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## The Buck Stops Here: Fundamental Rights Infringements Can No Longer Be Ignored When Transferring Asylum Seekers Under *Dublin II*

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# THE BUCK STOPS HERE: FUNDAMENTAL RIGHTS INFRINGEMENTS CAN NO LONGER BE IGNORED WHEN TRANSFERRING ASYLUM SEEKERS UNDER *DUBLIN II*

XING-YIN NI\*

**Abstract:** Many asylum seekers entering the European Union (EU) cross more than one Member State border before lodging their asylum claims. In response, the EU adopted Dublin II to designate the point of first entry, rather than the point of application, as the State responsible for examining the claim. Unfortunately, this allocation of examination responsibilities overburdens States on the frontline of entry, such as Greece, and has exacerbated the systemic deficiencies in these states' asylum systems. The Court of Justice of the European Union's decision in the Joined Cases C-411/10 & C-493/10 helped clarify that a receiving state cannot transfer asylum seekers to the responsible state if they would be subjected to inhumane treatment there. Although this decision halted Dublin II transfers to states where fundamental rights risked being violated, the EU continues to struggle with an unbalanced distribution of asylum claims. Until the principle of solidarity is put into practice and more claims are shifted to lesser-burdened states, the EU will not meet its goal of creating a fair and effective Common European Asylum Policy.

## INTRODUCTION

On December 21, 2011, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered a critical interpretation of European Union (EU) asylum law in the case *N.S. v. Secretary of State for the Home Department & M. E. et al. v. Refugee Applications Commissioner et al.*<sup>1</sup> The landmark decision has significant repercussions on the EU's commitment to implementing a common asylum system across its Member States.<sup>2</sup> For such a system to function, it is imperative that each Member State shares a common understanding of

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<sup>1</sup> See Joined Cases C-411/10 & C-493/10, *N.S. v. Sec'y of State for the Home Dep't* (Eur. Ct. Justice Dec. 21, 2011).

<sup>2</sup> See Memorandum, European Commission, Commissioner Malmström Welcomes the European Parliament's Vote on the Common European Asylum System, MEMO/13/534 (June 12, 2013) [hereinafter Malmström Welcomes CEAS].

its responsibilities within that system.<sup>3</sup> The CJEU's decision in *N.S.* clarifies those responsibilities.<sup>4</sup>

The judgment in *N.S.* addressed whether Member States are obliged under Dublin II, the EU regulation that establishes responsibility for examining asylum claims, to evaluate whether the receiving state observes the fundamental rights of the EU.<sup>5</sup> The CJEU ruled that under EU law, there is a rebuttable presumption, as distinguished from a conclusive presumption, that Member States observe fundamental rights.<sup>6</sup> If there are substantial grounds for believing that an asylum seeker would face inhuman or degrading treatment in the receiving state, the Member State is forbidden from transferring the asylum applicant there.<sup>7</sup>

Part I of this Comment describes the background of the CJEU decision in *N.S.* Part II provides a discussion of the CJEU's holding, the conditions of the asylum system in Greece that underlies that holding, and the overlap between the judgments of the CJEU and the European Court of Human Rights (ECtHR) in the area of human rights. Part III examines the implications of the holding on Member States, particularly Greece. This Comment concludes by highlighting the need for a revision of Dublin II to allow for wider distribution of asylum claims throughout the EU.

## I. BACKGROUND

On June 12, 2013, the European Parliament adopted a series of directives that authorized the establishment of a uniform asylum system across the EU.<sup>8</sup> The goal of the system is to assure that asylum seekers are treated fairly and humanely in every Member State.<sup>9</sup> The road that led to this historic vote, however, was a tough one.<sup>10</sup> Asylum is a fundamental right in the EU, first guaranteed in the 1951 Geneva Convention Relating to the Status of Refugees and the

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<sup>3</sup> See C-411/10, *N.S.*, ¶ 79.

<sup>4</sup> See *id.* ¶¶ 94, 106.

<sup>5</sup> See Council Regulation 343/2003, art. 3, 2003 O.J. (L 50) 1, 3 (EC) [hereinafter Dublin II]; C-411/10, *N.S.*, ¶ 50; European Asylum Support Office, *2011 Annual Report on the Situation of Asylum in the European Union and on the Activities of the European Asylum Support Office*, (2012), at 36 [hereinafter *EASO Report*]. Dublin II replaced the earlier Dublin Convention, which had established the state responsible for examining asylum applications lodged in one of the Member States of the EU. Dublin II, art. 24.

<sup>6</sup> See C-411/10, *N.S.*, ¶¶ 104–105.

<sup>7</sup> See *id.* ¶¶ 86, 94.

<sup>8</sup> See Malmström Welcomes CEAS, *supra* note 2; *EU Puts Common Asylum System in Place*, European Commission (Jun. 12, 2103), [http://ec.europa.eu/commission\\_2010-2014/malmstrom/news/archives/2013/06/20130612\\_en.htm](http://ec.europa.eu/commission_2010-2014/malmstrom/news/archives/2013/06/20130612_en.htm) (last visited Oct. 17, 2014).

<sup>9</sup> *EU Puts Common Asylum System in Place*, *supra* note 8.

