M.S.S. V BELGIUM AND GREECE: NON-REFOULEMENT, SYSTEMIC DEFICIENCIES AND THE LIMITS OF THE DUBLIN SYSTEM

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ABSTRACT

The case of M.S.S. v. Belgium and Greece was an important one for European asylum and human rights law because it considered the interplay between the Dublin system and the rights of Member States under the European Convention on Human Rights. The European Court of Human Rights, Grand Chamber, found a violation of the applicant's right to life (Article 3) in the context of his detention and conditions in Greece, and held Belgium responsible for his transfer to Greece in the absence of any scant information regarding deficiencies in the Greek asylum system. The Court also held that Article 13 used together with Article 3 was violated because of the lack of effective remedies that can address the risks associated with the transfer. This case commentary focuses on the following three aspects of the application of non-refoulement in Article 3, the restrictions on the mutual trust doctrine within the Dublin system and the role of effective procedural safeguards. It also reflects on the significance of the judgment in the context of European asylum law and practice, especially given the recent case of N.S. v. Secretary of State for the Home Department and Tarakhel v. Switzerland. The commentary claims that M.S.S. continues to show the ongoing significance of inter-individual human rights assessment in frameworks of inter-State responsibility allocation.

Keywords: M.S.S. v. Belgium and Greece; non-refoulement; Article 3 ECHR; Dublin System; asylum; mutual trust; systemic deficiencies.

Introduction and Relevance of the Case

The M.S.S. v. Belgium and Greece is considered a case of historical significance in both European asylum and human rights law.[1] The case was decided by the Grand Chamber of the European Court of Human Rights (ECtHR) in 2011 and considered the duties of European States towards asylum seekers if they are facing the risk of being treated in a manner incompatible with the European Convention on Human Rights (ECHR) as a result of shortcomings in the asylum and reception system of the State of first asylum. The judgment greatly shaped the interplay between the operation of the EU's "Dublin system" and the domestic human rights obligations of the Member States under the Convention.

The Dublin II Regulation was part of the Common European Asylum System (CEAS), and the case was brought in the context of this Regulation.[2] The Dublin system provided for the determination of which Member State would have jurisdiction to consider an asylum application by a third-country national. There was a hierarchy of responsibility criteria in the Regulation and in some cases it was possible for a Member State by which an asylum seeker had travelled to the European Union to consider an application, although they would not be responsible for it under the criteria.[3] To a large degree, the system was based on mutual trust and cooperation between the Member States in regard to the quality of their respective asylum systems.

In the context of this, M.S.S. found significant shortcomings in the Greek asylum system, such as lack of proper detention and reception facilities, problems in providing for basic needs, and problems in examining asylum claims. The ECtHR considered whether these conditions and the way in which the asylum procedure was conducted comply with the applicant's rights under Article 3 of the ECHR, which bans torture and inhuman or degrading treatment. The Court concluded that Greece had been in breach of Article 3 by denying the applicant a decent standard of detention and living conditions and by exposing him to serious shortcomings in the asylum procedure.[4] More importantly, Belgium was also determined to be liable under Article 3 for its transfer to Greece where there were significant grounds for believing he would be subjected to treatment

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[1] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR [GC], 21 January 2011).
[2] 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 [2003] OJ L50/1 (Dublin II Regulation).
[3] ibid art 3(2).
[4] *M.S.S.* (n 1) paras 233, 263, 321.

incompatible with Article 3.[5] The Court also concluded that, together with Article 3, Article 13 was violated because of the lack of an effective remedy against the transfer.[6]

The significance of the judgment goes beyond the particular case of the applicant. M.S.S. showed that a State cannot escape its responsibilities under international human rights law by taking part in an inter-State responsibility-sharing mechanism.[7] States still have the right to decide the conditions under which their citizens are admitted to their country and what conditions are required for granting asylum, but their decision is limited by their obligations under the ECHR, including the principle of non-refoulement, which is that an individual cannot be transferred to another country if there is a real risk that they will face prohibited treatment there. The judgment thus introduced a crucial restriction of the assumption that a Member State can automatically rely on the operation of the Dublin system, or on mutual trust, when transferring asylum seekers.

