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Guardian of Human Rights and Agent of Change:

The European Court of Human Rights' Influence on the Asylum Policy of the Member States of the European Union.

An Analysis of the Impact of the ECtHR's Judgment "M.S.S. v. Belgium and Greece" with particular Focus on Theories of Norm Diffusion.

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ABSTRACT

As the influx of refugees towards European countries continues to increase due to violent regional conflicts and as a consequence of the Arab Spring as well as the wars in Afghanistan, Iraq and Syria, the question of how to handle matters, such as the accommodation, administration and placement of these people, becomes more and more pressing. These issues – while essentially being a sensitive area of individual nation-states' sovereignty – have increasingly also become a European problem. Since the beginning of the 1990's, European integration in the area of asylum policy has continuously advanced. The structure, norms and objectives of the so-called Common European Asylum System (CEAS) have continuously drawn criticism – not least, from the European Court of Human Rights (ECtHR) which has undertaken numerous court proceedings regarding fundamental rights violations in this context. One of these cases is *M.S.S. v. Belgium and Greece* (*MSS*). The Court ruled in favour of the applicant, M.S.S., and concluded that two EU member states, Greece and Belgium, had violated the European Convention on Human Rights. The *MSS* Judgment can be categorised as a leading decision as it marks on the one hand a watershed in the jurisdiction of the ECtHR; on the other hand, it is a decision of great political influence among EU member states.

The observation that the case-law of the ECtHR causes strong reactions – also policy-wise – among EU member states, even though they are not directly concerned as court factions, leads to the first thesis this paper considers: The admission and proceeding of certain cases by the ECtHR can catalyse political and societal discourses which – under certain conditions – trigger policy changes in individual states. The second and main thesis derives from this assumption: By contributing to the evolution of protection standards regarding asylum-seekers' rights and asylum procedures in the member states of the European Union, the ECtHR has become an agent of change in the area of asylum policy.

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INTRODUCTION

International law influences national jurisdiction as well as national policies regarding various areas, such as human rights, environmental and economic policies, war crimes and labour rights. Until today, more than 28 permanent international courts (ICs) have been established which delivered judgments in more than 30,000 cases; among these, the Court of Justice of the European Union (ECJ) and the European Court of Human Rights (ECtHR; hereinafter also 'Court') are the most active international courts (cf. Alter 2011: 17 f.). Since its establishment in 1959 and its reform in 1998, the European Court of Human Rights has aimed at contributing to the promotion and protection of human rights among the 47 signatory states of the "Convention for the Protection of Human Rights and Fundamental Freedoms" (ECHR; hereinafter also 'Convention'). Furthermore, and with regard to the European Union's (EU) legislative acts, it has intervened on various occasions on behalf of human rights protection. This holds especially true for the EU's asylum policy, which – since the beginning of its harmonisation process – has been the source of vehement criticism as well as multiple judicial proceedings.

As the influx of refugees towards European countries continues to increase due to violent regional conflicts and as a consequence of the Arab Spring as well as the wars in Afghanistan, Iraq and Syria, the question of how to handle problems, such as the accommodation, administration and placement of these people, becomes more and more pressing. These issues – while essentially being a sensitive area of individual nation-states' sovereignty – have increasingly also become a European problem. When the Dublin Convention (DC) came into force in 1997, a formal co-operation among fifteen European Countries constituting a common procedure on finding the state responsible for processing an asylum application was established for the first time. This was the beginning of the Dublin System (DS). Since then, European integration in the area of asylum policy has continuously advanced. Although still to a large extent a divided competence between the EU and its member states, the coming into force of the so-called Dublin II Regulation in 2003 characterises the first step towards an integrated area of asylum policy, bound to EU legislation. Within the scope of the Dublin System, the Dublin II Regulation was corroborated by several directives concerning reception standards of asylum-seekers as well as procedural requirements for asylum applications. However, the structure, norms[1] and objectives of the Dublin System have continuously drawn criticism – not least, from the ECtHR. Subsequently, the Dublin II Regulation has led to numerous court proceedings regarding fundamental rights violations. These cases particularly addressed insufficient accommodation and maltreatment of asylum-seekers as well as a breach of the Non-Refoulement Principle[2] through a transfer to other EU member states or third countries, respectively.

[1] According to Krasner "norms are standards of behaviour defined in terms of rights and obligations" (Krasner 1982: 186). Social norms compose a sub-category of norms. Jackson defines them as the "customary rules of behaviour that coordinate our interactions with others" (Jackson 1965: 302). These norms evolve through time and space and, therefore, vary from one generation to another as well as among social groups and entire cultural setting. Smith differentiates between a global and a regional dimension of norms. Whereas global norms include essential principles in inter-state relations, such as diplomatic immunity, sovereignty, and free trade, regional norms mark expectations or preferences among states that are specific to a region (cf. Smith 2004: 14 f.).

[2] Non-Refoulement (*prohibition of expulsion or return*): The 'Non-Refoulement Principle' is constituted in Article 33 I of the Convention on the Status of Refugees, also Geneva Convention for Refugees Article (GCR). It states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories

One of these cases is *M.S.S. v. Belgium and Greece* (*MSS*). The case concerned an Afghan citizen (M.S.S.) travelling through Greece to Belgium where he applied for asylum. Belgium, although being informed about the deficiencies of the Greek asylum system, insisted on returning M.S.S. to Greece – in line with the Dublin II Regulation. M.S.S. made several attempts to legally challenge this decision but was sent back to Greece, nonetheless. When arriving in Greece he was detained twice, held in degrading conditions, did not receive a thorough asylum examination and finally ended up living in a park. The judgment concerning M.S.S. was delivered by the Grand Chamber of the European Court of Human Rights in January 2011. The Court ruled in favour of M.S.S. and concluded that Greece as well as Belgium had violated the Convention by exposing M.S.S. to the conditions described above without giving him access to an effective remedy. The *MSS* Judgment can be categorised as a leading decision because it marks a watershed in the jurisdiction of the ECtHR. *MSS* is such a drastic shift because it is the first Dublin Case decided upon in the Grand Chamber, which was ruled in favour of the applicant and on the basis of a breach of Articles 3[3] and 13[4] ECHR. Moreover, it concerned two European Union member states at the same time: Belgium, on the one hand, which had expelled M.S.S. in line with the Dublin II Regulation, and Greece, on the other hand, which had taken him back and exposed him to conditions conflicting with the above-cited Article 3 ECHR. Because of its vast legal and political implications, the *MSS* Judgment has triggered various reactions: Around the time of the first hearing as well as after the delivery of the judgment comprehensive policy changes can be observed – not only regarding the parties of the proceedings but also in many other member states of the European Union.

The observation that the case-law of the European Court of Human Rights causes strong reactions – also policy-wise – among EU member states, even though they are not directly concerned as court factions, leads to the first thesis this paper considers: The admission and proceeding of certain cases by the ECtHR can catalyse political and societal discourses which – under certain conditions – trigger policy changes in individual states. The second and main thesis derives from this assumption: By contributing to the evolution of protection standards regarding asylum-seekers' rights and asylum procedures in the member states of the European Union the ECtHR has become an agent of change in the area of asylum policy. In this context, this thesis will consider the following questions: How and to what extent is the ECtHR an agent of change? By means of which mechanisms do the norms established by the Court diffuse to its contracting parties and – infinitely more important – beyond the actual concerned parties of one case respectively judgment? Which agents, actors and structures enable the ECtHR's normative power[5] in the field of asylum policy? The thesis' main finding is that, in view of the norm diffusion process triggered by the *MSS* Judgment, the

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where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

[3] Article 3 ECHR (*Prohibition of torture*)**: "**No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

[4] Article 13 ECHR (*Right to an effective remedy*): **"**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".

[4] Article 13 ECHR (*Right to an effective remedy*): "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".

[5] Normative Power: With regard to the European Union, Ian Manners identifies 'normative power' as the power to alter structures, institutions and policies through interaction by diffusing norms. A normative power is an entity, which – built on a normative basis – "act[s] in a normative way in world politics" and which furthermore "can be conceptualized as a changer of norms in the international system" (Manners 2002: 252). It seeks to redefine and re-interpret international norms according to its own norms regime by extending its normative system.

Court has indeed proven to be a powerful change agent with regard to asylum-seekers' rights. His power however, also derives from the fact that its specific political and legal environment, in particular the EU, as well as various other actors essentially support and promote its authority.

The relevance of this paper's underlying theses and findings is corroborated by the observation that the compatibility between human rights protection standards and the EU's asylum system as well as its member states' practises cannot be taken for granted. Since the ECtHR is *per definitionem* the institution which guards the fundamental rights established in the ECHR, it is thus the decisive monitoring entity regarding signatory states' compliance with its human rights regime[6]. Analysing the Court's role in promoting and developing fundamental rights in the field of asylum policy over time and space is therefore an important step towards identifying the mechanisms and mediating factors that actually enable or enhance its normative power as well as the compliance of its signatory states. As Anagnostou puts it with respect to the theoretical foundations of the Court's influence,

> "*attempts to explore the national and non-legal factors that influence domestic implementation of the ECtHR's judgments are still at an embryonic stage. Making progress in this direction, though, is essential in order to move beyond a descriptive and still mainly legally centred institutional analysis.*" (Anagnostou 2013: 3)

Thus, this paper aims at complementing the existing literature on the normative and transformative power of international courts by retracing the ECtHR's role as an agent of change in the area of European asylum policies. It will, furthermore, apply aspects of norm diffusion theories to the context of the ECtHR and, thereby, identify the factors and mechanisms underlying the diffusion of norms from the ECtHR to the member states of the EU by means of the exemplary case *MSS*.

The paper's theoretical foundation is rooted in the findings of norm diffusion theorisers and Europeanization researchers. The selection of diffusion theory seems reasonable as it considers on the one hand how norms spread from the international to the domestic level, and thereby cause policy changes. On the other hand, norm diffusion scholars have identified mechanisms that explain states' behaviour, as well as intervening variables that enhance the emergence, promotion and dispersion of certain norms among states on a global as well as on the domestic scale. Here, in particular, the works of Tanja Börzel and Thomas Risse will provide a basis for the author's considerations on the underlying topic. Moreover, the authors and researchers Karen Alter, Laurence Helfer and Erik Voeten as well as Dia Anagnostou will serve as further theoretical references. These authors offer different perspectives on how and why international courts transport norms and why certain norms diffuse from the international to the domestic level. Their findings will be taken into consideration when the role of the ECtHR as an agent of change is analysed.

This thesis will proceed as follows: First, a historic and political contextualisation of the Dublin System as well as a brief overview of the evolution of the ECtHR will be taken up. Afterwards, the methodological and theoretical framework of this paper will be presented. This section will, first, address the underlying method, the single-case study, as well as the assumed variables to the select-

[6] According to Krasner, "regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations" (Krasner 1982: 186). With regard to this paper's research proposal, norms will play a particularly important role. Following Donnelly, the term "human rights regime" is used to describe the emergence and growth of international action regarding the issue and area of human rights since the End of World War II 1945. "This growth can be explained largely by expanding perceptions of moral interdependence and community, increased national commitment, the growing ideological appeal of human rights, and changes in the distributions of international power" (Donnelly 1986: 599).

ed case. Then, norm diffusion theory as well as different mechanisms and intervening factors of norm diffusion processes will be described. Subsequently, the second and main part of this paper will present the case of *MSS en detail*, before it will briefly summarise the responses of the selected member states of the European Union in order to make the supposed diffusion process visible. The following section will address the influence of further norm enhancing actors that play a decisive role in order to allow the Court to establish and spread 'new' norms. The final chapter will tie up the loose ends by asking about the ECtHR's role as an agent of change with regard to asylum policies in the European Union's member states. Taking up the previously defined concepts and mechanisms of norm diffusion, this section will aim at answering the underlying research questions regarding the ECtHR's role and influence as an agent of change in the European asylum policy.

CONTEXTUALISATION

1 THE DUBLIN SYSTEM – ASYLUM POLICY IN THE EUROPEAN CONTEXT: BETWEEN NATION-STATES' SOVEREIGNTY AND EUROPEAN SOLUTIONS[7]

Asylum policy is traditionally one of the most sensitive areas of a nation-state's sovereign competencies. The right to determine who is welcome to stay within a country's territory and who is not sits at the core of a nation-state's self-image and identity. A transfer of this right to another entity is a serious admission and only tenable vis-à-vis a country's population if particular circumstances and situations necessitate such an action.

The 1980s and 1990s brought about precisely such circumstances: Violent conflicts, for instance in the Balkans, drove massive streams of refugees towards many European countries. Often these refugee movements were perceived to be a de-stabilising factor, and even a threat to a country's security. When the number of asylum applications peaked in 1992, various shortcomings in terms of financial resources, administrative staff and bureaucratic preparedness had already been noticeable. In this context, the first attempts to accomplish a European solution were made: The Dublin Convention, which was signed in 1990, established a formal cooperation between the 15 member states of the European Community (EC) regarding a common procedure on the determination of the state responsible to initiate an asylum procedure ('On State Only Principle'). The Dublin System was initiated.

The coming into effect of the Treaty of Amsterdam marks the second and fundamental step of policy harmonisation in the area of asylum: "Since the Amsterdam Treaty (…), it has been possible to speak of a common EU migration and asylum policy with significant development of institutional roles and policy" (Geddes 2013: 8). Hereafter, the evolution of a common European asylum system can be divided into three phases, of which the first is called the 'Tampere Programme'. Initiated at the European Council meeting at Tampere in 1999 in order to adopt a common 'Area of Freedom, Security and Justice', the 'Tampere Programme' (1999-2004) aimed at the creation of a 'Common European Asylum System' (CEAS). The second phase of harmonisation, the 'Hague Programme'

[7] This section draws on Günther, J.: Differentiated Integration in the Area of European Asylum Policy. The Dublin System and the CEAS – a Trend towards Integration and Unification?, Seminararbeit, Freie Universität Berlin, 2014.

(2004-2009), superseded the Tampere Programme and substantially advanced the CEAS: Under that programme three directives and one regulation, the Dublin II Regulation (EC) No. 343/2003, were passed. The directives aimed at standardising the criteria and procedures to determine the refugee status as well as at establishing reception standards, for instance rights to social benefits and social security services (cf. Hatton 2012: 9 f.). The Dublin II Regulation replaced the Dublin Convention. It was officially applied by all EU member states and, additionally, by Iceland, Liechtenstein, Norway and Switzerland (cf. Europa.de 2011). When coming into force, the regulation was also supposed to simplify and optimise the by-laws of the Dublin Convention. It established a catalogue of criteria determining the state responsible for dealing with an asylum-seeker. In this regard, the Dublin II Regulation adopted the 'Mutual Trust Principle' which was constituted by the Dublin Convention. This principle denotes that all member states of the Dublin System are "safe third countries" and undertake asylum procedures thoroughly and responsibly in equal measure (cf. Dublin II 2003: Recitals 2, 7). At the same time, it adopted the Dublin Convention's so-called Sovereignty Clause (Article 3 II) which established that states can intervene and assume asylum procedures even if they are not actually responsible (cf. Moreno-Lax 2012: 6).[8]

The third phase of harmonisation began in 2009 with the 'Stockholm Programme' (2009-2014), which aimed at completing the CEAS (cf. ECRE 2014). Under this programme, the Dublin II Regulation was revised and finally replaced with the Dublin III Regulation, which came into force on 1 January 2014. The revision, however, only touched upon the Dublin System's foundations to limited extent: The "One State Only"-Principle stayed in place; the criteria according to which the responsible state for an asylum application is selected have only been further differentiated and completed. (cf. Bender/ Bethke 2013: 364). Nonetheless, the Sovereignty Clause was abolished and the Suspension Clause integrated, instead. Thus, instead of assuming responsibility for asylum applications, which actually should be undertaken by another Dublin state, member states now have to step in and process the application themselves whenever there is evidence that the actually responsible state's asylum system might bear systematic deficiencies.[9] All European Union member states as well as the former signatories of the Dublin Convention and the Dublin II Regulation have also joined the Dublin III Regulation.

2 THE DEVELOPMENT AND ROLE OF THE ECTHR

The history of the European Court of Human Rights begins with the establishment of the Council of Europe in 1949 and the establishment of the European Convention on Human Rights and Fundamental Liberties. The Convention was signed on 4 November 1950 and entered into force in September 1953. Its major goal was to initiate a legally binding regime, which promoted the rights of the United Nations' Universal Declaration of Human Rights (UDHR) (1948). Hence, the content of the

[8] 'Sovereignty Clause': "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." (Dublin II 2003: Art. 3 II)

[9] 'Suspension Clause': "Where it is impossible to transfer an applicant to the Member State primarily designated 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 inhuman 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." (Dublin III 2013: Art. 2)

ECHR rights is essentially derived from the UDHR's wording (cf. Sweeney 2013: 11; Rainey et al. 2014: 3). In order to guarantee the enforcements of the Convention's articles, three organs were constituted: the European Commission on Human Rights (established in 1954), the European Court of Human Rights (established in 1959) and the Committee of Ministers of the Council of Europe (CoM), which consists of the signatory states' foreign ministers. Originally, the member states of the ECHR and – if these member states had approved of it – legal and natural persons were allowed to lodge an individual complaint before the European Commission on Human Rights, which first examined the admissibility of the complaint. The Commission then produced a report, which was handed over to the Committee of Ministers. Hereafter, the Commission as well as every concerned member state could address the ECtHR within a period of three months. Natural persons did not have that right until the Additional Protocol No. 9 was established, which gave individuals the possibility to directly address the ECtHR under the condition that the concerned member state had ratified the protocol (cf. ECtHR 2003).

With the admission of new member states in the 1990s, the number of complaints rose drastically. A reform of the convention's monitoring organs became more and more necessary and was – with the coming into effect of the Additional Protocol No. 11 in 1998 – finally successful. This protocol created the ECtHR in its current form, as a permanent court, whose jurisdiction is legally binding, while at the same time abolishing the judicial power of the Committee of Ministers (cf. Rainey et al. 2014: 9). Since its reforms in 1994 and 1998 every contracting state of the ECHR (inter-state application) as well as any individual person (individual application) can directly address the ECtHR if they have become victims of a violation of the rights that are guaranteed in the Convention. As a consequence of these revisions, the Court's case-load further increased and the 'Pilot Judgment Procedure' (Rule 69) was introduced. This procedure collects and summarises *repetitive cases*, which "derive from a common dysfunction at the national level" (Rainey et al. 2014: 12) in order to deliver one respective judgment.