<sup>10</sup> Malmström Welcomes CEAS, *supra* note 2.

associated Protocol of 1967 (Geneva Convention).<sup>11</sup> Article 33(1) of the Geneva Convention prohibits Member States from expelling or returning a refugee to a place where he or she would risk being persecuted.<sup>12</sup> The EU's goal for its asylum policy was to establish "an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community."<sup>13</sup> Implementation of such a policy is governed by the principle of mutual confidence and the principle of solidarity and fair sharing between the Member States.<sup>14</sup> Given the persistent disparities in each Member State's asylum procedures, however, it was difficult to establish a fair but effective distribution of asylum responsibilities across the Member States.<sup>15</sup> The differences in systems and practice resulted in forum shopping, with asylum seekers lodging applications in more than one Member State and gravitating towards states with higher recognition rates and more social benefits.<sup>16</sup>

In response, the European Council in 1999 negotiated a set of rules to harmonize asylum policies across the EU, envisioning the establishment of a Common European Asylum System (CEAS).<sup>17</sup> The CEAS would ensure that every asylum seeker would receive the same treatment, regardless of where his or her application was lodged.<sup>18</sup> In order to establish with legal certainty "a

<sup>11</sup> Opinion of Advocate General V. Trstenják in Case C-411/10 ¶ 10 [hereinafter Advocate General]; *EASO Report*, *supra* note 5, at 35.

<sup>12</sup> See Geneva Convention Relating to the Status of Refugees, art. 33, Jul. 28, 1951, 189 U.N.T.S. 150 [hereinafter Geneva Convention]. ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

<sup>13</sup> C-411/10, *N.S.* ¶ 14; see *id.* ¶ 83.

<sup>14</sup> See C-411/10, *N.S.* ¶¶ 78–79, 93; Consolidated Version of the Treaty on the Functioning of the European Union arts. 78, 80, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU]; see also Memorandum, European Commission, A Common European Asylum System, MEMO/13/532 (June 12, 2013), at 1 [hereinafter A Common European Asylum System] ("EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar.").

<sup>15</sup> See Advocate General, *supra* note 11, ¶ 1; *From Schengen to Stockholm, History of the CEAS*, EUROPEAN COUNCIL ON REFUGEES AND EXILES, <http://www.ecre.org/component/content/article/36-introduction/194-history-of-ceas.html> (last visited Oct. 17, 2014).

<sup>16</sup> See *From Schengen to Stockholm, History of the CEAS*, *supra* note 15.

<sup>17</sup> See C-411/10, *N.S.* ¶¶ 6–7. To effectuate the goals of the CEAS, the European Council adopted legal measures establishing the substantive minimum standards for the treatment of asylum seekers and the examination of their applications. See Advocate General, *supra* note 11, ¶ 17. These include Directives on the minimum standards for the reception of asylum seekers (2003/9/EC), the qualification as refugees (2004/83/EC), and the procedures for granting and withdrawing refugee status (2005/85/EC); as well as Council Regulation (EC) No 2725/2000 which created Eurodac, the EU database that records the fingerprints of foreign nationals illegally crossing an external border. C-411/10, *N.S.* ¶ 11–13.

<sup>18</sup> *Briefing Notes: UNHCR Welcome EU Moves Towards a Common Asylum System*, UNHCR (Sep. 14, 2013), available at <http://www.unhcr.org/51baf2269.html>.

clear and effective method for dealing with an asylum application,” the Member States adopted Council Regulation No. 343/2003 (Dublin II).<sup>19</sup> Dublin II established the exhaustive rules for determining the single Member State responsible for examining an asylum application lodged in the EU, and instituted a hierarchy of objective criteria for determining which Member State held that obligation.<sup>20</sup> Significantly, Dublin II provided that the Member State where the asylum seeker entered the EU, whether legally or illegally, is responsible for examining the asylum claim.<sup>21</sup> Dublin II was designed to streamline the asylum process and avoid the inefficiencies that had previously plagued the system.<sup>22</sup> By designating responsibility in a single state, the regulation was designed to avoid situations where no state admits responsibility for a claim and to prevent abuse of the system by applicants who filed their claims in multiple states.<sup>23</sup>

Despite the objective rules set out in Dublin II, implementation of the CEAS has faced setbacks.<sup>24</sup> Since the responsible state under Dublin II is typically the country of first arrival, the regulation places pressure on states that sit on the EU’s external borders and receive a disproportionately large number of asylum seekers.<sup>25</sup> The text of Dublin II does not expressly contain procedures for the situation where a Member State’s asylum system is experiencing an exceptionally heavy burden.<sup>26</sup> With its position on the southeastern border of the EU and its close proximity to several conflict-ridden countries, Greece has become the primary point of irregular border crossings into Europe.<sup>27</sup> The asylum system in Greece has become disproportionately burdened relative to other Member States because almost ninety percent of illegal immigrants enter the EU through its borders.<sup>28</sup> In 2011, when the CJEU issued its ruling in *N.S.*, the national asylum system in Greece had completely collapsed.<sup>29</sup> The overloading

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<sup>19</sup> See C-411/10, *N.S.* ¶¶ 79, 84.

<sup>20</sup> See Dublin II, *supra* note 5, arts. 1, 17; Advocate General, *supra* note 11, ¶¶ 80, 93; A Common European Asylum System, *supra* note 14, at 4.

<sup>21</sup> See Dublin II, *supra* note 5, arts. 9(4), 10(1).

<sup>22</sup> See C-411/10, *N.S.* ¶ 79.

<sup>23</sup> See *id.*; *EASO Report*, *supra* note 5, at 36.

<sup>24</sup> See C-411/10, *N.S.* ¶ 90.

<sup>25</sup> See Dublin II, *supra* note 5, arts. 5–14; C-411/10, *N.S.* ¶ 87; Special Rapporteur on the Human Rights of Migrants, *Mission to Greece*, U.N. Human Rights Council ¶ 70, U.N. Doc. A/HRC/23/46/Add.4 (Apr. 18, 2013).

<sup>26</sup> See Advocate General, *supra* note 11, ¶ 99.

<sup>27</sup> See *Mission to Greece*, *supra* note 25, ¶ 5.