The ECtHR's premise that a transferring State could be held responsible for foreseeable human rights violations in the receiving State further increased the procedural and substantive protections of the process of making asylum transfers. M.S.S. thus marks a pivotal moment in the evolution of European law on non-refoulement and poses an ongoing issue about the capacity of institutional mechanisms of responsibility sharing to function when they come into conflict with the fundamental rights enshrined in the ECHR.

Factual Background

The applicant, an Afghan national, fled Afghanistan and made his way to Europe for international protection. He came into the European Union via Greece, and then moved on to Belgium where he filed an application for asylum. His role in Greece was important due to the Dublin II Regulation, which, according to its criteria, allows for the examination of an asylum application to be allocated to the Member State responsible for the applicant under the Regulation, including, in relevant circumstances, the State that the asylum seeker arrived in the European Union via irregular means.[8]

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[5] ibid paras 358–360.

[6] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) arts 3, 13; *M.S.S.* (n 1) paras 322, 396.

[7] *M.S.S.* (n 1) paras 342–343.

[8] 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 [2003] OJ L50/1 (Dublin II Regulation) art 10(1); *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR [GC], 21 January 2011) paras 9–11.

The Belgian authorities decided to have the applicant's asylum claim examined, and started his transfer to Greece under the Dublin system. In that time, however, the Greek asylum system was facing significant criticism by the international organisations, governmental and non-governmental organisations. There had been reports of severe deficiencies in reception and detention conditions for asylum seekers, problems in accessing the asylum procedure and shortcomings in the procedure for examining asylum applications. However, the Belgian authorities did not stop the transfer of the applicant, in spite of this information.[9]

The gravity of the Greek asylum crisis had already attracted sustained international attention prior to the applicant's transfer. In December 2009, UNHCR formally recommended that EU Member States refrain from returning asylum seekers to Greece under the Dublin Regulation, citing severe procedural shortcomings, a lack of adequate reception facilities, and a risk of arbitrary detention. The systemic nature of these deficiencies was further reflected in statistical terms: Greece's first-instance protection rate had fallen to just 0.06 per cent in 2008, a figure starkly at odds with the EU average of 36.2 per cent across the five largest asylum-receiving Member States in the same period.[10]

As soon as the applicant arrived back in Greece, he was arrested in circumstances which violated human dignity. The facility was overcrowded, unsanitary and the applicant was not provided with a decent medical treatment and basic needs. After getting out, his condition still wasn't significantly better. He had no proper place to live or financial help and had to depend largely on help from charitable organisations.

There were also significant obstacles to the accessing of the Greek asylum procedure by the applicant. He said that the process was ineffective and that asylum seekers encountered significant barriers when they tried to register and to follow-up and receive a substantive decision on their claims. The lack of effective access to international protection was especially concerning in the context of the broader shortcomings of the Greek asylum system, which meant that people transferred under the Dublin mechanism were at risk of not accessing international protection.[11]

[9] *M.S.S.* (n 1) paras 20–25, 346–350.

[10] Statewatch, 'UNHCR Call to Stop Dublin II Returns to Greece' (Statewatch, January 2010) <https://www.statewatch.org/news/2010/january/greece-unhcr-call-to-stop-dublin-ii-returns-to-greece/> accessed 18 September 2026.

[11] ibid paras 34–52, 223–234, 254–264.

The conditions documented in the factual record before the Court were corroborated by independent monitoring conducted in the period immediately preceding the M.S.S. judgment. In March 2010, Amnesty International published a detailed report titled 'The Dublin II Trap: Transfers of Asylum-Seekers to Greece', which found that asylum seekers transferred to Greece were routinely denied meaningful access to the asylum procedure and faced a serious risk of refoulement, given that the formal review mechanism had become effectively non-functional. The report recorded accounts of severe overcrowding and unsanitary detention conditions that closely mirrored the applicant's own account before the Court, lending independent empirical weight to his submissions.[12]

In such situations, the applicant filed an application with the European Court of Human Rights against Belgium and Greece. He brought in particular, a complaint under Article 3 of the European Convention on Human Rights against Greece for the conditions of his detention and living conditions and the deficiencies of the procedure for granting asylum. He also stated that Belgium had breached Article 3 by sending him to Greece when they knew there was a risk of treatment that was not in keeping with the Convention. In addition, the applicant commented on the lack of an effective remedy against his transfer, invoking Article 13 of the Convention in conjunction with Article 3.[13]

The facts of the case were thus directly opposed to the applicant's fundamental rights in the context of the operation of the Dublin system. The main factual issue was not only whether the asylum system in Greece was inadequate, but also whether Belgium had a right to mandate an asylum seeker to a Member State, where there was a substantial basis to believe that the asylum and reception conditions in the receiving State would result in treatment that was contrary to the Convention.