Procedures are generally open to the public, unless the chambers decide otherwise. The same is true for the written pieces of evidence supplied. In the case of an individual application, one section of the court is declared responsible, which then has to select a rapporteur. The rapporteur must then decide if a committee or a chamber should deal with the case. Afterwards, these organs must first examine the admissibility of the case (admissibility procedure[10]), before they can actually initiate the procedure or – if the case is of particular complexity – transfer it to the Grand Chamber (cf. Rainey et al. 2014: 10). After admitting a case, a chamber can ask the parties before the court to supply additional evidence, an application for fair compensation as well as to participate in a public hearing before the court (official proceedings) (cf. BiHR 2013: 2). All chambers decide according to majority voting. Every judge can attach a special note to the judgment, either in favour or against. Every party before the Court can apply for a referral of the case to the Grand Chamber within three months after the judgment. After this period, the judgment is legally binding. In the case of a referral to the

[10] The admissibility criteria have not changed after Protocol 11 entered into force. They are constituted in Article 34, 35 ECHR: 1. Can the applicant claim to be a victim of a violation of a Convention right? 2. Is the respondent State a party to the Convention? 3. Have domestic remedies been exhausted? 4. Is the application filed within the six-month time limit? 5. Is the application signed? 6. Has the application been brought before? 7. Is the application compatible with the Convention? 8. Is the application manifestly ill-founded? 9. Is there and abuse of the right of petition? (cf. Rainey et al. 2014: 11)

Grand Chamber, its judgment – also passed by majority voting – is final and definite. These judgments are binding for all contracting states, against which the complaint was lodged; other signatory states of the ECHR are not obliged to abide.[11]

The ECtHR consists of the same number of judges as the ECHR has signatory states. At the moment, their number is 47. The Parliamentary Assembly of the Council of Europe elects all judges for six year terms; during this time the judges do not represent their countries or carry out any other activity, which might jeopardise their independence. The Court is divided into four sections with a rotation of personnel every three years. Committees of three judges are constituted within each section for one year, chambers of seven judges are selected for each case according to the rotation principle. The Grand Chamber consists of 17 judges; in addition the president, the vice-president as well as the presidents of the sections participate in Grand Chamber cases (cf. BiHR 2013: 1). The Committee of Ministers is responsible for monitoring the implementation of the ECtHR's judgments within the states that have violated the convention's rights (cf. Rainey et al. 2014: 12).

METHODOLOGICAL AND THEORETICAL FRAMEWORK

3 METHODOLOGY: SINGLE-CASE STUDY

The method underlying this thesis is an embedded single-case study research design. According to Abercrombie et al. a case study is the

> „*detailed examination of a single example of a class of phenomena, a case study cannot provide reliable information about the broader class, but it may be useful in the preliminary stages of an investigation since it provides hypotheses, which may be tested systematically with a larger number of cases"* (Abercrombie et al. 1984: 34).

A case is thereby defined as an "instance of a class of events" (Bennett/ George 2004: 17) and "refers to a phenomenon of scientific interest (…) that the investigator chooses to study with the aim of developing theory (or 'generic knowledge')" (Bennett/ George 2004: 17f.). Thus, researchers use case studies aiming at examining "the conditions under which specified outcomes occur, and the mechanisms through which they occur" (Bennett/ George 2004: 31). Single-case studies have caused some criticism, e.g. because they supposedly entail the risk "of indeterminacy in the face of more than one possible explanation" (Bennett/ George 2004: 32). Barzelay however, defends – with regard to Marshaw's book on "Bureaucratic Justice" – the explanatory power and scientific validity of single-case studies which are "an extremely valuable method of public management research" (Barzelay 1993: 306) and furthermore capable of supporting empirical generalizations (cf. Barzelay 1993: 305). With regard to this paper's research questions, a single-case study seems reasonable and enlightening for three reasons: first, it is helpful with regard to the testing of the explanatory power of norm diffusion theory, which forms this thesis' theoretical basis; second, a relatively large number of intervening variables can be taken into account when identifying the conditions triggering a causal mechanism; third, complex causal relations and interdependencies, such as interaction mechanisms, can be considered by analysing a single case (cf. Bennett/ George 2004: 21 f.).

[11] Art. 46 I ECHR states "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".

The case selection underlying this thesis follows the logic of a critical case with regard to the objective of testing an already established theory, namely norm diffusion theory. Norm diffusion scholars have identified and extensively elaborated on the mechanisms and circumstances causing and enabling the diffusion of norms. Thus, a single-case study, which meets "all of the conditions for testing the theory, can confirm, challenge, or extend the theory" (Yin 2014: 47). Furthermore, the case selection follows the rationale of an "extreme case" (Yin 2014: 47) as will be demonstrated in the following chapter. With regard to this paper's underlying research question, the decision for a single-case study roots in the desire to comprehend the different aspects of the European Court of Human Rights' role in the area of asylum policy of the EU member states. The objective is to prove the thesis of the ECtHR being an agent of change. In this context, a single-case study offers the possibility of analysing the case's sub-units as well as its overall-impact. Accordingly, the way the case is presented and analysed can be also referred to as an embedded case study (cf. Yin 2014: 50) because the assessment refers to a number of intervening variables and divergent outcomes. The analysis is geared to the four elements identified by Barzelay: observation, description, normative reasoning, and evaluation (cf. Barzelay 1993: 312). Moreover, as already mentioned, it will be structured and corroborated by the conceptual resources of norm diffusion theory.

3.1 Case Selection

This paper essentially focuses upon one case that was taken before the ECtHR: The Grand Chamber case "M.S.S. v. Belgium and Greece"[12].

The Afghan interpreter M.S.S. lodged an appeal before the ECtHR in 2009 claiming that his treatment before and during his asylum procedure by both Belgium and Greece led to a violation of the Articles 3 and 13[13] of the ECHR. The case was decided in 2011 – in favour of M.S.S. This decision marks a fundamental change in the ECtHR's jurisdiction. This assessment is based on the observation of the ECtHR's case-law with regard to "Dublin Cases" during the past decade. *MSS* is the first case concerning the Dublin System, which the Grand Chamber decided in favour of the claimant referring to a breach of Article 3 of the ECHR. Furthermore, not only the country that actively created the conditions in conflict with Article 3 ECHR, but also the country sending M.S.S. into these conditions was found guilty of a violation of the Convention. Such an essential shift in direction entails strong reactions. The judgment was viewed as a "leading decision" among media and non-governmental organisations (NGOs) (cf. Süddeutsche 2011a; Zeit online 2011a; ProAsyl 2011a) and assumed to lay a cornerstone for the implementation of an effective human rights protection within European asylum policies. *MSS* can, thus, be viewed as the most important ECtHR case regarding European asylum law and the Dublin System in the past decade. It has evoked heated

[12] Admittedly, *MSS* is not the only case concerned with the Dublin System respectively European or national asylum policies that was decided upon in the ECtHR's Grand Chamber. Recently, the Grand Chamber judgments "Mohammed v. Austria" (June 2013), "Sharif v. Austria" (December 2013) and "Mohammadi v. Austria" (July 2014) dealt with similar complaints (cf. ECtHR 2014a: 3 f.). Here, the frequent prosecution of Austrian asylum practices is especially peculiar. Another case referring to the Dublin System was currently decided on be the Court: "Tarakhel v. Switzerland". As the other cases did as well, Tarakhel most importantly refers to a violation of Article 3 of the ECHR. A hearing has taken place in February 2014 (cf. ECtHR 2014b); the judgment was delivered on 4 November 2014 in favour of the Tarakhel family assessing that – in particular for children – the Italian reception conditions were not compatible with the protection provided by Article 3 of the ECHR [this footnote was updated by the author retrospectively].

[13] Please see annexe IV (ECHR) for information on the content of specific articles of the ECHR.

debates about the power of human rights in asylum policy as well as a great number of scientific discussions about the effect, impact and consequences of this jurisdiction (cf. ECtHR/ MSS 2011: §31 ff.). Since *MSS* marks a watershed in the ECtHR's jurisdiction, it also appears to be the natural main reference point in order to retrace and analyse the diffusional impact of the ECtHR's case-law. It will thus support the author's main thesis which claims that the ECtHR's jurisdiction influences the asylum policies of EU member states by catalysing, promoting and diffusing human rights norms. Selecting *MSS* as main case in order to show the direction and impacts of diffusion from the ECtHR to EU member states follows the 'logic of extreme cases': Since it can be expected that such an extreme case entails particularly strong reactions, causal mechanisms become starkly evident. Thus, *MSS* can serve as a vivid example of the power of the ECtHR as an agent of change that generates, re-interprets and diffuses international norms.

3.2 Variables

This chapter's goal is to briefly introduce the variables analysed in this thesis. The ECtHR's case-law is considered the independent variable as it marks the starting point of the diffusion process. It is assumed that the content and form of the Court's jurisdiction, namely the *MSS* Judgment, does not change over time, or when confronted with new information. This dimension will be further elaborated on in chapter 5. In this regard, the asylum policy of the member states of the European Union, which – hence the observation – changes in consequence of ECtHR case-law, is considered the dependent variable. It will be addressed *en detail* and analysed in chapter 6. Intervening variables are various in this thesis' case. However, four groups of actors and structures, which influence and filter the effects of *MSS* case-law will be introduced in detail: Veto points or veto players, formal institutions, change agents or norm entrepreneurs, and epistemic communities. These variables will then be addressed in theory (chapter 4.5) as well as specifically with regard to the *MSS* Judgment (chapter 7.2).

4 The Diffusion of Norms and Policies

This entire section aims at giving a brief and certainly not exhaustive overview over the existing – and for the course and goal of this thesis relevant – literature on the topic of norm diffusion. Since norm diffusion literature is fairly extensive, the following chapters will focus on core arguments feeding into the paper's context which is, in particular, the normative power of international courts. In this regard, the reference literature is selected according to its significance, exemplarity as well as with respect to the goal of representing different perspectives on the topic.

Norm diffusion as understood and demonstrated in this paper should be defined as the "process through which ideas, policies, and institutions spread transnationally, i.e., across borders and regions, time and space" (Stumbaum 2014: 8; cf. Börzel/ Risse 2012; Gilardi 2010; Dobbin et al. 2007; Strang/Meyer 1993). Norm Diffusion theory in political science is based on the observation that certain policies were taken up by different actors over time, which led to a policy convergence in these areas (cf. Shipan/ Volden 2012: 1 f.; Börzel/ Risse 2012: 2; Dobbin et al. 2007: 450). While seeking to explain the general phenomenon of norm diffusion, theorists from sociology and political

science as well as economists also aim at explaining the patterns of diffusion of particular policies to and among certain countries at specific points in time (cf. Dobbin et al. 2007: 450). Why and how these policies, norms or practices diffused the way they did, are core questions of diffusion theory.

The chapter's sub-sections will first describe the evolution of norm diffusion theory. Hereafter, different approaches to norm diffusion will be presented, before norm diffusion mechanisms and intervening factors as well as variables will be addressed.

4.1 The Evolution of Norm Diffusion Theory

The emergence of norm and policy diffusion theory dates back to the 1950s. The first theory established in this field is known as 'social diffusion theory' or 'diffusion of innovations theory' and was elaborated by Everett M. Rogers in his book "The Diffusion of Innovations" (1962). Accordingly, diffusion theories are rooted in sociology where they were used to explain the changing behaviour and attitude towards specific cultural, political or social phenomena (cf. Rogers 2003; Dobbin et al. 2007: 449) before they were taken up by other disciplines. During the 1990s diffusion theory became increasingly popular among social scientists fuelled by the desire to explain rapid social change in the light of drastic (technological) innovations (cf. Elkins/ Simmons 2004: 4). At that time, the institutional aspects of diffusion were taken more and more into consideration. Strang and Meyer, for instance, have analysed how institutional conditions within social systems affected the form and intensity of diffusion. They emphasise the meaning of cultural factors in diffusion processes which define the adopter's (the person who takes up the new idea or behaviour) identities and therefore are decisive for the acceptance of new ideas (cf. Strang/ Meyer 1993: 488).

Later on, specific mechanisms of norm diffusion were taken into account when explaining diffusion processes. On the one hand, mechanisms like *learning*, *adaptation* or *coercion* were analysed in this context. On the other hand, and with regard to diffusion processes among states, factors such as regional variances and convergence through geographic proximity were also examined in terms of their effects on diffusing ideas and norms (cf. Berry/ Berry 2007: 258).

As of now, Gilardi and Meseguer have identified three generations of diffusion theorists (cf. Gilardi/ Meseguer 2008). Howlett and Rayner claim that the first generation of diffusion literature was mainly concerned with the conceptualisation of diffusion patterns. The second generation added intervening structures and factors, such as globalisation, democratisation and market instruments as a background for processes of diffusion (cf. Howlett/ Rayner 2008). Furthermore, they identified basic mechanisms of diffusion. The third generation included an empirical framework, sophisticated quantitative methodologies as well as causal mechanisms of diffusion and their comparative analysis (cf. Stumbaum 2014: 8; Heinze 2011; Rayner/Howlett 2008; Shipan/ Volden 2008). Howlett and Rayner argue that, while advancing diffusion theory substantially, the third generation still lacks a more pluralistic methodological framework which is sensitive to the context in which diffusion occurs (cf. Howlett/ Rayner 2008: 387 f.).

4.2 Theoretical Approaches to Norm and Policy Diffusion

Basically, two theoretical and conceptual approaches in the analysis of norm diffusion can be found in literature: a rationalist approach and a sociological or constructivist perspective (cf. Stumbaum 2014: 7; Börzel/ Risse 2009: 2, Checkel 1997). Both approaches are rooted in the theoretical sphere of institutionalism. While rationalist institutionalism assumes that a 'logic of consequentialism' determines actors' behaviour and decisions, the sociological or constructivist approach considers a 'logic of appropriateness to be the driving force behind actors' choices (cf. Börzel/ Risse 2009: 2, 7; March/ Olsen 2009). The logic of consequentialism supposes that actors choose and decide rationally and goal-oriented according to their given and definite preferences which are inserted exogenously; "rules simply reflect interests and powers, or they are irrelevant" (cf. March/ Olsen 2009: 5). As Heinze puts it, "actor's behavior then is instrumental according to their interests and preferences (or desires), their available resources and opportunities as well as their expectations and beliefs regarding the effects of their own behaviour" (Heinze 2011: 9). Actors in the above-mentioned sense may include all persons and institutions that take influence in the policy-making process, such as national governments but also courts.

On the other hand, the sociological/ constructivist approach argues that impulses of persuasion are at the centre of norm diffusion processes leading to a change in domestic policies. As this thesis will rather pursue a constructivist approach, this perspective will be explained in more detail. Following the argumentation of the sociological/ constructivist approach, continuous interaction between governments and other relevant actors can gradually change norm paradigms and identities of these actors (cf. Wendt 1994: 384; Stumbaum 2014: 6). Heinze argues that, according to constructivist approaches, "the emergence of international norms can alter the normative structures underlying world politics and it can render the adoption of a specific policy as a more appropriate and legitimate choice" (Heinze 2011: 11). Accordingly, sociological institutionalists assume that norm diffusion "leads to domestic change through a socialization and collective learning process resulting in norm internalization and the development of new identities" (Börzel/ Risse 2009: 2). As this approach takes the logic of appropriateness (March/ Olsen 2009) as a basis for its analysis of actors' behaviour, actors are influenced by common standards of behaviour, collective social rules and mutually shared values. Thus, their decisions are based on situational interpretations of what is right with respect to the supposed consequences of their decisions (cf. Heinze: 9; Börzel/ Risse 2009: 10; Sending 2002: 444 f.). What actors perceive as 'proper behaviour' in this regard also defines their goals and strategies which primarily aim at fulfilling social expectations (cf. Börzel/ Risse 2009: 10). As Dobbin et al. summarise in a particularly apt manner, "for constructivists, understanding how public policies become socially accepted is the key to understanding why they diffuse" (Dobbin et al. 2007: 452). In addition, the sociological or constructive perspectives consider the role of social networks, epistemic communities and international organisations as important enhancers of the diffusion of ideas and knowlegde. Moreover, these actors define norms, such as economic progress or human rights, and, thus, actively create and promote certain sets of norms (cf. Dobbin et al. 2007: 449; Finnemore & Sikkink 2001, Haas 1992). Change in this regard is a result of socialisation and learning on the one hand and a political culture based on co-operation and mediating or intervening factors on the other hand (cf. Börzel Risse 2009: 18).

To conclude with, it must be stated that sociological/ constructivist approaches as well as rationalist perspectives are by no means exclusive. On the contrary, as both approaches emerged from the desire to explain the change of policies, practices and structures, due to an adoption of international norms they have extensive over-laps, for instance regarding the mechanisms presumably underlying these changes.

4.3 Conditions for Norm Diffusion

As Börzel and Risse put it, there must be some degree of "misfit" in order to initiate change. This so-called misfit or "mismatch" (cf. Héritier 1996) between domestic policies and the internationally created norms leads to adaptational pressures, which – if taken up and supported by domestic actors – might result in domestic change (cf. Börzel/ Risse 2009: 1f.). High levels of incompatibility, however, may also challenge the domestic policy-making apparatus which then increasingly suffers from compliance problems. These processes "might even threaten deeply collective understandings of national identity as it touches upon constitutive norms such as state sovereignty" (Börzel/ Risse 2009: 7). A high degree of misfit might thus lead to a failed implementation of newly emerged international forms. As Hirata points out, international norm diffusion has proven to be particularly fragile in the area of human rights due to an often small congruence between domestic and international norms (cf. Hirata 2008: 181).

Generally, the equation can be set up that the "lower the capability between European and domestic processes, policies, and institutions, the higher the adaptational pressure" (Börzel/ Risse 2000: 6); in the case of a minor misfit, the adaptational pressure is equally little as the 'new' norms do not cause compliance problems. Accordingly, a minor misfit is not likely result in any major policy changes either. As Héritier and Knill point out, a policy or norm misfit does not *per se* lead to reform or policy change. In order to actually initiate change, reform capacity with regard to overcoming veto players is needed (cf. Héritier/ Knill 2001: 2). Finnemore and Sikkink argue „that a combination of pressure for conformity, desire to enhance international legitimation, and the desire of state leaders to enhance their self-esteem facilitates norm cascades (Finnemore/ Sikkink 1998: 895). How policy-makers or domestic actors react to the adaptational pressure substantially depends on further conditions that must be met before change actually happens. Börzel and Risse identify two so-called 'mediating factors' which will be picked up in the course of this section: a) *multiple veto points* in a country's institutional structure which offer resistance to particular or all aspects of change, and b) *formal institutions* which provide (civil society) actors with information regarding the aspired change (cf. Börzel/ Risse 2009: 2). Furthermore, *change agents* and *epistemic communities* are important enhancers of policy change, which aim at persuading a critical mass of domestic actors (national level) or states (international level) to embrace new norms (cf. Finnemore/ Sikkink 1998: 895). These agents will be considered in detail in chapters 4.5 and 7.2.

With regard to international courts, such as the European Court of Human Rights, another phenomenon must be briefly introduced in this context: the *erga omnes effect*[14]. This concept refers

[14] As Helfer and Voeten note: "This Latin phrase, meaning 'flowing to all', signals that the influence of a court decision extends beyond the litigants in a particular dispute. Formally, the judgments of international courts (…) are binding only *inter partes*. They do not bind other states or the tribunal in future cases. This principle reflects national sover-

to the observation that ECtHR judgments have caused policy changes in other countries than the ones being parties of the actual proceedings. For the course and argument of this paper, the *erga omnes effect* is a fundamental reference point. The assumption that the *MSS* Judgment has led to a process of norm diffusion among member states of the European Union roots in the observation of precisely this effect: Besides Belgium and Greece, also other EU and Dublin member states responded to the judgment by changing aspects of their individual asylum policies. Helfer and Voeten identify three mechanisms that are essential for the influence of international court rulings that affect states that were not a party of the proceedings: *pre-empting future litigation*[15], *persuasive authority*[16] and *agenda-setting*[17] (cf. Helfer/ Voeten 2014: 80 ff.). Chapter 6 will describe the responses of EU member states, and thereby demonstrate that all of these mechanisms as conditions for an *erga omnes effect* take effect in the case of "M.S.S. v. Belgium and Greece".