<sup>28</sup> C-411/10, *N.S.* ¶ 87.

<sup>29</sup> See Commissioner for Human Rights of the Council of Europe, *Rep. Following His Visit to Greece from 28 January to 1 February 2013*, (Apr. 16, 2013) ¶ 138 [hereinafter Commissioner Report].

of the asylum system in Greece is highlighted in the Joined Cases C-411/10 & C-493/10.<sup>30</sup>

### A. The Joined Cases C-411/10 & C-493/10

Case C-411/10 concerns an Afghan national, N.S., who entered Greece, where he was allegedly arrested and detained.<sup>31</sup> He was eventually expelled to Turkey, where he contends to have been detained in appalling conditions for two months.<sup>32</sup> He further claims that he escaped from detention in Turkey and traveled to the United Kingdom, where he submitted an asylum application on the day he arrived.<sup>33</sup> Pursuant to Article 17 of Dublin II, the Secretary of State of the Home Department requested that Greece take charge of his application.<sup>34</sup> Greece did not respond to the request in a timely manner, as Article 18(7) of Dublin II requires.<sup>35</sup> Accordingly, Greece was deemed by default to have accepted responsibility for N.S.'s asylum claim and the Secretary ordered him removed to Greece.<sup>36</sup>

In July 2009, N.S. requested that the Secretary accept responsibility for his asylum claim, arguing that returning him to Greece would breach the Geneva Convention and risk violating his fundamental rights under EU law and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>37</sup> The Secretary denied his request and maintained the order to transfer N.S. to Greece.<sup>38</sup> He sought judicial review of the Secretary's decisions and in February 2010, the High Court of Justice of England & Wales examined his application.<sup>39</sup> Following the High Court's dismissal of the application, he appealed the decision to the Court of Appeal of England & Wales.<sup>40</sup>

The proceeding in Case C-411/10 was joined with Case C-493/10, which concerns the proposed transfer of five asylum applicants from Ireland to Greece.<sup>41</sup> The applicants originated from Afghanistan, Iran, and Algeria, and each entered the EU through Greece, where they were arrested for illegal entry

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<sup>30</sup> See C-411/10, N.S. ¶ 87. On May 16, 2011, the President of the CJEU joined Cases C-411/10 and C-493/10 for the purposes of the written and oral procedure and the judgment. See *id.* ¶ 54.

<sup>31</sup> See *id.* ¶¶ 34–35. N.S. was arrested in Greece on September 24, 2008, but he never sought asylum in Greece. *Id.*

<sup>32</sup> *Id.* ¶ 35.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* ¶ 36.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* ¶¶ 36–37.

<sup>37</sup> *Id.* ¶ 40. Article 3 of the ECHR recognized that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>38</sup> C-411/10, N.S. ¶ 40.

<sup>39</sup> *Id.* ¶ 42.

<sup>40</sup> *Id.* ¶ 43.

<sup>41</sup> *Id.* ¶ 51–54.

and requested to leave.<sup>42</sup> They subsequently traveled to Ireland where they applied for asylum.<sup>43</sup> All five resisted return to Greece, arguing to the High Court of Ireland that the procedures and conditions for asylum seekers in Greece were inadequate and that Ireland should assume responsibility for their applications in accordance to Article 3(2) of Dublin II.<sup>44</sup>

Both the Court of Appeal of England & Wales and the Irish High Court stayed their domestic proceedings to refer certain questions of EU law to the CJEU for a preliminary ruling.<sup>45</sup> In particular, questions two through four asked the CJEU to determine:

(2) Is the duty of a Member State to observe EU fundamental rights . . . discharged where that State sends the asylum seeker to the Member State which Article 3(1) [of Regulation No 343/2003] designates as the responsible State . . . , regardless of the situation in the responsible State?

(3) In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe . . . the claimant's fundamental rights under European Union law . . . ?

(4) Alternatively, is a Member State obliged by EU law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where

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<sup>42</sup> *Id.* ¶ 51; Liam Thornton, *Asylum Transfers from Ireland to Greece*, HUMAN RIGHTS IN IRELAND, <http://humanrights.ie/international-law/international-human-rights/asylum-transfers-from-ireland-to-greece/> (last visited Oct. 17, 2014).

<sup>43</sup> C-411/10, N.S. ¶ 51.

<sup>44</sup> *Id.* ¶ 52. Article 3(2) gives each Member State the discretionary power to assume responsibility for an asylum claim that would otherwise be another state's responsibility under Dublin II's objective criteria. See Dublin II, *supra* note 5, art. 3. A Member State that voluntarily examines a claim accepts the obligations associated with that claim. *Id.*

<sup>45</sup> *Id.* ¶¶ 49–50, 53. In accordance to Article 267 of the Treaty of the Functioning of the European Union, when a national court is uncertain about the interpretation of EU law it may refer the question before it to the CJEU for a preliminary ruling. See TFEU, *supra* note 14, art. 267. In a press release, the CJEU clarified that,

A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Press Release No. 140/11, Court of Justice of the European Union, Judgment in Joined Cases C-411/10 N.S. v Secretary of State for the Home Department and C-493/10 M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (Dec. 21, 2011).

transfer to the responsible State would expose the [asylum] claimant to a risk of violation of his fundamental rights . . . ?<sup>46</sup>

By answering these questions, the CJEU confronts a tension between Dublin II's propensity to vest responsibility in the applicant's point of entry and the need to distribute asylum claims throughout the EU in light of the overloading of the system in Member States like Greece.<sup>47</sup>