Issues before the Court

[12] Amnesty International, 'The Dublin II Trap: Transfers of Asylum-Seekers to Greece' (EUR 25/001/2010, Amnesty International, 10 March 2010) <https://www.amnesty.org/en/documents/eur25/001/2010/en/> accessed 18 September 2026.

[13] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) arts 3, 13; *M.S.S.* (n 1) paras 3–5.

The European Court of Human Rights had to establish whether the treatment suffered by the applicant and his transfer from Belgium to Greece was reasonably in accordance with the provisions of the European Convention on Human Rights (ECHR). The case was called upon to give a ruling on the conduct of the receiving State (Greece) and the responsibility of the sending State (Belgium) under the Dublin system.

The main questions before the Court were:

1. Whether the conditions of the applicant's detention and living conditions in Greece amounted to inhuman or degrading treatment in violation of Article 3 of the ECHR.
2. Whether Belgium breached Article 3 of the ECHR by implementing the Dublin II Regulation and transferring the applicant to Greece despite the presence of significant information about serious shortcomings in the Greek asylum system and reception conditions and the risk that the applicant would be treated in a way that was incompatible with Article 3.
3. Whether the failure by Belgium to afford the applicant an effective remedy to adequately challenge his transfer to Greece constituted a denial of an effective remedy within the meaning of Article 13 of the ECHR, taken together with Article 3.
4. How the Dublin system and the principle of mutual trust between European States will impact on the ability of a State to exercise freedom to undertake independent obligations under the ECHR.

Such questions called into question the relationship between the EU system for distributing asylum responsibilities and the obligations imposed on the individual States by the Convention in respect of their obligations under the Convention. The central issue in the case was whether adherence to the procedural structure established under the Dublin system could be adequate grounds for transferring an asylum-seeker to a state in which there are significant problems with the conditions of asylum and reception.

Rules and Legal Framework

In M.S.S. v. Belgium and Greece, the Court's reasoning was based heavily on the guarantees provided under the ECHR, in particular Article 3 and Article 13, in conjunction with the implications of the Dublin II Regulation. The Court had to decide how these human rights guarantees are implemented in the European asylum system in relation to the responsibility distribution between the Member States.

1. Article 3 of the European Convention on Human Rights

The ECHR has an absolute ban on torture and inhuman or degrading treatment or punishment under Article 3. The right in Article 3 is non-derogable, whereas some Convention rights allow such restrictions in specific circumstances. For this reason, factors like national security, public emergency or immigration control do not warrant treatment that is within the scope of Article 3.[14]

The protection extended by Article 3 is not limited to the direct ill-treatment by a State. The Court has also held that a State may also assume responsibility in situations where the State has removed or transferred an individual to another State where there are "substantial grounds for believing" that it would be a "real risk" that the person would be treated in a manner inconsistent with Article 3.[15] This principle is an integral part of the Convention's protection against refoulement. States therefore shall consider, prior to making a transfer, its foreseeable human rights implications.

This is especially relevant for the asylum context, as the mere designation of another State to consider an asylum application does not, as a matter of principle, dismiss the obligations of the transferring State under Article 3.[16]

2. Article 13 of the European Convention on Human Rights

Article 13 states that everyone has the right to a remedy before a national authority for a violation of rights and freedoms guaranteed by the Convention. The remedy must have practical effect and it must be also capable of offering adequate relief if in the future a serious claim under the Convention is put forward.[17]

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[14] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) arts 3, 15(2); *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR [GC], 21 January 2011) para 218.
[15] *Soering v United Kingdom* (1989) 11 EHRR 439 paras 88–91; *M.S.S.* (n 1) paras 338, 365.
[16] *M.S.S.* (n 1) paras 342, 359.
[17] ECHR art 13; *M.S.S.* (n 1) paras 288–293.