In addition, another group of mechanisms must be introduced with regard to norm diffusion processes. Norm diffusion mechanisms explain how and why norms diffuse to particular countries and subsequently lead to changes of policy; thus, they can also explain variation among responses and policy variations. These mechanisms will be presented in the following chapter and analysed and interpreted with regard to the *MSS* Judgment in chapter 7.1.

4.4 Norm Diffusion Mechanisms

Understanding the various mechanisms of norm as well as policy diffusion is, in particular, from a normative perspective desirable. As Shipan and Volden write, this is crucial to comprehend "the devolution of policy control to states and localities" (Shipan/ Volden 2008: 840). Different mechanisms imply different processes of diffusion and, thereby, different levels of self-determination and decision-making ability. While policy adoption due to *learning* is based on the observation of best-practice policies and state-success, simple *imitation* of policies is often caused by exogenous pressure to commit to specific norms in order to be a valuable member of certain social groups. Policy adoption because of *coercion*, however, entails a complicated and controversial process of policy internalisation which rarely produces adequate results (cf. Shipan/ Volden 2008: 840). Therefore, diffusion researchers have analysed various causal mechanisms, which enable norms, policies or practices to diffuse (cf. Stumbaum 2014: 9; Shipan/ Volden 2008; Meseguer 2008; Dobbin et al. 2007; Elkins/ Simmons: 2005; Rogers 2003).

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eignty concerns. By ratifying a treaty that creates an IC, a state accepts the court's jurisdiction and agrees to comply with specific judgments against it. But the state does not consent to be bound by rulings resulting from litigation in which it did not participate" (Helfer/ Voeten 2014: 77 f.)

[15] Pre-empting future litigation: "Repeated litigation of the same legal issue generally leads to the same outcome even if it involves a different state. Anticipating this result, national governments or courts may change their behavior to preempt future IC review." (Helfer/ Voeten 2014: 81)

[16] Persuasive authority: "An IC's reasoned determination that a law or policy is illegal can influence the behavior of compliance constituencies in other jurisdictions with similar laws or policies. (...). Persuasive authority need not be tied to legal reasoning: citizens and elites can be swayed by the fact that a policy is illegal if that information comes from an impartial source perceived to have expertise." (Helfer/ Voeten 2014: 81 f.)

[17] Agenda setting: "An IC judgment may raise awareness and thus increase the likelihood that an issue will appear on the agenda of national parliaments or executives." (Helfer/ Voeten 2014: 82)

This chapter will address the question of which mechanisms come to light whenever processes of norm diffusion occur. Diffusion mechanisms identified in the corresponding literature take effect in a direct as well as in an indirect way (cf. Börzel/ Risse 2012: 2). Direct mechanisms as Stumbaum identifies them are, for instance *socialisation* and *coercion* (legal as well as physical force). Indirect mechanisms, on the other hand, are *learning* and *imitation* (cf. Stumbaum 2014: 10). The differentiation between indirect and direct measures relates to the actor that initiates these measures. According to Börzel and Risse, direct mechanisms "describe diffusion processes initiated and conceptualised by the sender in the analysed relationship", indirect mechanisms on the other hand, "refer to processes of diffusion that are initiated by the intended recipient of the relationship" (Stumbaum 2014: 9; Börzel/ Risse 2012: 2). Direct mechanisms, which enable the sender of norms to persuade or encourage the recipient to adopt or comply with these norms, address different motives of change: coercion, particularly in a legal sense, only comes into effect were legal coercive powers are part of a regime, whereas an authoritative model (*normative rationality*) creates the conditions for socialisation (cf. Stumbaum 2014: 9). Indirect mechanisms, on the other hand, operate when "the defined 'recipient' of norms aims to emulate others in order to further its goals" (Stumbaum 2014: 10): Learning refers to an instrumental or rational logic, which requires an actor to actively search for best practices and policies that must also appear applicable to the 'learning actor's' domestic context among other actors' experiences. In contrast, mechanisms deriving from the rationale of imitation occur when an actor wants to adopt a particular policy for reasons of logic of appropriateness (*normative emulation*) in order to be part of a specific social or political group (cf. Stumbaum 2014: 10).

Heinze proposes a different classification of mechanisms. He identifies two factors for their categorisation: One is the rationality for policy adoption, which asks if the government's decision is rooted in instrumental or norm-based arguments; and secondly, the impact of policy choice which can be either direct by altering beliefs or structural through a change of decision-making conditions (cf. Heinze 2011: 4). A third way of differentiation is the categorisation of 'external' or 'international' and 'internal' or 'domestic' dimensions of diffusion processes (cf. Elkins/ Simmons 2004: 6). This differentiation refers to the level at which diffusion mechanisms occur or take effect.

Although a great number of diffusion mechanisms exist, only the above-mentioned mechanisms, which are particularly relevant for the considerations of this thesis, will be presented *en detail* in the following sub-sections. Hence, the categorisation of mechanisms will mainly draw on Börzel and Risse's as well as Elkins and Simmons' classification of diffusion mechanisms which are highly compatible.

4.4.1 Direct and External: Coercion

Coercion is the first mechanism presented here because it appears to be the most obvious one with regard to international courts' legal power. Shipan and Volden define coercion as "the use of force, threats, or incentives by one government to affect the policy decisions of another" (Shipan/ Volden 2012: 4). Thus, it can be characterised as a top-down mechanism of policy diffusion which obliges

governments to adopt certain policies, for instance, due to domestic legal requirements or in order to comply with international law requirements (cf. Heinze 2011: 17).

Dobbin et al. offer a wider definition of what characterises coercion and those exercising it. According to the authors, governments, as well as international organisations, and non-governmental actors can coerce countries "through physical force, the manipulation of economic costs and benefits, and even the monopolization of information or expertise" (Dobbin et al. 2007: 544). In addition, hegemonic ideas are considered to unfold coercive powers. Börzel and Risse classify mechanisms that fall under the category of coercion as 'direct' ones because they refer to the 'sender' and squarely lead to an alteration of policy. Heinze, on the other hand, attributes coercion to the category 'externalities' which involves mechanisms "based on setting (positive or negative) incentives for the adoption of certain policies (…) or from the direct impact of international policy instruments on domestic actors and institutions" (Heinze 2011: 12). That way, externalities force domestic actors to adopt certain policies by adjusting the existent structure of success and failure associated with pursuing a specific policy (cf. Heinze: 17). Furthermore, and with regard to the international environment, countries have the power to coerce each other through trade regimes or economic sanctions. This form of coercion has a direct and an indirect dimension – the latter, if the coercive practice is pursued by international institutions, such as the United Nations, which drive governments towards the adoption of certain policies in order to measure up to common expectations (cf. Shipan/ Volden 2008: 843).

4.4.2 Direct and External: Socialisation

The mechanism of *socialisation* includes several concepts. Essentially, "socialization relates to the internalization of shared beliefs due to the interaction of actors" (Heinze 2011: 12). Thus, diffusion through socialisation might result in an alteration of actors' self-concepts or normative systems as well as in the adoption of international norms (cf. Heinze 2011: 12). Socialisation also describes a process in which agents absorb norms or practices by taking certain group beliefs for granted and thus adapting to this group's interests, desires and identity (cf. Heinze: 19; March/ Olsen 2009). Concepts of socialisation are united by their constructivist origin. They assume that norms are constituted, internalised and changed through interactions among agents and structures over time and space (cf. Checkel 1997: 476; Checkel 1998: 326, Wendt 1992[18]). Thus, policy change is not a direct consequence of socialisation, but might rather occur due to the transfer, discussion and adoption of specific norms (cf. Heinze 2011: 19).

Diffusion scholars focussing on socialisation also draw particular attention to the role of international organisations that promote or block specific policies (cf. Checkel 2005: 815 ff.). Their research is rooted in those International Relations theories that emphasise the socialising effects of international organisations respectively institutions (cf. Checkel 2005: 807). As Finnemore and Sikkink point out, modern international organisations act not only as agents that make norm socialisation part of their agenda, but also as platforms of expertise and information exchange among politicians, scientists and other relevant actors (cf. Finnemore/ Sikkink 1998: 899 f.). The exchange of information and expertise, in turn, might result in persuasion or socialisation effects which alter habitual norms or

[18] Wendt applies the *symbolic interactionist theory*, which had so far only referred to the individual level, to the level of states as well.

beliefs regarding what is right and what is proper (cf. Heinze 2011: 20; Elkins/ Simmons 2005: 10). Moreover, international organisations exercise power on domestic actors within the policy-making process, "eventually leading to norm internalization and community-based behaviour" (Heinze 2011: 20). Checkel describes international organisations as *social environments* socialising states by means of membership and participation (cf. Checkel 2005: 815). Finnemore and Sikkink, furthermore, identify socialisation as the dominant mechanism with regard to the emergence of normative change as it forms the basis for change agents or norm entrepreneurs' persuasive powers. They consider it an essential finding that "state identity fundamentally shapes state behaviour, and that state identity is, in turn, shaped by the cultural-institutional context within which states act" (Finnemore/ Sikkink 1998: 902).

4.4.3 Indirect and Internal: Learning

Berry and Baybeck define *learning* as the process "[w]hen confronted with a problem, decision makers simplify the task of finding a solution by choosing an alternative that has proven successful elsewhere" (Berry and Baybeck 2005: 505). Shipan and Volden take up this definition and explain that policy-makers can learn from other governments' experiences through observation of policy choices and their impacts (cf. Shipan/ Volden 2008: 841). Heinze, too, relates learning to situations where national governments analyse policy choices of other governments or external actors in order to tackle their domestic problems (cf. Heinze 2011: 14). Berry and Baybeck identify two basic categories of learning of which the first refers to the already mentioned process of learning from (neighbouring) countries respectively governments; the second, however, is called ideologically based learning and occurs when states learn from ideologically similar states (cf. Baybeck et al. 2011: 242). All concepts of learning are rooted in the assumption that information is processed through interdependent structures and interpreted by actors according to their specific contexts (cf. Meseguer 2005, Heinze 2011); additionally, communicational tools are substantial as they allow actors to get access to information and expertise. This process is not a purely rational one, but involves actors' prior beliefs and cultural imprint, which influence how one interprets and uses given information (cf. Heinze 2011: 14 ff.).

Elkins and Simmons elaborate on learning as well. They rest their arguments on the assumption that "governments are independent in the sense that they make their own decisions without cooperation or coercion but dependent in the sense that they factor in the choices of other governments" (Elkins/ Simmons 2005: 37). Braun and Gilardi assume that the question of how much actors learn from each other depends on the question of how great the expected benefits of the regarding policies are. "In learning processes new information about the effectiveness of policies leads to change as soon as the evidence points to a greater effectiveness for the alternative policy" (Braun/ Gilardi 2006: 299). Generally, learning is a horizontal diffusion mechanism because policies or practices travel from one state to another due to diverging levels of influence and experience. Learning is furthermore categorised as an indirect/ internal mechanism as the adoption of certain norms or policies depends on domestic actors' assessment and willingness.

4.4.4 Indirect and Internal: Imitation

The concept of *imitation* – sometimes also called *emulation*, *mimicry* or simply *adaptation* – refers to the idea that a clash between international norms or policies and national ones causes legitimacy pressures at the domestic level (cf. Heinze: 12). Heinze considers emulation a key concept, which refers to the constellation when one actor simply copies another actor's successful models in order to increase their own legitimacy. This behaviour does not imply a change of belief regarding the appropriateness of a policy but rather refers to a change in the 'reputational payoffs' linked with embracing a certain norm or policy (cf. Heinze 2011: 21). As Elkins and Simmons put it, emulating actors are motivated by the benefits associated with the adoption of an institution, policy or norm instead of focussing on the merits and outputs of the institutions, policies or norms themselves (cf. Elkins/ Simmons 2005: 48). This leads to a simple adoption of alternative policy-decisions due to logic of social desirability or superficial effectiveness.

Reasons for imitation-based behaviour are complex: For instance, actors might copy certain policies because they attempt to appear as progressive, wealthy or powerful as other actors (cf. Dobbin et al. 2007: 452). Another reason is that adopting certain norms – at least, superficially – might be necessary to become an accepted member of a certain group or organisation. In this context, two broad approaches have appeared: One assumes that governments copy policies from others if the two share certain norms due to similar cultural, regional or ideological backgrounds. The other supposes that governments simply emulate more successful or more powerful states (cf. Heinze 2011: 22). Shipan and Volden, for instance, state that one government copies another simply because the one that "is perceived to be a leader has the policy and that it must, therefore, be something desirable" (Shipan/ Volden 2012: 3 f.). Thus, the copying actor does not analyse or evaluate the specific policy itself but only its effects in terms of redefining its image (cf. Shipan/ Volden 2008: 483).

In addition, international norms might serve as references for policy emulation and adoption. As Heinze explains, international norms tend to be perceived as more legitimate and more accepted than domestic ones. Thus, emerging international norms might create the necessity to legitimate one's practices and structures by adopting new policies (cf. Heinze 2011: 21). That way, international norms can "change the legitimacy-driven behavior of national actors in favor of the internationally acclaimed policy" (Heinze 2011: 22). This socially driven alteration of norms has been particularly considered in the concepts of mimicry and imitation "when actors are driven by legitimacy pressures and/or the desire for conformity" (Heinze 2011: 11). Legitimacy pressure, however, does not only emerge from the international level, but also from the domestic one: Voters or powerful domestic actors might demand the change of certain policies and the adoption of others which have proven successful elsewhere (cf. Shipan/ Volden 2012: 4).

4.5 Intervening Variables with Respect to Norm Diffusion Processes

Intervening variables in norm diffusion processes are diverse: To name some, the institutional system of a particular state plays a role, so does the density of non-governmental actors within the area of asylum policy. Furthermore, a simmering public discourse fed, for instance by reports from civil society actors or scientific think tanks, can be intervening factors. On the other hand, veto points in the political system must also be considered as intervening variables. In spite of the great number of

intervening factors, this paper will only look at factors that actually enhance (or constrain) change by contributing to diffusion processes. It will not consider those variables that explain why opportunities of change are perceived differently and diffusion processes, thus, evolve in divergent directions. To put it differently, with regard to intervening factors this thesis mainly considers the process of norm diffusion from the ECtHR to the European Union member states. It will not take into account aspects of variation and convergence among the member states themselves because that would require the examination of further intervening variables concerning the individual nation-states[19]. Admittedly, in practice this dividing line cannot be drawn that sharply as some factors explain on the one hand, how and why norm or policy diffusion occur, and on the other hand, why and to what extent change develops differently among regions and countries. However, for analytical reasons, i.e. to substantiate this paper's underlying research question, the factors described below will only be considered with respect to their diffusion enhancing or diffusion constraining features.

The intervening variables that will be analysed in the course of this chapter much rather occur as mediating factors in the process of norm diffusion from the international level (ECtHR) to the domestic level (EU member states). How their role is defined and how much importance is attached to them depends on the approach that is taken. Here, the already described core concepts – rationalist and constructivist/ sociological institutionalism – come to light again. As Börzel and Risse elaborate, in constructivist approaches mediating or intervening factors are an essential condition for change because they enable or prevent specific aspects of change (from happening). To put it differently, these factors are responsible for the distribution and interpretation of new ideas and opportunities as well as constraints: An effective redistribution of resources empowers some actors while others face a decline of influence (cf. Börzel/ Risse 2009: 9).

Since in literature as well as in practice various factors have been observed and analysed according to their intervening effect (cf. Wendt 1992, 1994; Checkel 1998, 2005; Moravcsik 2000, *et cetera*) this chapter will only focus on the most important factors in order to answer this paper's research question. As identified by Börzel and Risse – although only with respect to the domestic level – these are: *veto points in the political system*, *supporting formal institutions*, *change agents* or *norm entrepreneurs* and *epistemic communities* (cf. Börzel/ Risse 2009: 9 ff.; Börzel/ Risse 2000: 9 ff.). These variables or actors mediating "between the adaptational pressures and the outcome of domestic change" (Börzel/ Risse 2009: 18) will be described below in order to be able to use them as analytical tools when examining the case study in chapters 7 and 8.

4.5.1 Veto Points and Veto Players in the Political System

Veto points in the political system of a country substantially influence the way new opportunities provided by the international level are perceived and exploited. *Veto players*, as defined by Tsebelis, "are individual or collective decision-makers whose agreement is required for the change of the status quo" (Tsebelis 2000: 442). Veto points mark the specific institutional structures in a political

[19] In that case, intervening variables, such as the number of asylum applications, the degree of esteem as an 'asylum granting country', the government's political affiliation, the political culture and traditions regarding asylum policy as well as specific national discourses related to this area, *et cetera*, needed to be analysed.

system that allow veto players to take influence (cf. Immergut 1990: 396 ff.). In this regard, veto players can be parties, as well as entire parliaments or courts (cf. Crepaz/ Moser 2002: 7).

In general, veto points rather prevent change – or at least, certain aspects of change – from happening while encouraging other aspects (cf. Börzel/ Risse 2009: 18). More abstractly, veto points can be structures within a political system that exacerbate the formation of a "winning coalition". As Börzel and Risse put it: "The more power is dispersed across the political system and the more actors have a say in political-decision making, the more difficult it is to foster (…) domestic consensus" (Börzel/ Risse 2000: 9). As political decision-making in Western democracies requires this consensus – or at least a wide acceptance of the practice in question – the development of, for instance, a legislative proposal depends on the number and location of opportunities for veto players along the decision-making chain. Veto points or opportunities thereby emerge from the specific design of political institutions (cf. Immergut 1990: 396 ff.). According to Tsebelis it is essential that veto players *per se* do not cause particular political results. Their capabilities do not go beyond the prevention or facilitation of policy changes (cf. Tsebelis 2000: 463).

Actors that are referred to as veto players can perform various tasks within a political system and, accordingly, constrain change in very different ways. Constitutional courts, for example, are obliged to only accept change if it is consistent with the constitution, whereas parties (in parliament) decide according to their implicit value system if an aspect of change is desirable or not (cf. Anagnostou 2013: 218).

4.5.2 Supporting Formal Institutions

In contrast to veto points, *supporting formal institutions* enable norm diffusion processes, and thereby political change. They help processing and exploiting new opportunities, for instance, by collecting information or actively promoting new ideas, policies or practices. Thus, "in case of misfit [they] translate [the normative, practical or judicial input] into an effective redistribution of resources among actors" (Börzel/ Risse 2009: 9) and thereby determine if the new opportunities result in a shift of power among domestic actors. This does not mean, however, that formal institutions cannot operate as veto points. Supporting formal institutions simply represent the other side of the coin. As the different institutions within a nation-state also dispose of diverging levels of power and resources regarding domestic policy-making processes, they might also have different preferences as to whether to embrace certain changes or to prevent them (cf. Anagnostou 2013: 217). In this regard, domestic courts can play a significant role in the promotion of change (as they can in its constraint): Due to the subsidiary nature of international law, domestic courts play a decisive role in the acceptance and implementation of new norms as it is their task to apply them to existing law (cf. Börzel/ Risse 2000: 9). In the case that domestic courts are constitutionally enabled to apply international law while putting domestic law out of force, these courts can initiate change, even where the government does not favour it (cf. Helfer/ Voeten 2014: 79).