## II. DISCUSSION

### A. *The Fundamental Right of Asylum*

The EU was founded on the universal values of human dignity, freedom, equality, and solidarity, and the fundamental rights that flow from those values.<sup>48</sup> Among those fundamental rights is the right to asylum, guaranteed in Article 18 of the Charter and Article 78 of the TFEU.<sup>49</sup> Underlying Dublin II and the other regulations and directives of the CEAS is the desire to ensure full observance of the right to asylum.<sup>50</sup> For the CEAS to be effective, each Member State must have mutual confidence that the other states comply with the fundamental rights of the EU in their treatment of asylum seekers.<sup>51</sup> Accordingly, Dublin II assumes that the Member State responsible for examining the application observe the fundamental rights guaranteed by the Charter, the Geneva Convention, and the ECHR.<sup>52</sup>

Despite the presumption of compliance, it is possible that the asylum procedures of a given state are deficient in practice and asylum seekers transferred

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<sup>46</sup> C-411/10, *N.S.* ¶ 50. Among the other issues the CJEU considered were: whether a decision adopted by a Member State under the discretionary power of Dublin II's Article 3(2) falls within the scope of EU law and Article 51 of the Charter of Fundamental Rights of the European Union; whether the protections set out in the Charter are wider in scope than the protections conferred by Article 3 of the ECHR; and whether "safe country" provisions are compatible with Article 47 of the Charter of Fundamental Rights of the European Union. *Id.*

<sup>47</sup> See Advocate General, *supra* note 11, ¶ 1, 105; *Mission to Greece*, *supra* note 25, ¶ 68.

<sup>48</sup> See Charter of Fundamental Rights of the European Union Preamble, 2010 O.J. C 83/02, at 391 [hereinafter Charter of Rights]; C-411/10, *N.S.* ¶ 1.

<sup>49</sup> C-411/10, *N.S.* ¶ 4; Advocate General, *supra* note 11, ¶ 114; see TFEU, *supra* note 14, art. 78; Charter of Rights, *supra* note 48, art. 18, 2010 O.J. C 83, at 395.

<sup>50</sup> See Dublin II, *supra* note 5, recital (15) in the Preamble, at 2; C-411/10, *N.S.* ¶ 78.

<sup>51</sup> See C-411/10, *N.S.* ¶¶ 78, 80.

<sup>52</sup> See *id.* ¶ 80. This assumption of compliance is reflected in the Preamble to Dublin II, which states that "Member States . . . are considered as safe countries for third-country nationals." Dublin II, *supra* note 5, recital (2) in the Preamble, at 1. Before Case C-411/10 was stayed and referred to the CJEU, the Secretary of State asserted to the Court of Appeal of England & Wales that the Dublin II scheme permits a conclusive presumption that every Member State complies with its obligations under EU law. See C-411/10, *N.S.* ¶ 47. Accordingly, the Secretary contended that she was not required to consider evidence that returning the appellant to Greece would risk violation of his fundamental rights. *Id.*



to that state would risk violation of their fundamental rights.<sup>53</sup> For example, in 2010, Greece experienced a disproportionate influx of asylum applicants and was unable to cope with the situation.<sup>54</sup> In light of this reality, the European Commission proposed that Dublin II be amended to mitigate the criteria of lodging responsibility in the point of first entry.<sup>55</sup> Nevertheless, the CJEU emphasized that allowing exceptions to the obligations of Dublin II would “deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible.”<sup>56</sup> In interpreting Dublin II, the CJEU faced the challenge of ensuring compliance with the fundamental rights protected by the EU without stripping Dublin II of its clear objectives.<sup>57</sup>

The CJEU resolved this tension by concluding that there is a rebuttable presumption, as distinguished from a conclusive presumption, that asylum applicants will be treated in a way that complies with fundamental rights in all Member States.<sup>58</sup> Since the CEAS is based on a presumption of compliance, it would be incompatible to allow the “slightest infringement” of CEAS directives to halt the transfer of asylum seekers to the responsible state in accordance to Dublin II.<sup>59</sup> If, on the other hand, there are substantial grounds to believe that the responsible state’s asylum system is systemically flawed, transfer to that state would result in the infringement of fundamental rights and a violation of the Charter.<sup>60</sup>

### *B. The CJEU Decision Clarifies the Obligations of the Member States to Examine Asylum Applications*

In light of this rebuttable presumption, the CJEU held that a Member State may not transfer an asylum seeker under Dublin II when it “cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.”<sup>61</sup> This restriction on transfer

<sup>53</sup> C-411/10, *N.S.*, ¶ 81.

<sup>54</sup> *See id.* ¶ 87.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.* ¶ 85.

<sup>57</sup> *See id.* ¶¶ 77, 85. CJEU case law has established that Member States should not interpret legislation in a way that conflicts with the fundamental rights protected by the EU. *See id.* ¶ 77.

<sup>58</sup> *See id.* ¶¶ 99–105.

<sup>59</sup> *See C-411/10, N.S.* ¶ 84.

<sup>60</sup> *See id.* ¶ 86. Although not addressed by the CJEU, the Advocate General in her opinion emphasized that operation of this rebuttable presumption “must observe the principle of effectiveness, according to which the realisation of the rights conferred by European Union law may not be rendered practically impossible or excessively difficult.” *See Advocate General, supra* note 11, ¶ 134.