Where the applicant objects to any action of removal or transfer, Article 13 has a special significance where he or she complains that he or she would be subject to treatment prohibited by Article 3. A remedy must give the relevant risk an appropriate opportunity to be challenged, and if needed, prevent transfer from occurring until the relevant risk has been sufficiently investigated.[18]

3. The Dublin II Regulation

It introduced the Dublin II system, which clarifies which Member State has the jurisdiction to examine an asylum application that is submitted in another Member State in the European Union. It aimed to stop multiple applications for asylum in other Member States and to create a set of rules to be applied to determine which State should be responsible.[19]

System was largely inter-State cooperative and mutually confident. The Dublin mechanism did not however replace the separation of the obligations of the Member States under the ECHR. A State responsible for transferring an asylum seeker had to take into account the protection of the fundamental rights of the asylum seeker by the receiving State.

It was not possible to take the existence of a European responsibility-allocation mechanism as an automatic basis for transferring an individual where there were significant grounds for believing that the transfer would lead to treatment which would be prohibited by Article 3.

4. State Responsibility and Non-Refoulement

Another legal doctrine that was part of the reasoning in the judgment was that a State cannot simply evade its human rights responsibility because it is the other jurisdiction where the immediate risk of ill-treatment is emanating. If a State has authority over an individual and makes a decision to transfer that individual to another country, it takes account of the foreseeable consequences of such a decision.[20]

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[18] *M.S.S.* (n 1) paras 387–389.
[19] 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 [2003] OJ L50/1 (Dublin II Regulation) recitals 3–4, art 3(1).
[20] *TI v United Kingdom* App no 43844/98 (ECtHR, 7 March 2000); *M.S.S.* (n 1) paras 342–343.

In this way, therefore, the principle of non-refoulement does not only apply to direct deportations to a place of persecution, but also to transfers which might lead to fundamental rights violations faced by the individual. In M.S.S., this principle gained extra importance as Belgium's decision to transfer took place under a formal framework agreed upon within the European mechanism, but the Court rejected the argument that that would eliminate Belgium's obligation to consider the human rights risks involved in the transfer.[21]

Judgment of the Court

After examining the factual circumstances, the applicable Convention provisions and the evidence concerning the Greek asylum system, the Grand Chamber of the European Court of Human Rights found violations of the Convention by both Greece and Belgium. The findings against the two States, however, came out of differing aspects of treatment and circumstances.

1. Greece's violation of Article 3

The Court first looked at the applicant's detention in Greece under the following conditions. It concluded that the conditions of detention did not meet the conditions of Article 3. Applicant was kept in very overcrowded, unhygienic conditions with poor access to basic facilities. The Court took into account the cumulative treatment the applicant experienced and found it to be degrading.[22]

The Court also considered the situation of the applicant after his release from detention. He was left in material poverty and precariousness, without any place to live, job or income to support his daily life. The Court considered that the specific conditions of the asylum seeker and the length of his stay rendered his living conditions to be also at the level to be considered as falling under the scope of Article 3.[23]

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[21] *M.S.S.* (n 1) paras 353–359.
[22] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR [GC], 21 January 2011) paras 223–234.
[23] ibid paras 254–264.

The meaning of this result was that Article 3 protection was not limited to intentional physical abuse. In very special cases, circumstances of extreme deprivation and vulnerability might be sufficiently severe to meet the threshold for degrading treatment.

2. Deficiencies in the Greek Asylum Procedure

The Court dealt separately with the operation of the Greek asylum procedure. It highlighted significant structural issues, such as problems in accessing the asylum procedure, shortcomings in the handling of asylum claims and the likelihood that an individual's protection needs would not be thoroughly considered before they were removed.[24]

The Court was especially worried about the practical difficulties that could arise in the process of presenting and pursuing asylum applications in Greece. The lack of these deficiencies resulted from the applicant having not had an effective and meaningful opportunity to have his need for international protection properly examined.

In effect, the judgment held that the conditions of detention or accommodation to which an asylum seeker is subjected when he or she is detained or accommodated are not the only situations in which the protection of Article 3 can be invoked; it can also be invoked where there is a real risk of being subjected to any prohibited treatment in the context of the asylum procedure, if the latter is so seriously deficient.