In view of the specific environment of the ECtHR's sphere of influence, the European Court of Justice can act as a powerful supporting institution whenever it takes up norms that have been promoted by the ECtHR. Furthermore, national governments and parliaments essentially contribute to the way new ideas are promoted or rejected. As Anagnostou puts it,

> "*In each country, the policy process is shaped by a particular constellation of institutions: state organisations or bodies (…); the ministries with competencies in the area that is touched upon (…); and the government and the legislature, with their specific configurations of political forces*." (Anagnostou 2013: 217)

4.5.3 Change Agents or Norm Entrepreneurs

Change agents or *norm entrepreneurs* play various roles in diffusion processes. On the one hand, they help overcoming deadlocks caused by high adaptational pressure due to a misfit between the domestic rule system and the international one. Börzel and Risse argue that misfits only lead to processes of socialisation and learning if change agents are in place to de-code the aspects of misfit and make them useful (cf. Börzel/ Risse 2009: 11). On the other hand, change agents can take up a specific value system or normative structure and actively promote it – on the domestic as well as on the international level. This holds true, for instance in the case of non-governmental organisations operating on the national as well as the international level while promoting the same values or ideas (cf. Sunstein 1995: 23).

Börzel and Risse analyse change agents only on the domestic level where they persuade and "pressure policy-makers to initiate change by increasing the costs of certain strategic options" (Börzel/ Risse 2009: 13). From this perspective, change agents contribute to the patterns of how ideas, norms, policies or collective understandings which do not fit well with those at the domestic level are taken up and exploited by national actors. Moreover, they argue on a moral basis when aiming at convincing actors to redefine their interests and alter their beliefs. This process is characterised by social learning; accordingly, persuasion and debate are the core mechanisms which, according to the sociological perspective, can be allocated to the diffusion mechanisms learning and socialisation (cf. Börzel/ Risse 2009: 13). Norm entrepreneurs are crucial agents for norm diffusion as well as norm emergence. As Finnemore and Sikkink put it, "they call attention to issues or even 'create' issues by using language that names, interprets, and dramatizes them" (Finnemore/ Sikkink 1998: 897).

Various political or social actors can be viewed as change agents. For instance, private groups mediating at the national level between citizens and state can exercise substantial influence by evaluating and even changing norms: "Religious groups are in this sense norm entrepreneurs; the same is true for environmental and civil rights organizations" (Sunstein 1995: 43). Change agents acting on the international level actively promoting a normative agenda mark the other spectrum of normative entrepreneurship. According to constructivist approaches, norm entrepreneurs motivated by altruism attempt to persuade states to adopt a new norm (cf. Smith 2004:13). These entrepreneurs enable change by 'making the first move', i.e. generating and promoting an idea, norm or policy. After initiating the process, a critical mass of actors that embraces the change is necessary: A norm cascade begins where the actors supporting the 'new' norm pressure others to embrace it as well. Subsequently, the 'new' norm is accepted by a broader mass and internalised by the population of actors (cf. Smith 2004: 17 f.). Here, the above-described logic of appropriateness makes an impact. Quoting Moravcsik, Smith states: "Rather than embracing a norm as a rational calculation that will achieve a given goal, states embrace norms out of their 'desire to conform to shared ideas and norms of behaviour'" (Smith 2004:13; Moravcsik 2000: 224). Critical perspectives towards this ap-

proach argue that norm diffusion is rather a regional phenomenon than an international one that depends on change agents' transformative power (cf. Smith 2004: 17 f.).

A special case of norm entrepreneurs are 'tipping point actors' (cf. Alter 2011: 1). These actors emerge or intervene at a crucial point of diffusion processes where they finally enable change. As Alter puts it: "The tipping point argument is premised on the notion that within each state are actors with numerous conflicting preferences" (Alter 2011: 2); when tipping point actors come into play, one of these conflicting preferences gains support and will, thus, be promoted.

As noted before, two categories of change agents must be differentiated for the reasoning of this thesis. Whereas internationally operating change agents are hereby defined as primary change agents, domestic norm entrepreneurs are characterised as secondary or supportive change agents. In this regard, the ECtHR itself as an active promoter of a specific human rights agenda belongs – hence the thesis to be proven – to the first category; if it does and to what extent will be conclusively analysed in chapters 7 and 8 with regard to the selected case. Secondary or supportive change agents are, for example, non-governmental organisations, such as ProAsyl, Amnesty International country groups or national refugee councils. These agents do not play a secondary role in promoting change; much rather, they act on the national level through fuelling emerging or simmering discourses, thus, providing the basis for primary change agents' tipping point interventions or impulses. Secondary change agents might also act on the international level through umbrella organisations or associations; however, their essential role is to provide information and enhance change within a domestic environment. For instance, while defining most of the present global human rights policy norms, NGOs and international non-governmental organisations (INGOs) still needed primary change agents, such as international courts or international institutions to actually apply and enforce these norms (cf. Dobbin et al. 2007: 453). As Finnemore and Sikkink explain:

> "*Even in situations where it might appear at first glance that international norms simply trump domestic norms, what we often see is a process by which domestic 'norm entrepreneurs' advocating a minority position use international norms to strengthen their position in domestic debates. In other words, there is a two-level norm game occurring in which the domestic and the international norm tables are increasingly linked*." (Finnemore/ Sikkink 1998: 893)

4.5.4 Epistemic Communities

Epistemic communities, as defined by Haas, are networks "of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" (Haas 1992: 3). These networks entail four conditions and characteristics: 1) a shared set of normative or principled beliefs, 2) shared causal beliefs, 3) shared notions of validity, and 4) a common policy enterprise (cf. Haas 1992: 3). Thereby, epistemic communities do not only consist of natural scientists, but also include social science scholars or individual experts "who have a sufficiently strong claim to a body of knowledge that is valued by society" (Haas 1992: 16).

Epistemic communities contribute to the legitimisation of emerging norms by providing information and actively generating scientific knowledge about utility, effects, as well as cost-benefit analyses about specific policies, norms or practices. These actors are particularly powerful in situations of

crisis, uncertainty or critical policy failure (cf. Haas 1992: 15). On the global scale, epistemic communities experience a strong increase of influence, which, in turn, explains why certain policies spread internationally at all levels, among nation-states as well as regions (Dobbin et al. 2007: 453). Epistemic communities can handle various tasks, such as providing information about the interlinkages of certain issues or the likely consequences of a particular policy-decision. Furthermore, they can support states in evaluating their self-interests and strategies as well as in formulating specific policies or determining policy-outcomes (cf. Haas 1992: 15). "While persuasion and social learning are mostly identified with processes of policy change, they transform domestic institutions, too" (Börzel/ Risse 2009: 12). In this context, epistemic communities present themselves as strong normative actors that share interests, such as the promotion of cosmopolitan beliefs or the advancement of collective betterment (cf. Haas 1992: 20).

With regard to this paper's research question, epistemic communities are particularly important when it comes to the reasons that are given for a delivered judgment. As will be shown with regard to the ECtHR's *MSS* Judgment, the generated knowledge and widely recognised expertise of epistemic communities was crucial for the Grand Chamber's decision in favour of M.S.S. In this context, epistemic communities can be academic 'think tanks' as well as well documented journalistic investigations. In any case, they produce knowledge about a specific topic which, in turn, can be used by primary and secondary change agents to build their arguments and agendas upon.

ANALYSIS

5 THE ECTHR'S JURISDICTION IN THE AREA OF ASYLUM POLICY: "M.S.S. V. BELGIUM AND GREECE"

After providing the analytical and theoretical basis in order to be able to analyse the selected case of M.S.S. v. Belgium and Greece, the following chapters will, first, give an overview over the content, significance and outcome of *MSS*. Thereafter, the norms established in the judgment as well as their implications will be extracted *en detail*, before their actual impact on the member states of the European Union will be described in the next section.

As stated before, the ECtHR's *MSS* Judgment marks a watershed in its jurisdiction regarding the European Union's Common Asylum System and particularly, the Dublin System. It furthermore serves as a reference point for the thesis that the Court operates as an agent of change with respect to asylum-seekers' rights in the European Union. To corroborate this thesis, the following chapters will explain why and to what extent this judgment is important and bears implications for the ECtHR's role within the area of European asylum policy. The section starts by describing the case's details and impact.

5.1 Case Facts

M.S.S. [20], an Afghan citizen, left Kabul in 2008 after, as he claimed, an attempt on his life was made

[20] This chapter draws on: ECtHR/ MSS 2011: 4-9.

by the Taliban[21]. He fled to Greece where his fingerprints were registered with EURODAC. There, he was detained for a week and then ordered to leave the country. M.S.S. did not initiate an asylum procedure in Greece, but travelled to Belgium where he attempted to lodge an asylum application with the Aliens Office. His fingerprints, however, showed that he had already been registered in Greece. While the applicant was taken to a Belgian reception centre the Aliens Office submitted a request to Greece under the Dublin II Regulation to take back the applicant and process his asylum application. When the Belgian authorities requested M.S.S. to leave Belgium and took him into detention, he lodged challenges to this decision with the Belgian Aliens Appeals Board. The reasons he gave particularly focussed on a violation of the Non-Refoulement Principle as well as Article 3 ECHR. M.S.S. referred to the risk of physical and psychological maltreatment as well as arbitrary detention due to deficiencies in the Greek asylum system. However, his appeals to have the order to leave the country set aside were not admitted for procedural reasons and M.S.S. was arrested again. At the same time, M.S.S. lodged an application before the ECtHR to have his transfer to Greece suspended. He referred to the fact that an asylum application in Greece was only rarely successful; M.S.S., thus, feared to be deported to Afghanistan. The ECtHR, however, did not follow M.S.S.'s request to apply Rule 39[22] assuming that Greece would be able to undertake an appropriate asylum procedure consistent with the provisions of the ECHR (cf. Clayton 2011: 758). Accordingly, the applicant was finally taken to Greece where he was immediately put into detention. The conditions he faced were the following: "He was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor" (ECtHR/ MSS 2011: §34). Hereupon, his lawyer informed the ECtHR. M.S.S. was released three days after and notified that he had to report to the Aliens Directorate of the Attica Police Asylum Department to declare his home address in Greece so that he can be informed of the progress of his asylum application. Believing that a home address was the condition for processing his case, M.S.S. did not report to the authorities and had to live in a park. Meanwhile, the ECtHR decided to apply Rule 39 against Greece, not to have M.S.S. deported due to severe risks he would have to face in case of return to Afghanistan.

When trying to leave Greece with a false Belgian identity M.S.S. was again put into detention. In his seven-day detention he had to face the same conditions as he had already suffered during his first arrest. This time he was allegedly even beaten, as he described to his legal counsel (cf. Clayton 2011: 758). After his release M.S.S. complained to the ECtHR about the conditions (homelessness, poverty, violence) he had to suffer due to the treatment by both Greece and Belgium.

> „*Against Greece he alleged breaches of Article 3 of the ECHR by reason of his conditions of detention, his conditions of living, and a breach of Article 13 of the ECHR because of the deficiencies in the asylum procedure and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application or access to an effective remedy. His complaint against Belgium was that Belgium had breached Articles 3 and 13 by sending him to Greece and exposing him to these risks.*" (Clayton 2011: 759)

[21] The international air force troops had hired M.S.S. as an interpreter – as certificates confirmed.
[22] Rule 39: This provision enables the ECtHR to order interim measures, such as the temporary suspension of an expulsion, until a final judgment is delivered.

5.2 Norms Promoted in the Judgment "M.S.S. v. Belgium and Greece"

The European Court of Human Rights delivered its judgment in the *MSS* case on 21 January 2011, after a public hearing on 1 September 2010. The judges ruled "in favour of the applicant and held that both Greece and Belgium were in violation of their obligations under Articles 3 and 13" (Clayton 2011: 759). This means that the Court found both states guilty of degrading and inhuman treatment: the one directly with regard to the applicant's living and detention conditions, the other indirectly by sending him into these conditions. The Court additionally found procedural deficiencies in both countries. These deficiencies concern the guarantee of an effective remedy in order to enable asylum-seekers to legally challenge the rejection of their applications. In view of Belgium's 'Extremely Urgent Procedure' the Court held that it "does not meet the requirements of Article 13 of the Convention" (ECtHR/ MSS 2011: §390) because it "reduces the rights of the defence and the examination of the case to a minimum" (ECtHR/ MSS 2011: §389).[23] With regard to Greece, the Court listed further systematic insufficiencies within the asylum system, for instance, handing out notifications only in Greek, insufficient reception and accommodation conditions as well as the deficient examination of the applicant's asylum request and the risk of direct or indirect Refoulement (cf. ECtHR/ MSS 2011: § 321, 331 f.).[24]

The *MSS* Judgment establishes a set of re-defined and newly established norms. Three of them are to be particularly stressed because they shake the Dublin System to the core. The first two norms are the discreditation of the Mutual Trust Principle and the establishment of the Refutability Principle regarding the Mutual Trust Principle or Inter-State Confidence Principle (cf. ECtHR/ MSS 2011: § 330). Interstate Confidence usually allows states that are members of the same organisation or regime to trust in the fellow member states' procedures and practices as being equally good as own standards. Here, the ECtHR intervenes and decides that this assumption cannot be taken for granted; it must be refutable, in particular with regard to direct Refoulement (cf. Moreno-Lax 2012: 11). In this context, the Court refers to an assessment constituted in two former judgments: *T.I. v. the United Kingdom (TI)* and *K.R.S. v. the United Kingdom (KRS)* (cf. ECtHR/ MSS 2011: § 330). In *TI*, the Court held that a state

> *"was required, in accordance with the well-established case-law, not to deport a person where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country."* (ECtHR/ MSS §342; cf. ECtHR/ TI 1996: 14)

In *KRS*, the ECtHR further elaborated that

> "*removal to an intermediary country which is also a Contracting State does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention. In T.I. the Court also found that the United Kingdom could not rely automatically in that context on the arrangements made in the*

[23] "The Court finds that there has been a violation of Article 13 taken in conjunction with Article 3. It follows that the applicant cannot be faulted for not having properly exhausted the domestic remedies and that the Belgian Government's preliminary objection of non-exhaustion (...) cannot be allowed." (ECtHR/ MSS 2011: §396)

[24] "The Court has found a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece combined with the prolonged uncertainty in which he lived and the lack of any prospect of his situation improving (…). It has also found a violation of Article 13 in conjunction with Article 3 of the Convention because of the shortcomings in the asylum procedure as applied to the applicant and the risk of *refoulement* to Afghanistan without any serious examination of his asylum application and without his having had access to an effective remedy (…)." (ECtHR/ MSS 2011: §401)

> *Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims."* (ECtHR/ KRS 2008: 16)

As *MSS* does, *KRS* concerned a Dublin Transfer to Greece as well. Although the UK was at that time not found guilty of a breach of Article 3 for transferring the respective applicant to Greece, this was mainly a consequence of the evaluation of the information situation at that point of time (cf. ECtHR/ MSS 2011: §343). Furthermore, with regard to *KRS*, the Court's core argument was that – even if there had been significant deficiencies in the Greek asylum system reported – the applicant should have taken up the issue directly with the Greek authorities in Greece. The ECtHR seemed satisfied with the assessment that applicants were not in risk of sudden refoulement without being invited to a hearing (cf. Clayton 2011: 761).

In *MSS*, the Court applies the already formulated Refutability Principle to M.S.S.'s situation. In addition, the ECtHR established a third principle, which constitutes an Extra-territorial Responsibility for states attempting to transfer asylum-seekers to third countries. In the context of the Dublin System, this means that all contracting states must ensure that "the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention" (ECtHR/ MSS 2011: §342). In other words, member states of the Dublin System, by majority also European Union member states, have an extra-territorial responsibility towards asylum-seekers who are to be transferred to another state.[25] This means that the individual sending states have to make sure that refugees as a group of particularly vulnerable people will not have to face conditions in the receiving country conflicting, in particular, with Article 3 ECHR. In *MSS* the Court, for the first time, "attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection" (ECtHR/ MSS 2011: §251).[26]

Furthermore, the states' obligation is to assess if the examination of an asylum application is sufficiently thorough in order to protect applicants from Refoulement. The fact that countries comply with the EU's legal framework does not *per se* imply that their actions are fully consistent with the ECHR's protection standards. This finding thus bears an Extra-territorial Responsibility for all countries expelling asylum-seekers to third states. As the Court held already in *TI*

> "*the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the [sending state's] responsibility (…) to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention*." (ECtHR/ TI 1996: 15)

In *MSS*, the ECtHR emphasised this statement:

> *"The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (…). State*

[25] Cf. ECtHR/ MSS 2011: §338: "The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (…). State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion."

[26] Cf. ICJ 2011: 2: "In *MSS*, the Court for the first time recognised asylum seekers themselves as a vulnerable group, in respect of whom States may have heightened positive obligations to protect (including against detention or living conditions in breach of Article 3)."

> *action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides*." (cf. ECtHR/ MSS 2011: §338)

In other words, human rights standards as established by the ECHR have to be applied wherever ratified, even if the supposed similarly high provisions of another legal framework allow differently. As Moreno-Lax puts it, "pre-eminence of compliance in practice with human rights obligations over formal adherence to the relevant instruments becomes clear" (Moreno-Lax 2012: 28). The author further elaborates, *MSS* "reinforces the primacy of non-refoulement over inter-state trust and related concerns linked to the efficiency of measures of immigration control" (Moreno-Lax 2012: 28).

Another development that becomes visible in *MSS*, is the shift of authority regarding the burden of proof. As the Court itself emphasises, it

> "*attaches more weight to the applicant's version because it is corroborated by a very large number of accounts collected from other witnesses by the Commissioner, the United Nations High Commissioner for Refugees (UNHCR) and various non-governmental organisations.*" (ECtHR/ MSS 2011: §204)

This assessment is a strong statement and thus a substantial deviance from earlier judgments. Its importance derives from two aspects: First, M.S.S.'s credibility was – in contrast to complainants from preceding cases – especially comprehensible because he had actually faced the Greek asylum system's conditions. Second, the Court relies on and supports the assessment of different organisations and institutions of expertise in the area of refugee and asylum policy. To put it differently, the ECtHR establishes the norm that information accessible for the general public must be assumed to be available for the involved governments as well and accordingly taken into account when decisions, such as transferring an asylum-seeker to another country, are made. This holds especially true in the case that the UNHCR sends a letter directly to the expelling state's government as he did in the proceedings of M.S.S. (cf. ECtHR/ MSS 2011: §349).

To conclude with, the *MSS* Judgment also establishes certain assessment standards with regard to future cases. Relevant criteria in order to detect a violation of the Convention, as summarised by Clayton, could in the future be constituted by: a) authorities' ignorance of applicant's serious deprivation or situation incompatible with human dignity; b) a total dependence on the part of the applicant regarding the state's power to resolve his situation; c) a pre-existing vulnerability of the applicant (caused by trauma etc. during his flight) (cf. Clayton 2011: 769). However, the most important normative changes the Court establishes in the *MSS* Judgment are the above-described ones: the discreditation of the Mutual Trust Principle, the establishment of the Refutability Principle regarding the Mutual Trust Principle, and the Principle of Extra-territorial Responsibility.