<sup>61</sup> C-411/10, *N.S.* ¶ 94.

ensures that the Member States meet their obligation to protect the fundamental rights of asylum seekers.<sup>62</sup>

If conditions in the responsible state are such that transferring an asylum seeker there would risk a violation of fundamental rights, the Member State in which the asylum seeker is present must examine the criteria in Chapter III of Dublin II to determine whether any other state is responsible for the application.<sup>63</sup> When the responsible Member State cannot be designated based on the criteria in Chapter III, the Member State where the applicant first lodged his or her asylum claim is responsible for examining it, pursuant to Article 13 of Dublin II.<sup>64</sup> That state should not take an unreasonable length of time in its determination and worsen the situation.<sup>65</sup> If necessary, the Member State in which the asylum seeker is present must take responsibility for the asylum application in accordance to Article 3(2) of Dublin II.<sup>66</sup>

### C. *The State of the Greek Asylum System*

The applicants in the Joined Cases C-411/10 & C-493/10 argued that Greece's asylum procedures were inadequate and risked infringement of their fundamental rights.<sup>67</sup> They asserted that the Member States where they lodged their asylum claims—the United Kingdom and Ireland—must take responsibility in accordance with Dublin II.<sup>68</sup> Prior to the CJEU's decision in *N.S.*, the asylum system in Greece was in a state of total collapse.<sup>69</sup> The Grand Chamber of the CJEU addressed several of the shortcomings of asylum procedures in Greece, including the procedural hurdles, the inadequate conditions for reception, the inadequate judicial remedies, and the low proportion of asylum applications granted.<sup>70</sup> As the Advocate General emphasized in her opinion, there

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<sup>62</sup> See *id.*

<sup>63</sup> See *id.* ¶ 96. The criteria listed in Chapter III of Dublin II, designating the Member State responsible for examining the application for asylum, include family membership, possession of residence documents or visas, and length of continuous residence. See Dublin II, *supra* note 5, arts. 5–14.

<sup>64</sup> C-411/10, *N.S.*, ¶ 97; Dublin II, *supra* note 5, art. 13 (“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.”).

<sup>65</sup> C-411/10, *N.S.*, ¶ 98.

<sup>66</sup> *Id.*; Dublin II, *supra* note 5, art. 3(2) (“[E]ach 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.”).

<sup>67</sup> See C-411/10, *N.S.*, ¶¶ 40, 52.

<sup>68</sup> See *id.*

<sup>69</sup> See Commissioner Report, *supra* note 29, ¶ 138.

<sup>70</sup> See C-411/10, *N.S.* ¶ 44.

was clear evidence of a wide gulf between the requirements for Greece's asylum system and the actual treatment of asylum seekers there.<sup>71</sup>

Since the judgment in *N.S.*, the Greek asylum system has been the subject of special review by organizations such as the United Nations Human Rights Council, the Council of Europe, and Amnesty International.<sup>72</sup> All have expressed concern over Greece's asylum policies and practices, which continue to suffer major shortcomings.<sup>73</sup> Although a new Asylum Service was adopted in 2011 in an effort to rebuild the national asylum system, that service was not yet operational a year after it became law.<sup>74</sup> Asylum seekers in detention continue to face poor sanitation, inadequate medical care, and insufficient access to information and legal assistance.<sup>75</sup> Following his visit to Greece in 2013, the Commissioner for Human Rights of the Council of Europe expressly recommended that EU Member States refrain from returning asylum seekers to Greece under Dublin II.<sup>76</sup>

On account of its geographical location and its proximity to several conflict-ridden countries, Greece receives more asylum seekers than its asylum system can accommodate.<sup>77</sup> Most migrants and refugees who enter the EU through Greece desire to travel further west to other Member States, but those who enter irregularly remain stuck in Greece because they are apprehended if

<sup>71</sup> See Advocate General, *supra* note 11, ¶ 85.

<sup>72</sup> See generally Commissioner Report, *supra* note 29 (evaluating human rights issues in Greece, including major shortcomings in its asylum system, following the Commissioner of Human Rights's visit); *Mission to Greece*, *supra* note 25 (assessing the human rights situation of migrants in Greece following the Special Rapporteur's official visit); AMNESTY INT'L, *Greece: The End of the Road for Refugees, Asylum Seekers and Migrants*, AI Index EUR 25/011/2012 (Dec. 20, 2012) [hereinafter *The End of the Road*] (describing the state of the asylum system in Greece).

<sup>73</sup> See Commissioner Report, *supra* note 29, at 3; *Mission to Greece*, *supra* note 25, ¶¶ 68, 85; *The End of the Road*, *supra* note 72, at 2.

<sup>74</sup> See *Mission to Greece*, *supra* note 25, ¶ 21. The proposed Asylum Service is part of Greece's National Action Plan on Asylum and Migration Management, which it submitted to the European Commission in August 2010. See *id.* (citing insufficient budget and staff as the reasons why the Asylum Service is not yet operational).

<sup>75</sup> See Bureau of Democracy, Human Rights and Labor, United States Dep't of State, 2012 Country Reports on Human Rights Practices—Greece (2013), at 11–13. For example, evaluators found that “authorities detained migrants, including members of vulnerable groups such as unaccompanied minors, in overcrowded cells and did not separate adult males from unaccompanied minors. Medical care, beds, and toilet and washing facilities were almost nonexistent; food was insufficient and of poor quality; access to interpreters, lawyers, and telephones was scarce and not guaranteed.” *Id.* at 13.

<sup>76</sup> See Commissioner Report, *supra* note 29, ¶ 150. Similarly, Amnesty International recommended that Member States maintain their halt on Dublin II transfers to Greece, in light of the rulings of the ECtHR and the CJEU. *The End of the Road*, *supra* note 72, at 12.