3. Belgium's Responsibility for the Transfer to Greece

The Court subsequently considered the duty of the Belgian to transfer the applicant to Greece under the Dublin II Regulation. When the transfer was made, there was also a significant amount of public information available about the problems of the Greek asylum system and the situation of asylum seekers in Greece.

The Court rejected the notion that Belgium should presume that Greece would fulfil its obligations under the Convention or that the Dublin system would come into its own. Belgium had to consider the applicant's need for transfer to be placed in a ‘real risk' of treatment contrary to Article 3.[25]

[24] ibid paras 300–321.
[25] ibid paras 342, 358–359.

Given the information available to the Court on the Greek asylum system and the conditions experienced by the applicants, the Court found that the Belgian authorities should have been aware of the dangers facing the applicants. Belgium had risked violating Article 3 by sending him to Greece, as he was treated differently than what was provided in Belgium. Belgium was thus held to have infringed Article 3 of the Convention.[26]

4. Violation of Article 13

The Court also concluded that there was a violation of Article 3 together with Article 13 with respect to Belgium. The applicant had not been made aware of an effective remedy which would allow him to challenge his transfer and safeguard against the risks which were being faced under Article 3 before the transfer took place.[27]

This part of the judgment confirmed the nature of non-refoulement protection, which is procedural. A State's having a formal legal process for challenging a removal decision was not enough. The remedy had to be feasible, not just in theory, and would have to have the potential to avoid serious and irreversible harm, if there was an arguable Article 3 claim.[28]

5. Limits of the Dublin System

The judgment eventually found that the Dublin II Regulation could not be interpreted mechanically if application of the Regulation would put an asylum seeker at a real risk of treatment that would breach the Convention. The presence of such an institutional framework to allocate responsibility between the Member States did not disregard the responsibilities of the transferring State under the ECHR.[29]

The Court's approach therefore put an important qualification on the principle of mutual confidence which underlies the Dublin system. Member States might normally resort to the

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[26] ibid paras 365–368.
[27] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) arts 3, 13; *M.S.S.* (n 1) paras 385–396.
[28] *M.S.S.* (n 1) paras 387, 396.
[29] ibid paras 340, 345, 353.

cooperation of other Member States, but this would not be sufficient when there was substantial evidence of serious deficiencies that could lead to a denial of an individual's fundamental Convention rights.[30]

Analysis

The judgment in M.S.S. v. Belgium and Greece is an important step in European asylum and human rights law as it set substantive restrictions on how the Dublin system can be applied by States.[31] The significance of this is not just because Greece had not ensured an asylum seeker right to receive treatment in accordance with Article 3 of the European Convention on Human Rights (ECHR), but because the Court has found that a State which transfers an asylum seeker to another Member State can also be held liable if the transfer renders the asylum seeker vulnerable to treatment that breaches Article 3 of the ECHR.[32]

A. Non-Refoulement and The Responsibility of the Transferring State

The most important application of the Article 3 prohibition was in regard to an inter-State transfer in the Dublin system. The judgment explained that a European mechanism for allocating responsibility for the application for asylum between States, in other words, the European System for the Protection of Asylum could not negate a State's duty to consider the consequences of a proposed transfer in the context of the person's fundamental rights.

This is significant in the case of Belgium. Belgium was not responsible for the conditions the applicant later faced in Greece, but the Court pointed out that it had failed to comply with Article 3 by transferring him despite the fact that it had been aware of “substantial” information regarding the shortcomings of the Greek asylum process.[33] The decision thus confirmed the right to equate the responsibility of a State to expose a person to a risk of prohibited treatment somewhere else with that of such person's direct exposure to the treatment.[34]

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[30] ibid paras 342, 359.
[31] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR [GC], 21 January 2011).

[32] ibid paras 338–340, 358–360.
[33] ibid paras 346–350, 365–368.
[34] *Soering v United Kingdom* (1989) 11 EHRR 439 paras 88–91; M.S.S. (n 1) paras 338, 365.