5.3 Implications for the Dublin System and the Asylum Policies of EU Member States

Generally, the *MSS* Judgment is viewed as ground breaking in relation to asylum-seekers' rights in the member states of the European Union (cf. Clayton 2011: 765; cf. Moreno-Lax 2012; cf. Rietz 2011). It triggered a re-consideration process regarding the validity of the Dublin System in terms of its human rights consistence. In particular, finding Belgium responsible for a breach of Article 3 ECHR by sending M.S.S. to Greece has wide implications for the application of human rights standards in asylum procedures: As explained, the Court established that Article 3 ECHR has an extra-

territorial effect with respect to socio-economic rights of particularly vulnerable groups of persons, such as refugees (cf. Clayton 2011: 766). Accordingly, individual EU member states

> "*can no longer take it as given that the system established by the Dublin Regulation absolves a sending state of responsibility for the procedure applied to asylum seekers in the receiving state nor for their living conditions, nor that the receiving state's membership of the CEAS entails that an asylum seeker will be safe from refoulement there*." (Clayton 2011: 762)

In other words, every sending as well as every receiving state has to make sure that the living conditions as well as the procedural guarantees that expect the applicant are consistent with the ECHR's human rights regime; the adherence to EU norms and legislation itself does not guarantee accurate human rights standards nor does this compliance discharge the individual nation-states from their duty to act according to the Convention's rules (cf. ECtHR/ MSS 2011: §332; 338). The assumption that every state being a signatory state of the ECHR has to make sure that his asylum procedures do not violate the Convention, especially Article 3, is now complemented by the decision that the sending state, too, must assure that an applicant will not have to face inhuman or degrading treatment as a consequence of returning him to another state. That way the above-explained Mutual or Inter-State Trust Principle can no longer automatically provide the basis for Dublin transfers between EU member states; "the practical implementation of protection standards by the Member State concerned must be verified first" (Moreno-Lax 2012: 29).

The Court's judgment leaves open many questions: For instance, what precisely is now required of a state that wishes to process a Dublin transfer to states that appear to have problematic asylum conditions (cf. Clayton 2011: 762)? On the one hand, the possibility for a rejected asylum-seeker to go to Court must be granted in order to have his transfer suspended. In this regard, the ECtHR's assessment that Article 13 had been violated by Belgium and Greece must be viewed as an important development as well. In fact, this finding establishes the basis for the ECtHR's judgment, that is, "the risk that poor processes result in the lack of an effective remedy against refoulement, (…) [i.e.] return to ill-treatment in the country of origin" (Clayton 2011: 764; cf. ECtHR/ MSS 2011: §321). Thus, the ECtHR constitutes in *MSS* that "access to a process capable of delivering an effective remedy is a vital human right" (Clayton 2011: 765). On the other hand, according to the *MSS* Judgment, it is not only up to the applicant to gather evidence, but also the (sending) state's duty to include public knowledge, such as reports or studies, in its assessment of the application. Although these reports were not evaluated to be sufficient in *KRS*, in *MSS* they finally constituted an important reference point (cf. UNHCR 2010; Clayton 2011: 761 ff.; ICJ 2011: 2).

Essentially, the *MSS* Judgment led to two different interpretations. One is a rather critical perspective, which claims that the Court constituted that the Dublin Regulation as well as the EU's Reception Directive is integral to the ECtHR's assessment of a breach of Article 3 ECHR because it refers to standards established by the EU within its reasoning. This, however, would lead to a divided jurisdiction depending on the question if a state is a EU member state. The other approach suggests that the Court's line of argument could also be interpreted in the way that the Reception Directive is not an integral, but rather an additional factor in the Court's ruling (cf. Clayton 2011: 768). This second approach – which does not consider the Reception Directive integral – triggers the conclusion that the ruling unlawful of M.S.S.'s transfer to Greece has implications for any removal (cf. Clayton 2011: 768). Being an early and important example of increasing interaction between the Common

European Asylum System, in particular the Dublin System, and the ECHR *MSS* unveils the high degree of influence the ECtHR's jurisdiction takes on the EU member states within the area of asylum policy.

To put it in a nutshell, Clayton summarises the impact of the Court's assessment as follows:

> "*The implication of this finding against Greece is that, even where the Reception Directive either does not apply (that is, for those Council of Europe members outside the EU) or is breached, absolute destitution of asylum seekers is a breach of Article 3 of the ECHR. The implication of the finding against Belgium is that sending an asylum seeker to such a situation in another country is also a breach of Article 3."* (Clayton 2011: 767)

6 Impact and Effects of ECtHR Rulings: Responses of the European Union Member States regarding the *MSS* Judgment

The preceding sections have, first, accomplished a methodological and theoretical foundation and then provided an overview over the details of the case selected for this thesis' analysis. They have also further carved out the norms established and promoted in the *MSS* Judgment. The following part will summarise some of the responses EU member states articulated during and after the *MSS* court procedure. This summary of responses answers the purpose of making diffusional processes triggered by the just-described judgment visible and comprehensible. The member states' reactions are, hereby, understood as indicators for the extent and intensity of the norm diffusion process developing from the ECtHR's case-law among the member states of the European Union. In this regard, the period between the ECtHR's *MSS* Judgment (January 2011) and its affirmation by the ECJ (December 2011) is particularly interesting as the EU member states were, then, left to themselves regarding the interpretation, evaluation and implementation of the *MSS* case's outcome. The following brief analysis is not exhaustive with regard to the different factors and aspects of EU member states' reactions, nor will it consider all member states responding to the Court's ruling. Its primary goal is to reveal the normative change in consequence to the *MSS* Judgment by highlighting specific events and advancements. More specifically, the chapter deals with the actual outcomes of norm diffusion by showing where norm diffusion effects can actually be observed in practice. In this regard, the already introduced *erga omnes effect,* referring to the adoption of norms by ECHR signatory states that have not been parties to the specific proceedings, will be demonstrated. Therefore, the chapter will first summarise the developments directly responding to the *MSS* court proceedings, before the next chapter takes a closer look at exemplary countries' reactions to the Court's judgment.

6.1 Developments Directly Responding to the Court Proceedings

In the period of time before the first Grand Chamber hearing regarding M.S.S.'s application on 1 September 2010, the case did not attract much attention – neither from the media nor from academia. Only the UNHCR who actively contributed to the assessment of the case, published its written intervention before the Court in June 2010 (cf. UNHCR 2010). It, furthermore, began to send letters to other EU and Dublin member states requesting a suspension of transfers to Greece.

At that point in time, only two individual member states of the EU actively participated in the case's

assessment. Both evaluated the case as third parties before the Court. The UK, on the one hand, argued that with regard to the fact that guaranteeing fast asylum procedures was one of the goals of the Dublin Regulation, a claim under Article 3 ECHR against the sending state was bound to immensely slow down the whole process of handling the application as well as the transfer. This, however, would allow asylum-seekers to culturally and socially root themselves in a country which might not be able to let them stay. Furthermore, the UK referred to the Court's *KRS* Judgment stating that

> " [KRS] *did not absolve the transferring States of their responsibility for potential violations of the Convention, but it meant that their responsibility could be engaged only in wholly exceptional circumstances where it was demonstrated that the persons concerned would not have access to the Court in the State responsible for dealing with the asylum application.*" (ECtHR/ MSS 2011: §331)

The Netherlands, on the other hand, explicitly pointed to the Mutual Trust Principle in the course of the hearing. They emphasised that reasoning against this principle would question the foundations of the Dublin System itself (cf. ECtHR/ MSS 2011: §330).

In the weeks following the time of the hearing, many EU member states had already started to suspend transfers of asylum-seekers to Greece under the Dublin II Regulation. At first, these cases appeared rather individually. In addition, the ECtHR started to send letters to the governments of Belgium, Finland, the Netherlands, and Norway in September 2010. It announced that it was planning on issuing interim measures in all future cases which concerned asylum-seekers being returned to Greece. The Court thus asked the respective governments to assume responsibility for applicants that would otherwise be returned to Greece under the Dublin II Regulation (cf. UNHCR 2011: 5). When the *MSS* case gradually gained public attention, the suspension of transfers slowly became systematic. Belgium, which was actively involved in the case, stopped all transfers to Greece only one month after the Grand Chamber hearing. The UK, Portugal, the Netherlands and the Czech Republic did so as well. Sweden followed suit in November 2010 and so did Germany, shortly before the judgment was delivered (cf. ProAsyl 2011; EMN 2012). After the delivery of the judgment a second group of states immediately decided to suspend all transfers under the Dublin II Regulation. For instance, Denmark, France and Finland belonged to this faction (cf. UNHCR 2011: 6). A third, albeit small, fraction of countries stuck to suspending transfers to Greece only in individual cases. These are, for instance, Austria, Estonia, Italy and Spain (cf. ProAsyl 2011; EMN 2012).

6.2 Policy Changes as a Consequence of the *MSS* Judgment

This chapter will look at particular policy changes in EU member states in order to show how the norms established or promoted by the ECtHR slowly diffused among them. Therefore, it will first, take into account the two parties of the *MSS* case, Belgium and Greece, which both presented action plans in consequence of the *MSS* Judgment. Second, it will take a look at responses to the judgment and the respective policy changes coming from other EU member states. In this context, there are two matters of interest: First, the actual change of policies, and second, the reasons governments and authorities gave to initiate these changes. The assessment will, thereby, mainly draw on reports from the UNHCR as well as the Committee of Ministers as these are independent and reliable sources, which regularly report on the situation of Dublin transfers. The chapter does not

aim at accomplishing an exhaustive overview over the detailed policy changes that occurred in consequence of the *MSS* Judgment. Much rather its goal is to show that there actually are strong reactions to the judgment, although to varying degrees, which indicate – thus the assumption – a (beginning) process of diffusion. The countries selected do not represent the EU member states in their entirety; much rather the selection aims at giving an impression on the variety of responses and argumentations.

6.2.1 Belgium

Besides Greece, Belgium was one of the two factions of the *MSS* proceedings. When ruled guilty of a violation of Articles 3 and 13 ECHR, Belgium was required by the ECtHR to propose appropriate measures to override the detected deficiencies (cf. AIDA 2013c: 24). State Secretary for Migration and Asylum Policy, Melchior Wathelet, announced on 20 October 2010 that Belgium would temporarily suspend all Dublin transfers to Greece (cf. La Libre 2010). In his statement, he referred to the pending *MSS* case and stated that asylum-seekers, who were not found to be in need of international protection would have to return to their country of origin instead of being returned to Greece (cf. UNHCR 2011: 6).

In the aftermath of the *MSS* Judgment, Belgium changed aspects of its appeal procedure, especially concerning the access to an effective remedy. The Council of Aliens Law Litigation (CALL) has attempted to comply with the *MSS* jurisdiction since the adoption of several judgments in February 2011. Precisely, this means that "suspension can be applied for during the entire thirty calendar days period for appeal" (AIDA 2013c: 24). Belgium has also changed its procedures concerning the conduction of personal interviews. The Belgian Aliens Office added several questions to the questionnaire "relating to elements relevant for determining if the sovereignty clause should be applied to avoid potential inhumane treatment of the person concerned, in case of transfer to another responsible EU or Schengen Associated state" (AIDA 2013c: 25; ICJ 2011: 4). However, as statistics by the Asylum Information Database (AIDA) point out, no specific questions are asked regarding the "reception or detention conditions, the asylum procedure and the access to an effective remedy are like in the responsible state" (AIDA 2013c: 25).

Furthermore, The Belgian Aliens Office has suspended transfers to other EU member states on the basis of the Sovereignty Clause, e.g. Poland, Malta and Italy (cf. AIDA 2013c: 23). Accordingly, since the *MSS* Judgment "detention and reception conditions, guarantees in the asylum procedure and the access to an effective remedy in the responsible state seem to be taken into consideration in some cases when deciding whether or not to apply the sovereignty clause" (AIDA 2013c: 23). The Committee of Ministers explicitly welcomed this fact in its 2012 report (cf. CoM 2012: §11).

6.2.2 Greece

Greece was condemned by the ECtHR of violating Article 3 ECHR through the inhuman and degrading conditions M.S.S. had to face while being held in detention and, afterwards, living in a park. It was, furthermore, ruled guilty with reference to Article 13 because M.S.S. was neither granted access to an effective remedy nor to a sufficient asylum procedure. After the final judgment was

delivered by the ECtHR Greece presented an action plan responding to the deficiencies of its asylum system. In 2011, a new legal framework was adopted to revise the Greek asylum system. One of the measures taken was the establishment of an Asylum Service and an Appeals Committee by means of Law 3907/2011 which attempts to establish an efficient and adequate reception system for refugees in Greece. The Asylum Service and the Appeals Committees of the new Appeals Authority employ civil personnel instead of policemen (cf. AIDA 2013e: 12; GCR 2014: 1).

Although first opened in March 2012, the Asylum Service and the Appeals Authority (CoM 2012: §46), were finally serviceable in June 2013; their primary goal, then, was to meet the ECtHR's requirements regarding the combat against "police brutality, ill-treatment, degrading detention conditions and unlawful detention of migrants and asylum seekers" (Psychogiopoulou 2014). Although Psychogiopoulou refers to the action plan as a "turning point" in the structure of the Greek asylum system, she remains sceptical towards its implementation as "serious deficiencies in the country's migration management and asylum system remain" (Psychogiopoulou 2014).

In its first evaluation of the Greek action plan, the Committee of Ministers, however, responds positively to the achievements of the newly established First Reception Service (FRS) "that appear[s] to be able to address the shortcomings in the field of conditions of detention" (CoM 2012: §23). The FRS, for instance, is responsible for establishing a New Asylum Service, which operates through regional offices and directly examines asylum applications, as well as preparing an Appeals' Authority, which decides over "appeals lodged against decisions rendered by the Asylum Service" (CoM 2012: §44). Further developments, according to the CoM, are the establishment of a notification mechanism regarding the assessment of an application for international protection, the recruitment of interpreters for the majority of procedures, and a new time limit for regular asylum procedures (six months) (cf. CoM 2012: §45).

6.2.3 Germany

The German Federal Ministry of the Interior ordered the suspension of all transfers to Greece two days before the *MSS* Judgment was delivered, on 19 January 2011 (cf. BMI 2011). Minister of the Interior, Thomas de Maizière announced in a press statement that this suspension would uphold for a year. In this period of time, according to the Minister, Germany would apply the Sovereignty Clause and process the asylum applications for which Greece was responsible in accordance with the Dublin II Regulation. De Maizière pointed out that Germany had already applied this clause in the past regarding individual cases; the latest change of policy, however, meant a complete suspension of transfers. Furthermore, de Maizière referred to the altered practices of other EU and Dublin member states such as the UK and Sweden in consequence of the *MSS* Judgment, which had already suspended all transfers some weeks ago.

Without questioning the Dublin System itself, Germany had to take into account the – at that point in time still – pending case of *MSS* as well as the proceedings pending before the German Constitutional Court regarding an Iraqi citizen who claimed that a transfer to Greece would violate his right to legal protection. Hereupon, the Constitutional Court terminated the proceedings reasoning that a complete suspension of transfers would do the problem justice, which in any case needed a Euro-

pean solution (cf. BVerfG 2011). Since its first announcement, the suspension of transfers to Greece has been extended annually. In addition, transfers of particularly vulnerable persons to other countries, such as Malta, have been annulled with reference to the Sovereignty Clause (cf. AIDA 2013d: 25).

As a report by Orr for the scientific services of the German *Bundestag* identifies: In addition to the case before the Federal Constitutional Court, the German government also wanted to anticipate the expected fundamental decision by the ECtHR in the *MSS* case (cf. Orr 2011: 1). Orr, then, interprets the ECtHR's judgment as a change of directions: Now, invoking the Sovereignty Clause is not an option anymore, but rather an obligation. The author furthermore argues that an increasing number of German administrative courts have agreed with this assessment since the *MSS* Judgment was delivered. Orr claims that the fact that the decision of the ECtHR referred to an EU regulation, which is implemented and applied in Germany as well, must be particularly taken into consideration. This holds especially true because in Germany – as it is the case in Belgium – courts do not undertake an examination of asylum applications with regard to content either whenever they have to adjudicate on a Dublin transfer. As it was the case in Belgium, German law does not apply interim measures – a fact, which is not fully consistent with the ECtHR's newly established interpretation of Article 3 ECHR.

6.2.4 The Netherlands

As argued before the ECtHR during the *MSS* proceedings, the Netherlands considered the Mutual Trust Principle as essential for the Dublin System's efficiency. Since this principle has been discredited by the ECtHR, the Netherlands followed suit and decided to deal with asylum applications that originally were Greece's responsibility. Even before the *MSS* Judgment, the Netherlands had temporarily suspended transfers to Greece; however, without questioning Greece's ability to undertake asylum procedures in the near future (cf. ICJ 2011: 3). As the UNHCR observed in a note from 31 January 2011, Hirsch Ballin, the Dutch Minister of Justice sent a letter to the House of Representatives on 13 October 2010 determining that 1,900 asylum-seekers, who would otherwise be transferred to Greece, were now temporarily dealt with in the Netherlands instead (cf. UNHCR 2011: 5). In consequence of the notification that the ECtHR would issue a Rule 39 until the *MSS* Judgment was delivered, Ballin stated that "he expected courts to temporarily suspend (…) transfers [to Greece]" (UNHCR 2011: 6). However, he emphasised that, in the case that ECtHR jurisdiction would allow future transfers, the latter would be resumed – including the group of 1,900 asylum-seekers (cf. UNHCR 2011: 6). In a report published in May 2013, AIDA noticed that the Netherlands have meanwhile suspended all transfers to Greece and assumed responsibility under Art. 3 II Dublin II Regulation for asylum-seekers that would have been transferred to Greece as a consequence of the *MSS* Judgment. Although the Netherlands had emphasised the significance of the Mutual Trust Principle, the Dutch Council of State and the Alien Circular have recently started to incorporate the norms implemented by the *MSS* Judgment (cf. AIDA 2013a: 21).

6.2.5 The United Kingdom

The United Kingdom is a special case as it has only partially opted into EU legal provisions regarding the Common European Asylum System. It only participates in the Dublin II Regulation – respectively, now Dublin III Regulation – without applying, e.g. the Reception Directive. The UK was, on the one hand, one of the first EU member states to publicly announce the suspension of Dublin transfers to Greece on 20 September 2010, on the other hand, the responsible UK Border Agency (UKBA) made clear that this suspension was only established due to pragmatic reasons and not on a systematic basis. Thereby, the UK wanted to prevent litigation before the European Court of Human Rights (cf. ICJ 2011: 4; UNHCR 2011: 5). Subsequently, the UK assumed responsibility for 1,300 applications instead of returning the applicants to Greece under the Dublin II Regulation. Although the Home Secretary made clear that it would still exercise its right of removal regarding new Dublin cases (cf. UNHCR 2011: 5), the UK has meanwhile – as documented by AIDA – suspended transfers to other countries, such as Italy and Cyprus, on an individual basis as well (cf. AIDAb 2013: 25).