<sup>77</sup> See Commissioner Report ¶¶ 139–140; *Mission to Greece*, *supra* note 25, ¶ 5. The police Directorate, which receives ninety percent of Greece's asylum applications, only accepts approximately fifty applications per week. See Commissioner Report, *supra* note 29, ¶ 140. Asylum seekers who are waiting to lodge their applications wait outdoors in line night after night, and are reportedly exposed to police abuse. See *id.* ¶ 140.

they attempt to leave.<sup>78</sup> The vast majority of illegal entries into the EU occur through Greece's borders, and the nation's policy is to systematically detain all irregular border-crossers and asylum seekers for up to eighteen months.<sup>79</sup>

Since 2012, there has been a concerted effort to crack down on irregular border-crossers.<sup>80</sup> Surveillance programs include "Xenios Zeus," a police operation focused on verifying the legal status of migrants, and "Poseidon Sea," a Frontex operation that intercepts migrants trying to reach Italy by boat from the west coast of Greece.<sup>81</sup> In an effort to deter illegal entries by land, Greece completed construction of a 10.5 kilometer fence along the Turkey-Greece border in December 2012.<sup>82</sup> The fence raised concerns that people seeking international protection would undertake unsafe crossings and face additional dangers.<sup>83</sup> In addition, there have been numerous reports of unlawful forced expulsions of irregular migrants.<sup>84</sup> Given that many irregular border-crossers enter Greece from conflict-ridden countries, these forced expulsions are particularly dangerous and risk *refoulement*.<sup>85</sup> Paralleling this recent rise in border security has been a significant increase in xenophobic violence against irregular migrants.<sup>86</sup> Victims are often unwilling to report these attacks at the risk of being detained and deported.<sup>87</sup> Furthermore, the police have been accused of tolerating and even perpetrating this xenophobic violence.<sup>88</sup>

The CJEU, by expressly addressing the flawed Greek asylum system in its judgment, acknowledged the possibility of a responsible state operating below the minimum standards presumed in Dublin II.<sup>89</sup> By rejecting a conclusive presumption that Member States comply with fundamental rights, the CJEU

<sup>78</sup> See *Mission to Greece*, *supra* note 25, ¶¶ 9–10; AMNESTY INT'L, *Enter at Your Peril: Lives Put at Risk at the Gate of Europe*, AI Index EUR 25/007/2013 (Jul. 9, 2013), at 8.

<sup>79</sup> See C-411/10, N.S. ¶ 87; *Mission to Greece*, *supra* note 25, ¶¶ 45–46. In 2010, Greece was the point of entry into the EU for nearly 90 percent of illegal immigrants. C-411/10, N.S. ¶ 87.

<sup>80</sup> See *Mission to Greece*, *supra* note 25, ¶ 6; *The End of the Road*, *supra* note 72, at 5.

<sup>81</sup> See *Mission to Greece*, *supra* note 25, ¶¶ 6, 10. Frontex is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. FRONTEX, <http://www.frontex.europa.eu> (last visited Oct. 17, 2014).

<sup>82</sup> AMNESTY INT'L, *Amnesty International Report 2013*, AI Index POL 10/001/2013 (May 23, 2013), at 108; *Enter at Your Peril*, *supra* note 78, at 3.

<sup>83</sup> *Amnesty International Report 2013*, *supra* note 82, at 108.

<sup>84</sup> See *Enter at Your Peril*, *supra* note 78, at 3; AMNESTY INT'L, *Greece: Frontier Europe: Human Rights Abuses on Greece's Border with Turkey*, AI Index EUR 25/008/2013 (Jul. 9, 2013), at 6; Office of the United Nations High Commissioner for Refugees, *Observations on Greece as a Country of Asylum* (December 2009), at 4.

<sup>85</sup> See *Mission to Greece*, *supra* note 25, ¶ 5; *Frontier Europe*, *supra* note 84, at 9. *Refoulement*, which is prohibited under European and international law, is defined as the forced return of individuals to countries in which they are at risk of serious human rights violations. *Frontier Europe*, *supra* note 84, at 9.

<sup>86</sup> See *Mission to Greece*, *supra* note 25, ¶ 8.

<sup>87</sup> *Id.* ¶ 71.

<sup>88</sup> *Id.*

<sup>89</sup> See C-411/10, N.S., ¶¶ 44, 81, 112.

mirrored a decision by the European Court of Human Rights from earlier that year.<sup>90</sup>

#### D. *The Interplay Between the Court of Justice of the European Union and the European Court of Human Rights*

The CJEU has jurisdiction over all matters of EU law.<sup>91</sup> After the Treaty of Lisbon came into force in 2009, the CJEU acquired jurisdiction over the fundamental rights contained in the ECHR.<sup>92</sup> In matters of EU law concerning fundamental rights, Member States are also subject to the jurisdiction of the European Court of Human Rights (ECtHR).<sup>93</sup> Given the overlap in jurisdiction, enhanced cooperation is required between the two courts in cases related to compliance with the ECHR.<sup>94</sup>

Shortly after the order for reference for a preliminary ruling was made to the CJEU in *N.S.*, the ECtHR delivered its first judgment on Dublin II transfers and held that Member States may not presume that asylum seekers are treated in a manner complying with the ECHR.<sup>95</sup> Based on a similar set of facts to Case C-411/10, *M.S.S. v. Belgium & Greece* concerned the transfer of an Afghan asylum seeker from Belgium to Greece pursuant to the procedure set out in Dublin II.<sup>96</sup> Not only did the ECtHR find that Greece's asylum conditions violated the ECHR, but that Belgium had also violated the ECHR by transferring the applicant back to Greece and knowingly exposing him to the systemic deficiencies of that country's asylum procedure.<sup>97</sup>

The ECtHR delivered the *M.S.S.* ruling in January 2011 and it was referenced in *N.S.*<sup>98</sup> The CJEU drew attention to the instruments that the ECtHR had considered to determine whether there were systemic deficiencies in Greece's asylum procedure, particularly reports, correspondence, and proposals submitted by international organizations.<sup>99</sup> Given their participation in

<sup>90</sup> See *id.* ¶¶ 88, 99–103.