This is of particular importance in the context of the principle of non-refoulement. While the concept of non-refoulement has been widely linked with the refusal to return a person to a State in which he or she is likely to be met with persecution or serious harm, M.S.S. illustrated the wider human-rights implications of the principle. In cases of an incompatibility between the asylum and reception conditions of the applicant in the receiving State and the AS of the sending State, a transfer is not possible under Article 3. The judgment thus compelled States to go beyond the formal legality of a transfer and look at its real human rights implications.[35]

B. The Limits of Mutual Trust under the Dublin System

The Dublin system was heavily grounded on the principle that Member States would adhere to the common European standards and respect the fundamental rights. The assumption of mutual trust was crucial for the system's operation as it allowed Member States to send asylum seekers without having to test each element of the receiving Member State's asylum system.

M.S.S. made a crucial qualification on this assumption. The Court impliedly acknowledged that the notion of "mutual trust" cannot be absolute if there is credible and substantial evidence of "systemic deficiencies" that could result in treatment of the patient incompatible with Article 3. A Member State could thus not use the designation by the other Member State under the Dublin Regulation as proof of the compatibility of the transfer with the Convention.[36]

This is one of the two conflicting goals of the European asylum governance. There is the need of an efficient and predictable mechanism for the assignment of responsibilities between Member States on one side and on the other side. On the opposite side of the coin is that administrative efficiency must not be allowed to trample on basic rights. The Court's arguments confirm that where these two purposes clash, the protection afforded by Article 3 would have to take precedence due to the absolute nature of the prohibition against torture and inhuman or degrading treatment.

The significance of this limitation on mutual trust was reinforced at the EU level within the same year. In December 2011, the Court of Justice of the European Union ruled in the joined NS cases that Member States, including national courts, may not transfer an asylum seeker under the Dublin

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[35] *M.S.S.* (n 1) paras 365–367.
[36] ibid paras 345, 359; Council Regulation (EC) No 343/2003 of 18 February 2003 (Dublin II Regulation) art 3(2).

Regulation where systemic deficiencies in the asylum procedure and reception conditions of the receiving State amount to substantial grounds for believing that the individual would face a real risk of inhuman or degrading treatment. Academic commentary has observed that this alignment between the ECtHR and the CJEU effectively dismantled the near-unconditional mutual trust framework and replaced it with a rebuttable presumption of compliance, subject to evidence-based assessment.[37]

C. Procedural Safeguards and Effective Protection

The protection of asylum seekers also relies on effective procedures, which is what is evident in this judgment. The formal right to apply for protection is of little use if the asylum seeker is unable to access the asylum-seeking procedure, speak about the basis for the claim, have the application examined, or challenge the unlawful transfer.

The Court's judgments thus underscored the link between the procedural flaws and substantive violations of human rights. A failure to follow the asylum process can be a contributing factor to fundamental rights being violated, where an individual who is in need of asylum faces a real risk of being removed without a meaningful consideration of his or her protection needs.

This is further underscored by the Article 13 part of the judgment. An effective remedy must be able to offer meaningful protection against a transfer in a situation where there is an arguable Article 3 risk. If there is no formal procedure, then having an opportunity to challenge the removal before the irreversible consequences of the transfer is reached is not enough.[38]

D. Sovereignty and Human Rights Constraints

Besides, the judgment carries more general implications on the part of State sovereignty and human rights. The control of immigration continues to be one of the components of State

[37] The European Migration Network, 'Joined Cases C-411/10 NS and C-493/10 ME' <https://emn.ie/case_law/joined-cases-c-411-10-ns-and-c-493-10-me/> accessed 18 September 2026; see also Joanna Buckley, 'Case Comment: N.S v Secretary of State for the Home Department (C-411/10)' (Eutopia Law, 25 January 2012) <https://eutopialaw.wordpress.com/2012/01/25/case-comment-n-s-v-secretary-of-state-for-the-home-department-c-41110/> accessed 18 September 2026.

[38] M.S.S. (n 1) paras 387, 396.

sovereignty, and States have a significant role to play in the regulation of entry, residence and removal. But this is done under a set of international and regional legal commitments.

The concept of sovereignty in the management of migration is therefore not absolute as illustrated by M.S.S. Belgium's transfer of the applicant took place based on a European legal instrument and is in line with the responsibility allocation rules of the Dublin system on an administrative level. However, the ECtHR concluded that the transfer was not justified, simply on the basis of that institutional structure, when it raised a real risk of treatment in breach of Article 3 for the applicant.[39]

The judgment thus illustrates that State responsibility for respecting human rights does not go away because of international cooperation. States can co-operate in controlling migration and in reaching an allocation of responsibility for asylum applications, provided this co-operation is compatible with fundamental rights.

