[177] If the preventive action plan is not effective, or if there is risk that the asylum system of the Member State may develop into a crisis, the Member State may be requested to draw up and implement a crisis management action plan.[178] Throughout the process of prevention and crisis management, the Council closely monitors the situation. The final sentence of article 33 states that "the European Parliament and the Council may, throughout the entire process, discuss and provide guidance on any solidarity measures as they deem appropriate."[179]

The article does not provide information on what the solidarity measures may entail. Additionally, article 33 is a step forward as it does admit that not all Member States may be able to handle the pressures being placed on their asylum system. It also makes it clear that not all Member States necessarily have the same level of protection or access to protection. However, this article does not provide any information on when

[176] Dublin Regulation art. 33(1).

[177] Dublin Regulation, art. 33(2).

[178] Dublin Regulation, art. 33(3).

[179] Dublin Regulation, art. 33(4).

transfers to a particular Member State may be suspended or what steps should be taken as preventive action or as crisis management.

5 Analysis

Throughout this thesis I have focused on two significant judgments on the Dublin-II, M.S.S. and N.S./M.E. The M.S.S. ruling essentially implies the end to Mutual Trust among the EU Member States. This case illustrates very clearly that assuming Mutual Trust is not feasible in practice and that it is unrealistic to expect that all Member States, each with their own individual histories and present day situations, have the same level of protection. The addition to article 3(2), the sovereignty clause, in the Dublin-III reflects this. It is now admitted within the Regulation that not all Member States have adequate levels of protection, and prohibits Member States from transferring to such states. It should never be assumed prior to transferring that other Member States automatically comply with international obligations. N.S./M.E. is also important because the judgment highlights the fact that the Regulation has been open to interpretation, and that there are different interpretations of its application. In the Dublin-II, it was not clear when there was an obligation to apply the sovereignty clause.

Both the verdicts of M.S.S. and N.S./M.E. highlight the issue of allocating responsibility for asylum applications amongst EU member states. The Dublin Regulation until recently has considered Member States as equal in regards to conditions for asylum seekers. The hierarchy of criteria in the Dublin Regulation has been responsible for distributing a disproportionate amount of the responsibility to states that are geographically make up the border of the EU. These states are less able to support an increasing population and to provide the level of protection needed for asylum seekers. It is both unrealistic and also not in the spirit of solidarity to expect these states to be responsible for a large proportion of asylum seekers. Determining responsibility should ideally be based on the needs of the asylum seeker and the ability of the Member State to cope with an influx of migrants. However, using the first state an asylum seeker lodged an application in as a criterion for responsibility does not take consideration of the capability of the state or needs of the asylum seeker.

Considering the validity of speculations on the impact of the cases is an interesting issue to examine after the new Regulation has already come into force. Such articles have focused primarily on what role the court has played in securing human rights for asylum seekers and how this impacted the recent rewriting of the Regulation.

While there is a new paragraph strengthening the rights of asylum seekers, the new Regulation is still based on the same hierarchy of criteria. While some of the additions and amendments are changes in a positive direction, the fundamental issue of the Regulation has still not been dealt with. The sovereignty clause is a positive addition to the Regulation, however the early warning mechanism is somewhat broad and lacks clear guidelines on how to deal in the face of a crisis in a Member State's asylum system.

As a union, the Member States of the EU have a collective responsibility and should share it in the manner of solidarity. I would argue that of Miller's connection theory, capacity and community are the most applicable ways to allocate remedial responsibility for asylum seekers. It would be much more in the spirit of solidarity if the responsibility to process claims for asylum seekers were shared according to capacity. Additionally, the interests of the asylum seeker are important too and community ties should also be considered. Most of the time Member States cannot be held directly responsible for the situation of the asylum seeker. In cases where they can be, it is not always easy to determine exactly how they are. For example, in M.S.S. the applicant had worked as an interpreter for an international air force, which was the reason for the attempt on his life by the Taliban. However, it is not easy to establish who in particular is responsible for his condition, other than the international community as a whole. So in this case, in the spirit of solidarity it makes sense for the most capable Member State to accept responsibility or any state, to which he has ties.