<sup>91</sup> See European Parliament Resolution of 19 May 2010 on the Institutional Aspects of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2011 O.J. C 161/E/12 ¶ 1.

<sup>92</sup> See *id.* ¶ 23; Press Release No. 104/09, Court of Justice of the European Union, The Treaty of Lisbon and the Court of Justice of the European Union (Nov. 30, 2009).

<sup>93</sup> See ECHR, *supra* note 37, art. 32.

<sup>94</sup> See European Parliament Resolution, *supra* note 91, ¶ 24. When both Courts have jurisdiction, simultaneous referrals of a single case to both Courts is not permitted. *Id.* ¶ 11.

<sup>95</sup> Advocate General, *supra* note 11, ¶¶ 6, 140; Patricia Mallia, *Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation*, 30 REFUGEE SURV. Q. 107, 108 (2011).

<sup>96</sup> C-411/10, *N.S.*, ¶ 88; *M.S.S. v. Belgium & Greece*, App. No. 30696/09, Eur. Ct. H.R. (2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>.

<sup>97</sup> C-411/10, *N.S.*, ¶¶ 88–89.

<sup>98</sup> See *id.* ¶¶ 88–91, 111–112.

<sup>99</sup> See *id.* ¶¶ 90–91.

the Council of the European Union, Member States may not claim to lack knowledge of the information contained in these instruments.<sup>100</sup> Accordingly, the CJEU concluded that Member States have sufficient instruments to assess the responsible state's compliance with fundamental rights.<sup>101</sup>

Although the two decisions came to similar conclusions—that a Member State must apply Dublin II in a manner that complies with the fundamental rights—*M.S.S.* addressed only the rights conferred by the ECHR, while *N.S.* addressed both the ECHR and the Charter of Fundamental Rights of the European Union.<sup>102</sup> The rulings of the ECtHR and the CJEU catalyzed a revision of Dublin II, which the EU codified in Council Regulation No. 604/2013.<sup>103</sup> Borrowing the language of the CJEU in *N.S.*, Article 3(2) of the recast regulation includes an express provision requiring Member States to continue examining an asylum application when transfer would risk inhuman or degrading treatment.<sup>104</sup> The revision also enhances the legal protections of asylum seekers by guaranteeing the right to appeal a transfer decision, free legal counsel, a personal interview, and access to detailed and translated information regarding the regulation.<sup>105</sup>

### III. ANALYSIS

The judgment of the CJEU in *N.S.* clarified the obligations of Member States under Dublin II, but did not ultimately effectuate Dublin II's goal of the fair sharing of asylum claims across the EU.<sup>106</sup> After the CJEU's judgment, there was no longer any doubt that every Member State has an affirmative obligation to examine the responsible state's asylum policies for systemic deficiencies before deporting an asylum seeker there.<sup>107</sup> Although there is a presumption that every Member State complies with fundamental rights, that presumption is rebuttable and not conclusive.<sup>108</sup> This rebuttable presumption acknowledges that the asylum system in some Member States may be so flawed as to be in violation of basic human rights.<sup>109</sup>

<sup>100</sup> See *id.* ¶ 92.

<sup>101</sup> See *id.* ¶¶ 91–92.

<sup>102</sup> See *id.* ¶¶ 109, 112, 115; *M.S.S.*, App. No. 30696/09 ¶¶ 367–368.

<sup>103</sup> See Council Regulation 604/2013, recital (1) in the Preamble, 2013 O.J. (L 180) 31, 31 (EC); Mallia, *supra* note 95, 108; Press Release, Council of the European Union, Recast of the Dublin Regulation: Enhancing the Efficiency of the Functioning of the Current System, 10526/1/13 REV 1 (Jun. 7, 2013).

<sup>104</sup> See C-411/10, *N.S.* ¶¶ 94, 96; Council Regulation 604/2013, *supra* note 103, art. 3(2), at 37.

<sup>105</sup> See EU Press Release, *supra* note 103, at 2–4.

<sup>106</sup> See Dublin II, *supra* note 5, recital (8) in the Preamble, at 1; C-411/10, *N.S.* ¶¶ 94, 96–98; *Mission to Greece*, *supra* note 25, ¶¶ 70, 118.

<sup>107</sup> See C-411/10, *N.S.* ¶ 94.

<sup>108</sup> See *id.* ¶¶ 104–105.

<sup>109</sup> See *id.*

By requiring Member States to be aware of those deficiencies, the judgment in *N.S.* compelled states to consider more seriously the principles of solidarity and fair sharing that underlie Dublin II, in accordance with Article 80 of the TFEU.<sup>110</sup> Member States are not permitted to blindly rely on Dublin II's objective criteria and risk violating the fundamental rights of asylum seekers in the process of transferring them to the designated responsible state.<sup>111</sup> The CJEU reaffirmed the ECtHR's ruling in *M.S.S.* by concluding that the fundamental rights of asylum seekers are guaranteed by the ECHR, and also extended this guarantee to the Charter of Fundamental Rights of the European Union.<sup>112</sup>

In both *N.S.* and the ECtHR's decision in *M.S.S.*, Greece was the primary example of a Member State with systemic deficiencies in its asylum procedures.<sup>113</sup> By highlighting that Dublin II transfers to Greece would infringe fundamental rights, the rulings of the CJEU and the ECtHR mandated other nations in the EU to share the migration inflows that had overburdened Greece.<sup>114</sup> Thus, these recent decisions seemed to open doors to a wider distribution of asylum claims across the EU.<sup>115</sup> Following these two decisions, transfers of asylum seekers to Greece under Dublin II have effectively halted.<sup>116</sup>

Despite efforts to improve the situation of its asylum system, the deplorable asylum policies and practices in Greece have persisted, if not worsened.<sup>117</sup> Recent border enforcement designed to reduce the number of illegal entries into Greece have only led to heightened risks and dangers for irregular bordercrossers.<sup>118</sup> Discrimination and violence against migrants is widespread, and has only escalated in recent years.<sup>119</sup>

Although the CJEU's decision in *N.S.* was codified in June 2013, the recast Dublin II continues to overburden the Greek asylum system.<sup>120</sup> Changes on paper will not lead to changes on the ground while vast differences in the

<sup>110</sup> See *id.* ¶¶ 10, 93; TFEU, *supra* note 14, art. 80.