6.3 Effects and Impact: Further Developments Responding to the *MSS* Judgment

Meanwhile, all European Union member states have suspended Dublin transfers to Greece according to a statistic by AIDA (cf. AIDA 2014). This development is primarily based on two far-reaching events: The first is the affirmation of the ECtHR's decision in the ECJ judgment on 21 December 2011 (cf. ECJ 2011: 1 ff.) and the second refers to the revision of the Dublin II Regulation and the coming into force of the Dublin III Regulation on 1 January 2014 (cf. Dublin III 2013).

The ECJ's judgment was delivered in the case "N.S. v. Secretary of State for the Home Department" responding to appeals from the Court of Appeal of England and Wales (UK) and the High Court (Ireland). The two courts had asked whether – in the face of systematic deficiencies in the Greek asylum system and their consequences regarding the living conditions for asylum-seekers – a sending state was responsible for examining if the receiving country actually complied with human rights standards. In addition, the courts asked: Do sending states have the obligation to apply the Sovereignty Clause and undertake the asylum procedure themselves if they find systematic flaws in the asylum system of the responsible state (cf. ECJ 2011: 2)? In its decision, the ECJ held "that the presumption that MS [EU member states] are observing the fundamental rights enshrined in the EU Charter of Fundamental Rights must be rebuttable" (Poptcheva 2012: 3) in the case that a country's asylum system shows systematic deficiencies regarding procedures and living conditions for asylum-seekers. Having noted such a situation, the sending state is obliged to apply Article 3 II of the Dublin II Regulation, the Sovereignty Clause (cf. Poptcheva 2012: 3). However, the ECJ emphasised in its decision that not every violation of norms regarding asylum standards meets the facts of a violation of fundamental rights. Such a presumption would endanger the efficiency of the Dublin System. Nonetheless, domestic courts as well as authorities are obliged to not transfer an asylum-seeker to a responsible country, whenever they have come to notice that this country's asylum system suffers from systematic deficiencies (cf. ECJ 2011: 2).

The second development after the *MSS* proceedings is the revision of the Dublin II Regulation and the coming into force of the Dublin III Regulation in January 2014. Instead of a Sovereignty Clause, this regulation includes the so-called Suspension Clause, which establishes that a member state asked to undertake an asylum procedure must do so – even if not responsible – in the case that the state responsible suffers from systematic flaws in the asylum procedure (cf. Dublin III 2013: Art. 2).

Cyprus, Malta, Italy, Greece and Spain had already called for such a clause since April 2011 in order to create "a mechanism to suspend transfers to [member states] facing particular pressure on their national asylum systems" (Poptcheva 2012: 2). As critical voices argue, however, replacing the Sovereignty Clause with the Suspension Clause means that it has actually become more difficult to protect asylum-seekers from inhuman treatment because in order to apply the Suspension Clause it has to be proven first that a country actually suffers from systematic flaws in its asylum system (cf. Peers 2012; Bendel 2013: 28).

6.4 Summary: Diffusing Norms and Changing Policies as Consequences of *MSS*

As the preceding chapters have shown, a great number of member states of the European Union made announcements on a change of policy regarding their application of the Dublin Regulation respectively the inherent Sovereignty Clause. Two different waves of responses can be identified: one, squarely referring to the *MSS* court proceedings, the other originating in the judgment's aftermath, enforced by the ECJ's affirmation of the ECtHR's assessment. According to the UNHCR's assessment, it now appears that all Dublin transfers to Greece have been effectively suspended. Furthermore, "responsibility for assessing Dublin-Greece cases substantively has in effect been assumed by Belgium, Denmark, Finland, Germany, Norway, Switzerland, and the UK" (UNHCR 2011: 9). Directly in response to the *MSS* Judgment in January 2011, Higher Courts in several EU member states, such as Austria, France, Hungary, Italy, Poland, Romania, Spain, and Sweden have increasingly intervened against proposed Dublin transfers to Greece; however, a number of Higher Courts have ruled that a transfer is principally legal, if there is no particular vulnerability to the applicant (cf. UNHCR 2011: 14).

Although a remarkable variation among the announcements of policy changes as well as the actually implemented policies can be observed, it becomes evident that the member states of the EU have responded to the discreditation of the Mutual Trust Principle by the ECtHR. Furthermore, a reaction to the other norms emerging from the *MSS* Judgment also comes to light: Although being generally rather long-term developments which cannot be exhaustively evaluated within this paper's scope, for instance the established principle of Extra-territorial Responsibility is being implemented when applying the Sovereignty Clause to other countries than Greece. This development also refers to the alteration within the interpretation of the Sovereignty Clause's application: Rather than being an optional mechanisms, countries must now fulfil the obligation of applying it, whenever a violation of Article 3 ECHR, on the part of the receiving state is likely. This assessment has been enhanced through the coming into force of the Dublin III Regulation and its inherent Suspension Clause. Thus, a process of diffusing norms established in the *MSS* Judgment as well as respectively changing policies in the individual member states of the European Union can be traced back to the ECtHR

judgment in January 2011. The following chapter will consider the mechanisms behind this process as well as the intervening factors that actually enabled it.

7 THE DIFFUSION OF NORMS THROUGH ECTHR'S CASE-LAW: THE IMPACT OF NORM DIFFUSION MECHANISMS AND INTERVENING VARIABLES

As the preceding chapters have shown with regard to the Court judgment "M.S.S. v. Belgium and Greece", the ECtHR's jurisdiction causes various reactions and, thereby, triggers significant policy changes. The goal of the subsequent chapters is to, first, describe the mechanisms that become evident when EU member states actually respond to the normative inputs by the ECtHR and comply with its newly established norms. Secondly, the intervening variables or mediating factors will be addressed in order to point out which factors or fellow-actors enable and enhance the diffusion of norms initiated by the ECtHR.

7.1 Norm Diffusion Mechanisms in the Case of "M.S.S. v. Belgium and Greece"

Norm diffusion mechanisms are numerous. This paper has started by filtering out four groups of mechanisms that have been extensively dealt with in norm diffusion literature. The following chapter will apply these four mechanisms to the selected case considering the above-described processes initiated by the ECtHR's *MSS* Judgment. This will be the first of two steps aiming at demonstrating through which mechanisms norms established or promoted by the Court diffuse to and among the EU member states; the second step will be directed at the factors that enable and enhance these norm diffusion processes and thereby, the ECtHR's role as change agent.

The first mechanism presented was *coercion*. Following the definition by Dobbin et al., according to which coercion can be exercised through legal as well as physical force, the manipulation of economic interests as well as the accumulation of expertise (c.f. Dobbin et al. 2007: 544), coercion is the first norm diffusion mechanism coming to mind when elaborating on the ECtHR's normative power as well as its contracting states' obligation to comply with its decisions. This interpretation is also in line with Heinze's characterisation, which assumes that coercive mechanisms derive from incentives or from direct impacts of international policy instruments (cf. Heinze 2011: 12). Such a direct impact, particularly in the case of Belgium and Greece, certainly is the ECtHR's judgment. However, as Article 46 ECHR clearly establishes: Only the parties directly involved in proceedings are obliged to implement the judgment's requirements. Moreover, the ECtHR lacks enforcement instruments; regarding the implementation of its jurisdiction, it is dependent on its contracting states concession. Therefore, coercion in its direct manner does not suffice in terms of explaining the EU member states' responses to the *MSS* case-law. Nonetheless, coercion is one of the mechanisms, which certainly disseminate their diffusional effect. Taking into account Börzel and Risse's classification, on the one hand, which characterises coercion as a 'direct' mechanism helps understanding the direction of the diffusion process: The ECtHR as the 'sender' generates and distributes norms among its contracting states. Furthermore, following Shipan and Volden's arguments, international institutions can drive governments towards the adoption of certain policies in order to measure up to common expectations (cf. Shipan/ Volden 2008: 843). Here, a second and third mechanism makes

an impact: socialisation and adaptation. The ECtHR's role as a powerful international institution and, moreover, normative regime, of which all EU member states are signatories, creates an environment with a specific value system. States acting in this environment are under the obligation to comply with this system in order to become or remain its valued members.

On the other hand, a different mode of coercion might emerge among the member states themselves: Hegemonic ideas can be produced or passed on by powerful – either economically or politically leading – states and spread among other states. When the UK as well as Sweden announced that they would suspend all Dublin transfers to Greece even before the judgment was delivered, soon other member states followed lead. Here, the second above-mentioned mechanism comes into play: *socialisation*. As Heinze puts it, socialisation means that shared beliefs and values are, first, generated through continuous interaction, and then, implemented by the inter-acting parties (cf. Heinze 2011: 12). This process is caused and enhanced by two aspects: For one, it is the ECtHR's area of influence, which extends far beyond the external borders of the European Union; secondly, the circle of EU member states is an evolving and continuously debating community. As a platform of constant dialogue, norms are accumulated, promoted or rejected. In this environment, sharply deviant norms do not persist for long. Thus, a common strategy or way to deal with emerging, reinterpreted, but even conflicting norms is more successful than individual solutions to problems that, in fact, concern all. This is certainly the case, when the ECtHR discredits the human rights conformity of a system, of which all EU member states are part.

Checkel as well as Finnemore and Sikkink draw particular attention to the influence of international institutions and organisations socialising or channelling particular norms and values (cf. Finnemore/ Sikkink 1998: 899 f., Checkel 2005: 815 ff.). In addition to their normative agenda, these institutions can also collect information and accumulate expertise and authority. In the case of the ECtHR, it is notable that it strongly relies on the expertise of fellow-agents, for instance the UNHCR; nonetheless, as it has the prerogative of interpretation regarding the ECHR and, furthermore, consists of the most qualified judges from its signatory states, it is itself a body of expertise. This argument is in line with Checkel's analysis showing that international organisations and institutions create 'social environments', which again, alter states' self-perceptions and identities by means of membership and participation (cf. Checkel 2005: 815). In the context of asylum policy, these social environments are completed by international legal regimes, such as the Geneva Convention (GCR) for the protection of refugees' rights as well as the European Charta of Fundamental Rights (ECFR). These regimes set specific standards by producing internationally or Europe-widely accepted norms. These norms are additionally enhanced by means of foundations and instruments of the Dublin System. As elaborated before, the EU member states are chained together by the Dublin System which gives them a common legal framework with regard to asylum policy. On the one hand, all members of this system are closely inter-connected; on the other hand, they have fairly far-reaching competencies regarding the asylum procedures and reception standards themselves. An essential pillar of the Dublin System is the Mutual Trust Principle. The discreditation of this principle has marked a turning point in the operating mode of the Dublin System. By establishing, first, the Principle of Refutability regarding the Mutual Trust Principle, which obliges all member states to consider the possibility that another state does not deserve that trust, and second, claiming the existence of External or Extra-

Territorial Responsibility, the ECtHR has substantially unsettled the 'social environment' of all Dublin member states. Finnemore and Sikkink's assessment that socialisation is the dominant mechanism with regard to the emergence of normative change as it forms the basis for change agents persuasive powers must, therefore, be approved.

Learning is the third mechanism presented and also the one, most difficult to comprehend and identify in the underlying case. According to Berry and Baybeck's definition, learning characterises the process, in which states – when confronted with a problem – select policies that have already been proven successful elsewhere (cf. Berry and Baybeck 2005: 505). This characterisation is shared by Shipan and Volden as well as Heinze (cf. Shipan/ Volden 2008; Heinze 2011). Generally, learning is a horizontal diffusion mechanism because policies or practices travel from one state to another by means of diverging levels of influence and power. However, in the situation of 'misfit' due to the ECtHR's *MSS* Judgment the arising problems were as much European as they were domestic. Suspending the transfers to Greece, thus, was the first most logic consequence in order to attenuate the existent misfit. Motivations for this process, however, may vary: As stated by the British government, they can be pragmatic (to avoid costs caused by more court proceedings regarding transfers to Greece), a response to altered conditions (adaptation to the Court's discreditation of the Mutual Trust Principle) or value-based (assumption of their extra-territorial responsibility due to intrinsic sense of duty).

However, since the governments decided individually about the suspension of transfers and, furthermore, with varying outcomes at different times, there might have occurred a learning process as well. This interpretation is supported by the observation that some countries referred to other government's change of policy when explaining their decision to assume responsibility for applicants, who would otherwise be sent to Greece. As, in particular, the assessment of Orr from the German *Bundestag* shows, the process of learning is rather a long-term dimension of the diffusional process initiated by the Court's judgment. By referring to parallels between the Belgium asylum system, which, according to the ECtHR, did not provide appropriate access to interim measures, and the German procedures, Orr comes to the conclusion that there might arise similar legal problems in future. This evaluation of policy deficiencies clearly indicates – at least, a preliminary step of – an individual learning process, which, however, has not yet led to any collectively enhanced results in Germany going beyond the suspensions of transfers to Greece and, in isolated cases, other Dublin states.

The last norm diffusion mechanism considered here is *imitation*. Imitation refers to a group of mechanisms, which contains different sub-categories, such as mimicry and adaptation. All of them root in legitimacy pressures caused by a clash between international norms or policies and domestic ones (cf. Heinze 2011: 12). While learning and socialisation assume a deep internalisation of the emerged, altered or re-interpreted norms, emulating actors are motivated by the benefits associated with the adoption of a norm or policy (cf. Elkins/ Simmons 2005: 48). With regard to the EU member states' responses to the *MSS* Judgment, the determining line between learning and emulation mechanisms is – at least, in practice – blurry. As noted before, the goal to remain an accepted member of the European community and the legitimisation of one's asylum practices and procedures might be a decisive factor for a change of policies. By taking other governments' decisions as

'bench-marks' and imitating those in order to – at least, superficially – comply with the ECtHR's newly established principles ('refutability' and 'extra-territorial responsibility'), the member states of the European Union adapt to altered normative conditions in the human rights regime they are all part of. The question is now if a first step of simple imitation is followed by further developments, such as a change of asylum procedures regarding interview practices or the access to more profound interim measures. In this context, first observations can be made, such as the suspension of transfers in some cases to further countries, for instance Hungary, or the coming into force of new asylum packages, e.g. in Greece and the Netherlands. To draw a sharper line between the impacts of simple emulation and profound learning respectively socialisation mechanisms, this process must be examined in its long-term dimension. However, the analysis of the mechanisms underlying the norm diffusion process initiated by *MSS* must be considered a groundwork establishing and therefore valuable first step. The next chapter will complement these findings with the analysis of intervening or mediating factors in the context of the *MSS* Judgment.

7.2 The Power of Institutions and Organisations: Intervening Factors Influencing the ECtHR's Normative Power

ECtHR case-law has become a fundamental point of reference for domestic human rights institutions and NGOs monitoring national compliance with the ECHR's human rights regime (cf. Psychogiopoulou 2014). How its rulings are interpreted, transformed and implemented is closely related to the question of the role and influence of intervening factors. This chapter will, therefore, consider the in chapter 4.5 defined 'intervening variables': *veto points, formal institutions, change agents* and *epistemic communities*. It will analyse the influence of these factors with regard to the *MSS* case's effects and impact, i.e. the process of norm diffusion initiated by the ECtHR's *MSS* Judgment. Thereby, the intervening variables will be divided into two groups: First, veto points and formal institutions will be addressed, which are both part of the institutional structure of the political system. Afterwards, change agents and epistemic communities will be dealt with as they represent actors that operate outside the formal structures of a political system, sometimes nationally as well as internationally. As the thesis' overarching goal is to prove the ECtHR's role as a (primary) change agent, the chapter on change agents will only address the influence of secondary change agents – as introduced in the theory section – in the context of European asylum policy. Taking into account these factors is an important step to comprehend why particular policies and norms are adopted and others are not. As Anagnostou puts it,

> "*The different institutions and actors that are involved in national policy processes are characterised by various power and other resource endowment, and they may have distinct preferences as to whether and how to implement particular ECtHR judgments*." (Anagnostou 2013: 217)

7.2.1 Veto Players, Veto Points and Formal Institutions

Veto players may be individual or collective decision-makers, who need to agree to a change of policy before it can actually be practised (cf. Tsebelis 2000: 442). Veto points mark the specific institutional structures in a political system that allow veto players to take influence (cf. Immergut 1990: 396 ff.). With regard to this paper's case and analysis, governments as well as (constitutional) courts

have proven to be important veto players but also powerful supporting formal institutions. These formal institutions are, according to Börzel and Risse, actors that exploit and process new opportunities that have emerged, for instance, through the ECtHR's jurisdiction. By actively enhancing the new norms, they extenuate their potential for conflict. Thus, in case of misfit formal institutions either adapt the normative, practical or judicial input to the given structures or they help changing the structures (cf. Börzel/ Risse 2009: 9). As the preceding section has shown, national governments have not only responded differently to the *MSS* Judgment, they have also exploited and implemented the emerging norms to varying degrees: Whereas Germany, for instance, has assumed responsibility for all applicants that should have been returned to Greece and has, furthermore, applied the Sovereignty Clause to other countries as well, Italy and Austria, for example, have only stopped the transfers; whereas Belgium as one of the parties of the proceedings has introduced new procedural elements, such as interviews, the UK emphasised that it has suspended transfers due to pragmatic reasons. Thus, veto players, such as governments can also serve as an explanation for variation among countries and cases (cf. Anagnostou 2013: 212). Constitutional courts, on the other hand, are, obliged to only promote change if it is consistent with a country's constitution. However, they can also implement arisen international norms into their own jurisdiction and, thereby, force national governments to change or develop legislation, which is in accordance with the international norms. Anagnostou summarises their power as follows:

> "*When courts can exercise the power of constitutional review, they can influence in a variety of direct and indirect ways the policy-making process. Beyond the nullification of policies, a court can exert such an influence by eliminating options and narrowing the range of acceptable policies, granting legitimacy to some and withholding it from others*." (Anagnostou 2013: 218)

In this regard, the general impact of the ECtHR's judgments and established norms depends on the willingness and support of national-level jurisdiction and judicial review. As Anagnostou, however, observes, "courts have tended to interpret national rights guarantees in the light of the ECHR norms" (Anagnostou 2013: 212). Due to its subsidiary nature – the lack of enforcement instruments and universal interpretation – domestic courts need to integrate international law in their jurisdiction in order to guarantee its effectiveness. Domestic courts must, therefore, be considered as strong veto points respectively players, and decisive supporting institutions at the same time.

This assessment holds true for the European Court of Justice as well. The ECJ serves as monitoring entity with respect to EU legislation and its implementation. Accordingly, it can act as a veto point itself. In this regard, it is important that the norms generated or promoted by the ECtHR do not only solely and directly diffuse to the member states' domestic level, but also to the European Union's decision-making bodies. In its affirmation of the ECtHR's *MSS* Judgment, the ECJ fundamentally enhanced the implementation of the 'new' norms: The decision that the Principle of Refutability must be considered whenever the Mutual Trust Principle is applied also meant an acknowledgment of the ECtHR's normative power.