E. Structural Weaknesses of the Dublin System:

The judgment of the Court was more concerned with the applicant's Convention rights, but resulted in the applicant's attention being drawn to deeper flaws in the Dublin system. The system might bear an unfair burden in practice on the Member States located at the external borders of the European Union (EU), especially in cases of a mass flow of persons seeking asylum into those States.

The Greek case illustrated what could happen when the balance tips in favor of the Greeks. In the absence of enough reception capacities, and in the face of a lack of reception capacities, administrative responsibility may become separated from the State's ability to provide protection. The issue is not just one of failures at the individual State level; it can also highlight failures in the design of mechanisms for sharing responsibility.

The M.S.S. thus may be interpreted as a human rights decision and a signal of the need for sustainability of a system that delegates responsibility without providing equal capacity and

[39] ibid paras 286, 338, 342.

standards for the participating States. The judgment put additional pressure on the need for further integration, sharing of responsibility and protection in the Common European Asylum System.[40]

The practical consequences of the judgment for the Dublin system were immediate and sustained. Transfers of asylum applicants from EU Member States to Greece under the Dublin Regulation were suspended from 2011, and that suspension remained effectively in place until 2017, a period spanning six years. This prolonged interruption exposed a fundamental tension at the heart of the Dublin architecture: the mechanism assumed a baseline of equivalent protection across participating States, yet offered no internal corrective when a Member State fell substantially short of that baseline, leaving the burden of structural failure to be borne by individual asylum seekers rather than by the system itself.[41]

F. Critical Assessment

However, the judgment poses challenging questions as well as being of significance. The Court imposed an extra obligation on the States under the Dublin framework to consider the conditions in the 'receiving' State. From a human rights point of view, this type of review is required, but it can also make the Dublin system less predictable and efficient.

If each transfer has to be assessed by the sending State, a responsibility-allocation mechanism cannot work well; but where, on the other hand, there is substantial evidence that the receiving State is incapable of providing adequate protection, a system based upon automatic transfers is equally difficult to implement.

The subsequent trajectory of European asylum jurisprudence confirmed that M.S.S. initiated, rather than resolved, this process of doctrinal recalibration. In Tarakhel v Switzerland (2014), the ECtHR extended the reasoning of M.S.S. to circumstances that fell short of outright systemic collapse, holding that the transfer of a vulnerable family to Italy without prior guarantees of adequate, family-specific accommodation would violate Article 3. Academic commentary has

[40] ibid paras 340, 345; see also Joined Cases C-411/10 and C-493/10 N.S. v Secretary of State for the Home Department [2011] ECR I-13905.

[41] Asylum Information Database, European Council on Refugees and Exiles, 'Dublin: Greece' <https://asylumineurope.org/reports/country/greece/asylum-procedure/procedures/dublin/> accessed 18 September 2026.

noted that Tarakhel shifted the analysis from aggregate systemic failure to an individualised assessment of risk, raising the practical compliance bar for sending States beyond what M.S.S. had strictly required and demonstrating that the Dublin framework remains structurally dependent on robust prior scrutiny at the individual level.[42]

It is therefore preferable not to leave out the responsibility-sharing method but to ensure that it is complementary to good human rights protection. In M.S.S. it is shown that the legitimacy of European asylum governance is ultimately contingent upon its efficiency and compatibility with respect for human dignity.

It found that the operation of European asylum governance should continue to be subject to meaningful judicial review and that the mere presence of a common legal framework should not be relied on to obviate the need to consider the foreseeable threat to fundamental rights. In this context, M.S.S made the reliance on mutual trust from a near automatic assumption to a doctrine that can be challenged under the rubric of human rights limitations.[43]

[42] Steve Peers, 'Tarakhel v Switzerland: Another Nail in the Coffin of the Dublin System?' (EU Law Analysis, 5 November 2014) <http://eulawanalysis.blogspot.com/2014/11/tarakhel-v-switzerland-another-nail-in.html> accessed 18 September 2026.

[43] M.S.S. (n 1) paras 342, 358–360, 387–389.