<sup>111</sup> See C-411/10, *N.S.*, ¶ 94.

<sup>112</sup> See *id.* ¶¶ 109, 112, 115.

<sup>113</sup> See *id.* ¶¶ 87–89.

<sup>114</sup> See C-411/10, *N.S.* ¶¶ 89, 94–97; Advocate General, *supra* note 11, ¶ 1.

<sup>115</sup> See C-411/10, *N.S.* ¶¶ 94–97; Advocate General, *supra* note 11, ¶ 1.

<sup>116</sup> See *EASO Report*, *supra* note 5, at 9; *Mission to Greece*, *supra* note 25, ¶ 70.

<sup>117</sup> See Commissioner Report, *supra* note 29, at 3; *Mission to Greece*, *supra* note 25, ¶ 8.

<sup>118</sup> See *Amnesty International Report 2013*, *supra* note 82, at 108; *Frontier Europe*, *supra* note 84, at 7.

<sup>119</sup> See *Mission to Greece*, *supra* note 25, ¶ 8.

<sup>120</sup> See Council Regulation 604/2013, *supra* note 103, recital (1) in the Preamble; *Mission to Greece*, *supra* note 25, ¶ 84.

distribution of asylum claims across the EU remain.<sup>121</sup> Greece continues to receive a disproportionate number of asylum applications, and other Member States seem content to allow Greece to serve as their gatekeeper.<sup>122</sup>

As the systemic deficiencies of Greece's asylum system continue, it is increasingly apparent that Dublin II is not sustainable in the long run and needs to be further revised.<sup>123</sup> By requiring the point of first entry to be solely responsible for asylum applications, Dublin II will only continue to overburden Greece's dysfunctional asylum system.<sup>124</sup> In light of this reality, the Dublin II regulation should be amended to create channels for distributing asylum claims from Member States with systemic deficiencies in their asylum procedures to less-burdened states.<sup>125</sup> A wider and more balanced distribution of asylum claims across the EU would reflect the principle of solidarity and fair sharing of responsibility, which is at the heart of Dublin II.<sup>126</sup>

After years of negotiation, the European Parliament voted in June 2013 to adopt the CEAS, a package of EU asylum directives and regulations of which Dublin II is part.<sup>127</sup> While Dublin II operating on its own has not been effective in creating a balanced distribution of asylum flows, the EU is hopeful that the CEAS scheme will be.<sup>128</sup> The historic passage of the CEAS reemphasizes that shared responsibility and mutual confidence are important shared goals across the EU.<sup>129</sup> As the European Commission works to implement the CEAS and guarantee fair and humane treatment of asylum seekers regardless of where they enter the EU, it will undoubtedly face setbacks in Greece.<sup>130</sup> If Dublin II continues to operate in its current state, the goals of the CEAS will be impossible to meet.<sup>131</sup>

## CONCLUSION

The CJEU's judgment in *N.S.* coupled with the ECtHR's ruling in *M.S.S.* is a welcome clarification of obligations under Dublin II. In the wake of these two decisions, Member States halted the practice of transferring asylum seek-

<sup>121</sup> See JESUIT REFUGEE SERVICE & EUROPEAN COUNCIL ON REFUGEES AND EXILES, *The Dublin III Regulation Enters Into Force* (Jul. 19, 2013), available at [http://en.jrs.net/news\\_detail?TN=NEWS-20131216051559](http://en.jrs.net/news_detail?TN=NEWS-20131216051559).

<sup>122</sup> See *Enter at Your Peril*, *supra* note 78, at 3; A Common European Asylum System, *supra* note 14, at 1.

<sup>123</sup> See *Mission to Greece*, *supra* note 25, ¶¶ 70, 84.

<sup>124</sup> See *id.* ¶¶ 70, 84.

<sup>125</sup> See *id.* ¶ 84.

<sup>126</sup> See TFEU, *supra* note 14, art. 80; C-411/10, *N.S.* ¶ 10.

<sup>127</sup> See A Common European Asylum System, *supra* note 14, at 1–5.

<sup>128</sup> See *EU Puts Common Asylum System in Place*, *supra* note 8.

<sup>129</sup> See C-411/10, *N.S.* ¶ 79; EU Puts Common Asylum System in Place, *supra* note 8.

<sup>130</sup> See *Mission to Greece*, *supra* note 25, ¶ 70; Malmström Welcomes CEAS, *supra* note 2.

<sup>131</sup> See Malmström Welcomes CEAS, *supra* note 2.



ers to Greece, a state with an asylum system that unquestionably violated fundamental rights. Despite these efforts to lighten Greece's load, it continues to receive more claims than its faulty asylum system can handle. As the EU makes efforts to implement the CEAS, it will undoubtedly face a tension between the goal of joint responsibility between the Member States and the disproportionate burden that Greece faces under Dublin II. If the EU wishes to act in full accordance to the principles of solidarity and fair sharing, the Dublin II regulation must be further revised to incorporate mechanisms that shift asylum claims out of Greece to less burdened States.