With regard to the specific environment of the ECtHR, the European Union's political system, particularly its decision-making bodies, must also be perceived as a potential veto point. Since the implementation of provisions regarding asylum sits within the EU's spectrum of competencies, member states can change their asylum policies only to a limited extent; even if they wanted to comply better with the ECtHR's human rights regime, they would need to adhere to the EU's regulations and di-

rectives as well. When, for instance, fighting for the Suspension Clause, the Council of the European Union strongly opposed the proposal, at first. Since it is – together with the European Parliament – the EU's legislative organ, a total rejection of the clause would have meant its end. Therefore, with respect to the European level, EU decision-making bodies are essential factors for the sustainable and profound implementation of ECtHR norms. Construing the EU's political system as one that includes veto points in relation to the ECtHR's human rights regime, means, on the one hand, that the EU – by establishing the Dublin System – has built a normative system partially in conflict with the ECtHR's human rights agenda. On the other hand, the assumption refers to the limits and opportunities of compliance within the three layer interplay between ECtHR case-law, EU decision-making bodies and national context.

7.2.2 Change Agents and Epistemic Communities

Change agents or norm entrepreneurs are actors that advocate political change along a specific normative agenda (cf. Sunstein 1995: 23). In this regard, they assume various tasks: They help overcoming deadlocks caused by extensive misfits between domestic and international norms, they persuade or pressure policy-makers to initiate change (cf. Börzel/ Risse 2009: 13), and they help translating 'new' norms into given structures, or vice versa. With regard to the European or international sphere as well as taking into account the specific area of asylum policy, these entities are actors that are concerned with the representation of, support and advocacy for refugees on a global scale. This description holds true, for instance, in the case of non-governmental organisations operating on the national and the international level while promoting the same values or ideas (cf. Sunstein 1995: 23). While having defined most of the present global human rights policy norms, NGOs still needed formal legal institutions to integrate these norms into international law (cf. Dobbin et al. 2007: 453). This is where the already introduced differentiation between primary and secondary change agents takes effect. As the thesis' overarching goal is to prove the ECtHR's role as a (primary) change agent, this chapter will only address the influence of secondary change agents in the context of European asylum policy.

A specific form of change agents are 'tipping point actors' (cf. Alter 2011: 1). While change agents, in general, constantly plead for a particular normative agenda, tipping point actors emerge or intervene at a crucial point of norm diffusion processes where they finally enable change. They usually take up a certain perspective within a simmering discourse and strengthen it towards a point where others follow suit and a norm cascade begins to expand.

In view of the *MSS* Judgment, especially NGOs, such as ProAsyl, the Greek Refugee Council, the European Council on Refugees and Exiles (an umbrella organisation of NGO's concerned with asylum throughout Europe) as well as several others created awareness towards the deficiencies of the Greek asylum system, and furthermore, served as reference points of expertise for the ECtHR's assessment. In addition, the UNHCR who vouches for the needs of the especially vulnerable social group of refugees took influence in the Court's ruling by providing expertise and authority. Through collecting information about the conditions and deficiencies of refugees' situations around Europe, the UNHCR is an important point of reference that combines expertise as well as normative power (cf. ECtHR/ MSS 2011: §349). The UNHCR played a decisive role in *MSS*: On the one hand, it ac-

tively intervened by sending a letter to the Belgian Minister in charge of immigration in April 2009 informing him about the deficiencies in the Greek asylum system and, thus, asking to suspend all transfers to Greece (cf. ECtHR/ MSS 2011: §349). On the other hand, the Court referred in its judgment to the UNHCR's reports and letters as valuable and publicly available sources of information. Accordingly, the fact that Belgium – although thoroughly informed by the UNHCR and other organisations – did not refrain from returning M.S.S. to Greece was a key finding of the Court's reasoning for Belgium's violation of Article 3. Additionally, the UNHCR intervened before the Court presenting evidence that showed inequities in asylum procedures as well as their outcomes. With respect to Greece, this evidence revealed that less than one per cent of refugees are granted asylum at first instance, whereas it is 25-36 per cent in other EU member states with a similar number of applications (cf. Clayton 2011: 760). Moreover, complementing reports by Amnesty International, the European Commissioner for Human Rights, the European Committee for the Prevention of Torture and Human Rights Watch were admitted as pieces of evidence demonstrating the desolate condition of the Greek asylum system (cf. ECtHR/ MSS 2011: §159). According to the Court, these reports had become more numerous and frequent in 2008 and 2009; thus, by the time Belgium had to decide on the transfer of M.S.S. the degrading and inhuman conditions of the Greek asylum system had already been public knowledge (cf. Clayton 2011: 762). As the Court states:

> "*These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect refoulement on an individual or a collective basis.*" (ECtHR/ MSS 2011: §347)

Comprehending the Court's line of argument also shows that the line between change agents and epistemic communities is not a sharp one. According to Haas, epistemic communities consist "of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" (Haas 1992: 3). As the impact of the UNHCR's letter as well as several reports and field studies by NGOs have shown, these actors can operate according to the logic of epistemic communities while, at the same time, being agents of change. By providing reliable information on the circumstances, the UNHCR as well as the enumerated NGOs contribute to the legitimisation of the norms established by the ECtHR or, just as important, provide an informed and substantiated basis for the Court's rulings. In view of the *MSS* Judgment as well as its impacts among the member states of the European Union, change agents appear to bear features of epistemic communities, which can also become tipping point actors by contributing scientific knowledge to a normative agenda.

8 The European Court of Human Rights as an Agent of Change: The Diffusion of Norms in the Area of European Asylum Policies

This paper's underlying thesis is that the ECtHR bears normative power and, thus, acts as an agent of change in the context of asylum policy of the European Union's member states. This final section aims at tying up the loose ends. It, thus, asks about the specific role of the ECtHR as change agent and norm catalyser. It starts by explaining how international courts, in general, and the European Court of Human Rights, in particular, can act as change agents or tipping point actors regarding norm and policy alterations. Thereafter, a final assessment of the ECtHR's role as an agent of

change will be given before a summary of the paper's findings will be drawn up and integrated in a schematic model.

8.1 International Courts as Agents of Change

This chapter will consider the question of how and to what extent international courts can be agents of change. It will, thus, provide a basis for the subsequent assessment of the ECtHR's role as an agent of change. Publications by Karen Alter will be the main theoretical reference as she has researched extensively on the influence, authority and agency of international courts.

Generally, it can be observed that domestic as well as international courts increasingly gain political power which, in turn, empowers them to change state politics. Alter states that while being independent actors, international courts are designed to influence state behaviour (cf. Alter 2011: 3). In this regard, they operate at the international as well as the national level. As Alter puts it: "Courts have become venues in which litigants, interest groups and opposition politicians can challenge the policies and actions of governing bodies" (Alter 2011: 1).

Thereby, courts play different roles: For one, they (re-)interpret international law and thus, advance it through independently delivered jurisdictions. Furthermore, international courts are naturally connected to other actors, especially domestic ones that help to shape the understanding and implementation of international law at the national level. These actors are, on the one hand, domestic courts, on the other hand, they might include civil society organisations as well. In co-operation with these actors ICs constantly adjust existing international norms to current contexts (cf. Alter 2011: 3). Thereby, they can support governments as well as de-legitimise them. In addition, they can help identifying topics of collective interest and co-ordinate common legal solutions for global problems (cf. Alter 2011: 5). These features enable ICs to actively influence policy changes or even initiate them (with the support of mediating actors and, possibly, against government preferences). In this context, ICs need domestic and international interlocutors who support their interpretations of the law in order to re-define specific policies. These interventions can lead to small as well as massive policy changes, so-called "norm cascades" (cf. Sunstein 1995) which initiate fast and fundamental change by taking up simmering public discontent (cf. Alter 2011: 8).

The power of ICs is extensive, as are their impacts:

> "*ICs can help to construct interests, but they are constrained by the power and preferences of existing societal actors. ICs can help to frame minority perspectives in universal terms that garner broader support, and they can help to build alliances between advocates of minority perspectives and rule of law actors and institutions. But ICs cannot impose their own legal solutions in the absence of the support of domestic and transnational interlocutors*." (Alter 2011: 20)

Smith pursues a rather critical approach towards the observation of ICs being agents of change. She argues that the compliance with international human rights regimes rather occurs due to regional normative patterns than because of international norm diffusion (cf. Smith 2004: 4). According to Smith's findings "a state will be more inclined to commit to a global human rights institution when others in its region have committed" (cf. Smith 2004: 18). This argument, however, does not *per se* exclude the possibility of international norms diffusing into regions and, thereby, altering regional or national policies. Smith only demonstrates that the likelihood of one state committing to a

human rights regime increases if other states in its neighbourhood have already done so. This argument again, is in line with Smith's reasoning; she states:

> "*States do not become socialized to acceptable patterns of behaviour exclusively from international norm entrepreneurs. The origin of norms and socialization of acceptable patterns of behaviour must be conceived of as a continuum devolving from international, to regional, to state, and eventually to the level of sub-national politics."* (Smith 2004: 19)

The importance of international norms as reference points is, therefore, undeniable. However, in order to be significant and influential international norms need to be adopted by domestic actors. As Helfer and Voeten write, ICs do not have the power to implement their judgments; they can only (attempt to) influence domestic actors that do have such powers. These are national courts as well as governments and non-governmental organisations (cf. Helfer/ Voeten 2014: 80). Alter further elaborates on the variety of options for international courts to initiate domestic policy changes. For instance, by co-operating with domestic courts in many countries, ICs can constantly adapt existing rules and interpretations of international law to new situations (cf. Alter 2011: 3; Alter 2014: 182). Furthermore, they indirectly influence national jurisdictions by providing guidance for the interpretation of existing domestic law in the light of evolving international law. Thus, ICs can initiate policy changes without even directly addressing national governments. In this context, further actors, of which some have been presented in the preceding chapters, shape the processes of norm diffusion and policy changes: Whenever these actors manage to take on an IC ruling and use it as evidence "that political leaders are deviating from their promises of respecting the rule of law, or from adhering to the goals and standards inscribed into international law", they can pressure these policy-makers to adapt policies to (new) international norms (cf. Alter 2011: 6; Alter 2014: 184). In this regard, ICs can also be tipping point actors that provide national actors or, more abstract, discourses with legal resources and arguments. In situations where many factors and opinions exist that find support among public and politics, IC case-law consistent with one existing position might just be what tips the scales. As Venzke points out a judgment by an international court, which holds a state's practices incongruent with certain aspects of international law, may enable a state's executive to further political projects that would have been too unpopular among its constituencies, otherwise (cf. Venzke 2013: 389).

Besides transformative effects within states that have been ruled guilty of a violation of a specific legal regime, ICs can also provoke responses in states that were not actually parties to the proceedings. As has been shown in chapter 6, this is the case looking at the *MSS* Judgment. As Helfer and Voeten elaborate with regard to the already mentioned *erga omnes effect*

> *"IC judgments against other states can raise the salience of an issue and provide opportunities for legitimation or government "hand washing," thus making policy change more likely. Moreover, IC judgments against one country may embolden international organizations (…) to demand policy change in all of its member states."* (Helfer/ Voeten 2014: 79)

It can be concluded that ICs being global actors operate at the international as well as the national level aiming at changing domestic policies according to their legal regime's provisions and agendas. Thus, they are not simply agents of states' preferences but – depending on their social and normative environment – can rather act as agents of change that contribute to the constitution of law and the evolution of domestic politics and policies (cf. Alter 2011: 8; cf. Venzke 2013: 390).

8.2 Concluding Assessment: The ECtHR's Normative Power as an Agent of Change

This chapter aims at closing the loop. Thus, this thesis' underlying question, how and to what extend the ECtHR is an agent of change in the area of asylum policy of EU member states, will be considered. In this context, various aspects that have already been addressed throughout the thesis must be taken into account: the mechanisms through which the ECtHR's normative power unfolds (norm diffusion mechanisms) and the actors or structures (intervening or mediating factors) that enable or enhance the process of norm diffusion from the international level (ECtHR) to the domestic level (EU member states).

The question of why and how norm diffusion theory can be applied to the impact of international courts relates to the question of which processes sit behind the commitment of states to certain sets of norms and norm regimes, e.g. provided by international human rights institutions. In view of the European Court of Human Rights' authority, understanding its contracting states' compliance is linked to the evaluation of the Court's specific environment. Residing in Strasbourg, the ECtHR is a neighbour of European Union institutions, such as the European Parliament and the European Ombudsman. This environment certainly takes its influence. As Smith writes, Western European states "have consistently complied with decisions handed down by the European Court of Human Rights" (Smith 2004: 16). However, its geographical proximity to the EU institutional system is not the only reason for the Court's normative power. During the past four years the ECtHR registered more than 10,100 interim measures among all contracting states (cf. ECtHR 2014d), it decided over almost 93,400 applications alone in 2013, and it delivered over 4,600 judgments in the past four years of which 18.45% concerned a violation of Article 3 ECHR (cf. ECtHR 2014e: 6 f.). However, human rights institutions like the ECtHR usually do not generate visible or even material benefits the way trade unions or defence alliances do. On the contrary, membership in human rights institutions requires commitment to sometimes inconvenient rules and brings about new domestic obligations. Furthermore, states do not need to sign conventions or become members of international institutions if they aim at accepting and promoting human rights (cf. Smith 2004: 2 f.). But still, states do not only decide to become members of human rights institutions, they also comply with their rules. Anagnostou points out that the ECtHR meanwhile substantially influences national legal and political systems as the undisputed authority of its judgments as well as the increasing number of cases demonstrate. This influence goes far beyond mere penalty of violations of the ECHR. In fact, as Anagnostou claims, the Court's jurisprudence triggers fundamental legal, judicial and institutional changes; additionally, it contributes to the improvement of national human rights protection (cf. Anagnostou 2013: 8).

When attempting to answer the question if the ECtHR is an agent of change, the analysis of policy diffusion among signatory states after a Court judgment is just as important as looking at the norms themselves promoted through the ruling. The ECtHR promotes a certain normative agenda: the ECHR's human rights regime. This agenda – and in fact, the impact it is supposed to have on all contracting states of the ECHR – has been addressed by the ECtHR in multiple rulings. In its *Ireland* Judgment the Court established in 1978 that its

> "*judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby con-*

> *tributing to the observance by the States of the engagements undertaken by them as Contracting Parties."* (ECtHR/ Ireland 1978: §154)

The ECtHR further elaborated on this interpretation of its mission in its *Karner* Judgment in 2003. The Court held that

> *"Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States."* (ECtHR/ Karner 2003: §26)

This aspired *erga omnes effect*, however, is not only the Court's ideal conception, it is as studies have shown a matter of fact (cf. Helfer/ Voeten 2014; Alter 2014; Stone Sweet/ Brunell 2013). Moreover, as the *MSS* Judgment, which served as case of analysis to this thesis, unveiled, the specific constellation of the ECtHR ruling against a member state of the EU that wrongly applied a provision of the Dublin Regulation exponentially increased the judgment's vigour. It affected not only the parties of the proceedings but the asylum policies of all EU member states respectively Dublin states. This observation can be attributed to the specific constellation of the ECtHR ruling guilty a member state of the Dublin System: As all Dublin states comply with the same common asylum regime, if one is accused of a violation of the ECHR by applying the provisions of this system, the others must fear litigation as well. Here, the rule is: The more alike the policies among states, the likelier the overall-change of policy after an ECtHR ruling. More generally, it can be stated that by helping to define specific policies as consistent or inconsistent with the ECHR's human rights protection the ECtHR creates the need to change policies accordingly. With regard to ECtHR rulings on lesbian, gay, bisexual, and transgender (LGBT) issues, Helfer and Voeten found that "judgments against one country substantially increase the probability of national-level policy change across [entire] Europe" (Helfer/ Voeten 2014: 77).

As this thesis has dealt with the specific area of asylum policies within the EU member states, namely the practice of Dublin transfers, it will cite the preceding chapters' findings as argumentative basis for the concluding assessment of the ECtHR's role as an agent of change. When finding breaches of Articles 3 and 13 ECHR, the Court condemned not only the detention and living conditions for asylum-seekers in Greece, it also found Belgium guilty of not protecting M.S.S. from these conditions. Since Belgium had simply trusted in the Dublin II Regulation's provisions and, furthermore, applied the Mutual Trust Principle, it must be considered representative for the vast majority of EU and Dublin member states. This fact, however, entails fundamental consequences for the entire Dublin System as well as its individual member states. As Clayton puts it, "one of the interesting aspects of M.S.S. is the part it plays in the development of an integrated system of human rights protection for asylum seekers in the EU" (Clayton 2011: 763). This assessment is important in the light of the normative agenda of the ECtHR and it furthermore, emphasises its decisive role in strengthening asylum-seekers rights throughout Europe. By discrediting approved and profound principles of the Dublin System, the ECtHR decided to risk a drastic shift of direction in order to protect the fundamental rights of the ECHR and, thus, promote its normative agenda. This decision lead to broad policy changes among EU member states as has been demonstrated in chapter 6.

By referring to non-governmental actors' expertise, the ECtHR furthermore specifically embraces the co-operation with organisations or civil society groupings that share the Court's normative agen-

da. In addition, national institutional structures, such as domestic courts have chosen to support the norms established in the ECtHR's *MSS* Judgment and consequently implemented them when suspending other Dublin transfers. These actors thus enable the ECtHR's mission as an agent of change in the area of asylum policy.

The *MSS* Judgment has unveiled a more general problem with regard to the functioning of the Dublin System. Spijkerboer explains in his analysis of procedural revision of Dublin provisions: Since the substantive examination of asylum applications is exceedingly neglected on the national level, "asylum seekers increasingly have good reasons to feel that the European Court of Human Rights will subject their application to an examination which is considerably more substantial than the examination by national courts" (Spijkerboer 2009: 49). By pinpointing general deficiencies of the Dublin System as well as extracting particular domestic shortcomings, the ECtHR questions the cornerstones of the European Asylum System. It, thus, triggers policy changes by means of re-interpreting international law and establishing 'new' norms. This argument is corroborated by the responding reactions of the European Court of Justice after ECtHR judgments. By affirming the decisions of the ECtHR the ECJ additionally attaches importance to the norms established by the ECtHR.

With regard to the *MSS* Judgment, which exposed the deficiencies of the Dublin System, the ECtHR jurisdiction fell on fertile ground because the EU member states' asylum policies are closely inter-linked and highly inter-dependent. Thus, the ECtHR's specific environment must not be underestimated. In this paper's underlying case the ECtHR ruling had exponentially greater impact due to the proceedings' specific constellation: Two individual nation-states having violated the provisions of the ECHR represented an entire legal and political regime. Presumably, this scenario made it possible in the first place that the in chapter 7.1 described norm diffusion mechanisms stand out that clearly and can, accordingly, be identified and analysed in relation to the judgment. When aiming, however, at making a generic statement about the ECtHR's role as an agent of change in the area of asylum policy, the question must be examined in its long-term dimension: Further cases and EU member states must be taken into account when analysing the effects of the Court's jurisdiction. Correspondingly, generalising this paper's findings is only possible to a limited extent. Nonetheless, in view of the specific impact of the *MSS* Judgment – the change of transfer practises among the EU member states as well as the establishment of the Extra-Territorial Responsibility Principle and the Refutability Principle with regard to the Mutual Trust Principle – the ECtHR has clearly proven to be an agent of change in the area of asylum policy.