National responsibility is important, as Member States often avoid taking on a fair share of the burden, and instead rely on the article which allocates the responsibility to the Member State which has been the first point of entry. This allows them to transfer that responsibility to states closer to the border, with fewer resources. The articles that I have looked at in this paper have highlighted that the redraft of the Dublin Regulation is disappointing. Some of the amendments are in the right direction, but in the long run a drastic change is needed. It is not reasonable to continue to place pressures on the state that was the first point of entry into the EU. It may be a common misconception that as a whole the EU is overburdened and that the number of asylum seekers is too many. However, Bacic argued that the EU is not overburdened. The problem, he argues, is in the disproportionate responsibility sharing. And it is in this that we need the most significant change, and to shift over to a spirit of solidarity between Member States.

Brouwer claimed that while we need a harmonization of human rights standards within the EU, more realistically we need exceptions to Mutual Trust. The Dublin-III does provide exceptions to this. However, Costello is more harsh, deeming the Dublin-III a failure without a fundamental change to the system as a whole. Ratio has argued that the Regulation was previously open to interpretation and that what is needed is harmonisation and common definitions. In the case of N.S./M.E., it became apparent that certain articles of the Regulation could be interpreted differently. While article 3(2) has been made more specific, I would argue that the Regulation lacks specific indications of when to apply some of the clauses. Ultimately, as Mallia argues, the premise of the Dublin Regulation can no longer stand without the spirit of solidarity between EU Member States. She claims that without solidarity between Member States, a stronger mechanism than the sovereignty clause is needed.

6 Conclusion

The Dublin Regulation has been the focus of much criticism over the years. The third version of this document came into force in 2013. After the cases of M.S.S. and N.S./M.E., the flaws of the system became blindingly obvious. These could no longer be ignored, and we were made aware that essentially, Mutual Trust is a myth. It is impossible to assume that all states have the same level of protection standards and access to asylum procedures on the sole virtue of membership in the EU. To do so would be naïve. Yet Mutual Trust has been the principle on which the Dublin Regulation inexplicitly relies on. In order for the hierarchy of criteria to work, the Dublin Regulation assumes Mutual Trust. This is because the criteria are always given the same weight of importance no matter the situation. The Dublin Regulation does not give importance to individual circumstances.

However, levels of protection and access to asylum procedures are certainly not uniform between the Member States. But the Dublin Regulation fails to take into account the capacity of individual states. Member States do not all have the same capability of being remedially responsible for asylum seekers. For some states with fewer resources, the cost of such a responsibility is a lot higher. It is unrealistic to allocate remedial responsibility on the sole virtue that a Member State was the entry point into the EU for an asylum seeker. This type of connection does not give a state any advantage to provide the remedy; in fact it increases the burden of it, as the majority of asylum seekers enter the EU through the same few states.

It has often been thought that the influx of asylum seekers to the EU is overburdening all of the Member States. However, this is a misconception. As a union, the EU is not actually overburdened: the problem lies in disproportionate burden sharing between Member States. A larger problem is created when too much pressure is put on specific states' asylum systems, as they risk collapsing. An immediate crisis in a Member State's asylum system, especially one that is an entry point into the EU, would be a bigger burden on the EU as a whole than proportionate responsibility sharing in the spirit of solidarity to begin with. While new clauses and mechanisms are added to the Dublin Regulation in order to deal with situations of acute crisis, the most effective long-term solution for prevention would be to distribute the responsibility

proportionately between Member States, taking into account various factors such as capacity and community ties.

The criterion providing for responsibility allocation to the Member State of entry into the EU remains intact in the Regulation. This criterion is a fundamental flaw within a system that cannot be rectified until it is removed. However, this criterion remained through the three versions of the Dublin Regulation. It is unlikely that such a fundamental change to the system will occur in the near future. The two judgments examined in this paper have in effect highlighted the myth of Mutual Trust. The Dublin-III does not take fore granted that all Member States have adequate levels of protection as the Dublin-II did. The conclusion of this investigation is that while the Dublin-III has some positive changes, its fundamental flaw has remained. Responsibility sharing between Member States will never be proportionate and in the spirit of solidarity until this is rectified.

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