8.3 Norm Diffusion Processes from the ECtHR to the EU Member States: a Schematic Reconstruction

This final section's goal is to develop a comprehensive, depictive schematic representation, which takes up the findings of this thesis. This schematic illustration is – as was the theoretical basis – rooted in norm diffusion theory. In this regard, a graph that specifically considers the process of norm diffusion initiated by the *MSS* Judgment will be developed (Figure 1). Subsequently, a more general figure, which shows norm diffusion processes triggered by the ECtHR, should be derived from the case study's findings (Figure 2). Due to the fact that this paper is based on a single-case

study it cannot provide a general model regarding diffusion processes initiated by ECtHR jurisdiction. In order to be able to further generalise this thesis' results other cases would have to be added and analysed. Presumably, this would also mean that even more actors and variables take effect and hence would have to be included. The figures below are by no means exhaustive; they only endeavour to summarise and abstract the findings of the preceding chapters.

In the context of asylum policy, two dimensions of norm diffusion processes are relevant: the horizontal and the vertical dimension. As the ECtHR does not provide explicit or precise policies, but normative and, of course, legal stipulations, horizontal diffusion refers to the process when particular policies spread among states faced with the same problem or acting in the same cultural, economic or political environment. This environment, however, is substantially influenced by the norms the ECtHR promotes, which diffuse vertically – from the international level where the ECtHR operates to the domestic level which is the playing field for national governments and other policy-making actors.

With particular regard to the area of asylum policy, another aspect must be considered: Due to the regulations of the Dublin System the member states of the European Union deal with a complex system of divided competencies. On the one hand, they have to implement and conduct the various directives and regulations deriving from the European level; on the other hand, they are chained, particularly in this sensitive area of national self-determination and self-conceptualisation, to their individual cultural backgrounds as well as their constituencies dominating interests. At this point, the above-described intervening factors take effect; and so do the different norm diffusion mechanisms. Both, intervening factors and diffusion mechanisms must be considered important aspects at the international as well as the domestic level of norm diffusion processes. As pointed out in the preceding chapters, veto players, formal institutions, change agents and epistemic communities provide the structures, expertise or capacities to dissolve a misfit between the international norms generated by the ECtHR and possibly conflicting norms at the domestic level. Diffusion mechanisms on the other hand, describe the patterns of interaction among the member states of the EU as well as between the ECtHR and the individual member states.

Thus, a three-level structure can be construed: Presumably, the norms promoted by the ECtHR diffuse, on the one hand, through the European level and are, then, transferred to the member states' level; this path of diffusion must also be considered in its counter direction: EU member states or actors coming from those member states also take influence – or even create – the EU's norm system by contributing to its legislation in the Council of the EU as well as in the European Parliament. On the other hand, the jurisdiction of the ECtHR leads to a direct path regarding the diffusion of specific norms to the member states – although filtered or mediated by the intervening variables and diffusion mechanisms, likewise. Due to the fact that the ECtHR's judges are sent by the contracting states of the ECHR, the domestic value system might also play a role in the ECtHR's jurisdiction. Thus, a diffusion process could also occur from the EU member states level to the ECtHR level. Furthermore, and supposed that these countries also contributed some particular sets of values when the ECHR was established it could be assumed that the ECtHR judges on the basis of diffused and fused norm and value systems. The European Union is a strong normative power itself as e.g. Manners (2002; 2004), Börzel and Risse (2009, 2012) and Sjursen (2006) have re-

peatedly demonstrated. Therefore, it diffuses norms and policies by its own. However, it can be assumed that the EU – although it is not yet a contracting entity of the ECHR – is geared to the ECtHR's human rights regime. This holds true because the EU is, at least indirectly through its member states, legally bound to guarantee the ECHR's rights. The respective jurisdiction of the ECJ also contributes to this fact. Here, a practise of mutual influence between the ECtHR and the ECJ has emerged – not least visible in the *MSS* Judgment's aftermath.

When pursuing the objective of developing a schematic model which summarises this paper's findings the starting point must be the specific ruling, in this case *MSS*. However, this assumption should also apply in the case of raising the findings to a more abstract level: the process of norm diffusion deriving from the ECtHR's judgment and resulting in an actual change of policy within EU member states. Then, initiated by the ECtHR judgment and enabled by mediating actors, norms are taken up by the member states. This adoption and implementation of norms – caused and enhanced through different diffusion mechanisms – leads to a change of policies in a group of vanguard states. These are usually the parties of the proceedings which are obliged to adhere to the Court's ruling. At this point, mediating factors, such as secondary change agents and epistemic communities come into play again by taking up and promoting norms also within other political domestic environments. After these agents have successfully furthered and circulated these norms, e.g. by feeding them into already simmering public discourses, others member states follow suit. A so-called norm cascade is initiated. When a crucial number of EU member states have responded to the judgment and started to initiate policy change, the EU level comes under pressure. Since the essential aspects of the Dublin System are passed and dealt with at the European level, a need for more extensive changes arises. This pressure is increased by a possible respective ECJ judgment which – in this paper's case – finally supports the European Commission's objective to accomplish a revision of the Dublin System. However, as mentioned before the just described process can only be generalised to a limited extent. In order to construe an ideal type norm diffusion process triggered by ECtHR jurisdiction and disseminating among the EU member states further cases must be evaluated. Moreover, to comprehend the complexity of these processes, further member states as well as their individual policy changes and altered structures must be carefully taken into account when analysing the consequences of a specific ECtHR ruling. Therefore, the figures below should not be understood as templates for the entirety of norm diffusion processes triggered by the ECtHR. They rather depict the specific finding of this paper while attempting to abstract them as far as possible and insightful.

Figure 1: Norm diffusion process initiated by the ECtHR's MSS Judgment

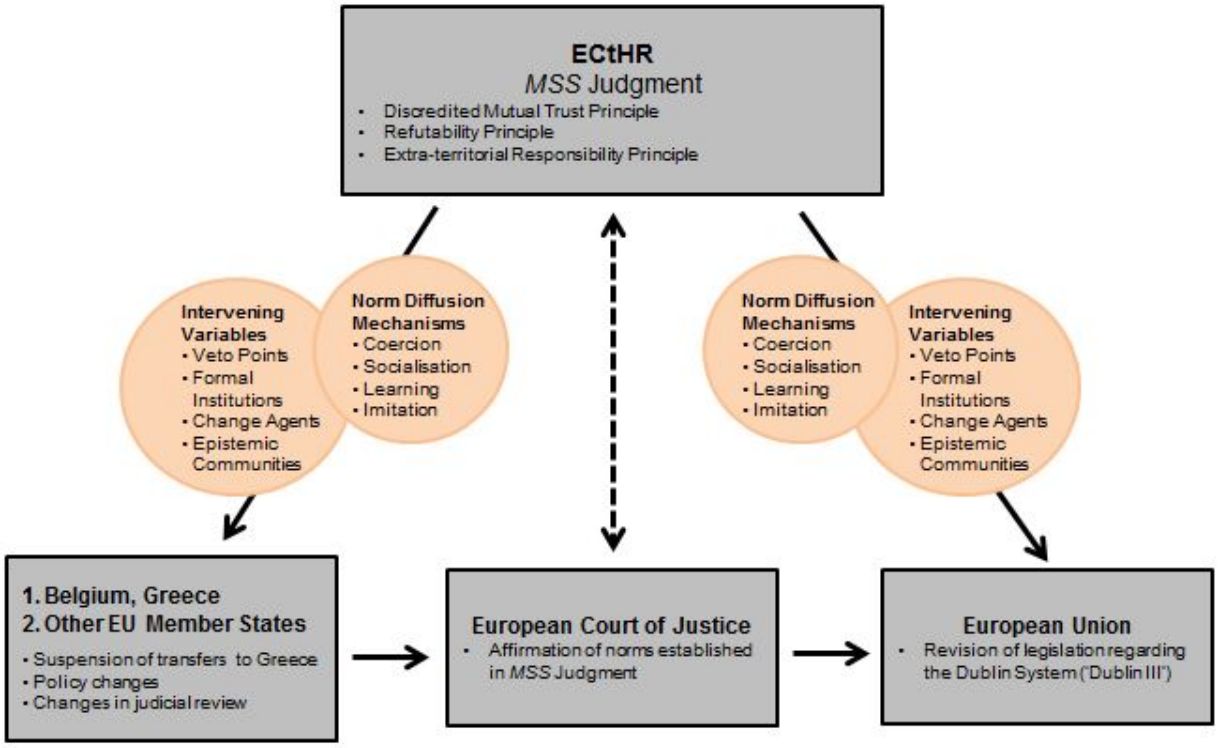
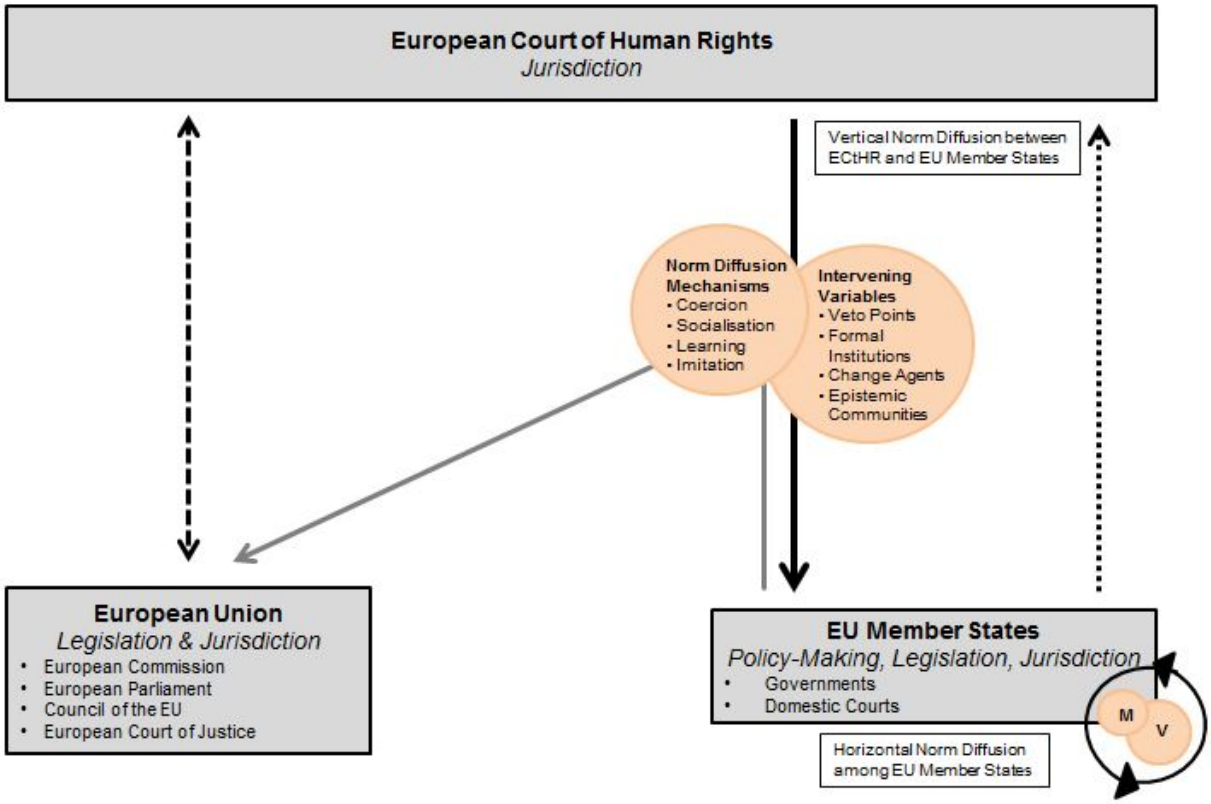


Figure 2: Norm diffusion processes in the area of asylum policy from the ECtHR to the EU and its member states



CONCLUSION

This thesis has investigated the question, how and to what extent the European Court of Human Rights is an agent of change in the field of asylum policy. This question was considered due to the observation that the admission and proceeding of certain cases by the ECtHR can catalyse political and societal discourses which, under specific conditions, trigger policy changes in individual states – as it was the case in "M.S.S. v. Belgium and Greece". In order to explain MSS's *erga omnes* effect and to assess the ECtHR's role as an agent of change, the thesis has further asked which mechanisms enable the norms generated or promoted by the ECtHR to diffuse. The third question considered in this context concerns the intervening or mediating factors – be it agents, actors or structures – that support the norm diffusion process, on the one hand, and thereby, enable the ECtHR's normative power, on the other hand. In order to answer these questions, the paper drew on the findings of norm diffusion theory by applying them to the sphere and process of influence of the ECtHR with particular regard to the *MSS* Judgment. The paper first contextualised the role of the ECtHR as well as the different instruments of the Dublin System. Thereupon, the theoretical foundations rooting in norm diffusion theory were presented and, thereby, the analytical tools developed. After describing the selected case "M.S.S. v. Belgium and Greece" and extracting the norms established in the ECtHR's judgment in January 2011, several member states' responses to the Court's ruling were presented and analysed. The last two chapters took up the tools of analysis presented in the theory section and applied them to the case of *MSS* as well as to the area of European asylum policy in general. Thereafter, a concluding assessment of the European Court of Human Rights' role as an agent of change was pursued.

Observing a variety of responses – also policy-wise – among member states of the European Union, which were not parties of the proceedings revealed that an *erga omnes* effect actually occurred in consequence of the *MSS* Judgment. This effect must be viewed as a process of norm diffusion triggered by the Court's judgment and then, spreading in waves among the EU member states. As argued and elaborated on in this thesis, the diffusing norms mainly concern three principles touched upon in the *MSS* Judgment: the discreditation of the Mutual Trust Principle, the establishment of the Refutability Principle in relation with the Mutual Trust Principle, and the establishment of a principle of Extra-territorial Responsibility. These three principles all relate to the situation where one Dublin state attempts to expel a person under the Dublin Regulations to another Dublin state. Instead of taking for granted that the country, which in fact is responsible for undertaking the asylum procedure, can do so in accordance with human rights and procedural standards, sending states now have to make sure that this is the case. Otherwise, they are obliged to assume responsibility for the concerned asylum-seeker themselves.

The diffusion of these principles or norms depends on various factors. As argued and demonstrated in chapter 7.1, norm diffusion mechanisms, such as coercion, socialisation, learning and imitation play a decisive role regarding the extent and intensity to which norms actually spread and ingrain. In this respect, coercion seems particularly applicable as it refers to diffusion processes triggered by physical but also legal force. However, as could be shown in the course of chapter 7.1, mechanisms, such as socialisation and imitation may have strong implications in the *MSS* scenario as well.

These mechanisms derive from the assumption that states operate in a social environment. This social environment generates, on the one hand, certain norms and values through continuous interaction among states and creates, on the other hand, specific expectations that must be met by the individual nation-states in order to remain valued members of the international system. Applied to the MSS Judgment, this means that states might either adopt the norms established by the Court because they appear to be consistent with their own normative socialisation; or they perceive the need to comply with the ECtHR's jurisdiction in order to not be exposed to public criticism. The fourth mechanism presented in this thesis is learning. The effects of learning are difficult to pinpoint with regard to the impacts of the *MSS* Judgment. There might have occurred learning processes as well, but in order to extract them from the general process of norm diffusion a long-term study focussing on individual EU member-states' policy changes would be necessary. Such a study might be also relevant and desirable in order to explain variation and convergence among the EU member states' responses to the *MSS* Judgment. It could, on the one hand, unveil which mechanisms mainly take effect in the process of norm diffusion from the international to the domestic level in relation to the field of European asylum policy; on the other hand, it could assess the specific domestic influence of different mediating factors and intervening variables, such as the structure of the political system, formal institutions, other change agents and epistemic communities. Precisely those factors or variables were the second set of aspects of norm diffusion processes this paper has examined with regard to asylum policy in EU member states. In particular, four variables were taken into account when analysing the diffusion of norms from ECtHR jurisdiction to the domestic level: veto points, formal institutions, change agents and epistemic communities.

When considered in the context of the *MSS* Judgment veto points can be found at the European (European Commission, European Court of Justice) as well as at the national level (constitutional courts, national governments). Depending on their structures but also preferences, these variables may also act as supporting institutions by promoting, approving and implementing the norms established by the ECtHR. Similarly, change agents and epistemic communities play a decisive role at the European as well as at the national level. By raising awareness towards specific issues – in the context of *MSS*, e.g. the non-compliance with human rights standards on the part of Greece – change agents promote and exploit the norms established by the Court within national environments; at the same time, change agents as well as epistemic communities provide the ECtHR with information and expertise in order to substantiate its legal and factual assessments. Thus, while contributing to the establishment of 'new' norms at the international level, the identified intervening variables also influence the way these norms are perceived, adopted and implemented within the domestic context.

The consideration of these variables and mechanisms aimed at drawing a holistic picture of the ECtHR's role and influence in the area of asylum policy in the European environment. In view of the impact of the Court's judgment in "M.S.S. v. Belgium and Greece", the conclusion must be drawn that the ECtHR can act as a powerful agent of change. While monitoring the human rights compliance of its individual contracting states, the ECtHR also essentially contributed to the evolution and improvement of protection standards in the European Union's asylum policy. However, although the Court's power to initiate or enhance processes of norm diffusion seems substantial, its direct influ-

ence in actual policy changes is limited. The latter depends on the cooperativeness and willingness of the states being party of the proceedings or, and this has been the specific constellation in the *MSS* case, involved in the same legal system. Precisely this fact has – thus, the assumption – increased the ECtHR jurisdiction's normative power exponentially. Since all member states of the Dublin System are obliged to comply with the same legal regime the Court's assessment that certain aspects of this regime provide the basis for violations of the ECHR's provisions has implications not only for the litigants but for the entire system. In other words, the fact that one state is adjudged of a violation, although it has simply applied the rules provided by the legal system it is part of, entails consequences for all member states of this system. Thus, the establishment of new norms or the correction and re-interpretation of already established norms, which relate to a common set of rules, may unfold a by far greater impact than case-law that only concerns an individual state's asylum system. That way, the ECtHR's influence in the area of EU asylum policy respectively EU member states' asylum policies must be considered a fundamental one.

In spite of still existing undeniable deficiencies in the Greek asylum system in particular, as well as in the Dublin System in general, this thesis was able to show that the ECtHR's case-law leads to substantial progress regarding asylum policy in Europe. The revision of the Dublin II Regulation and the coming into force of the Dublin III Regulation marks an important respective step. To claim that a rethinking with respect to the entire Dublin System focussing on the improvement of its human rights compatibility has begun would neglect the fact that states' considerations in the field of asylum policy are highly determined by security-related objectives. In this regard, the jurisdiction of the ECtHR must rather be viewed as providing strong normative incentives for its signatory states. As progress, however, develops slowly a cross-country long-term study would be needed in order to fully comprehend the precise consequences of the *MSS* Judgment as well as other judgments concerning the Dublin System. Such a comprehensive study should be able to explain the variations among the EU and Dublin member states, on the one hand, and the different intervening factors that nourish the ECtHR's influence, on the other hand. This is where future research on this topic should spud in, in order to complement and substantiate this thesis' findings. As for the underlying goal of this paper, the consideration of the ECtHR's role as an agent of change in the area of European asylum policy, the analysis of the *MSS* Judgment's impacts revealed that the European Court of Human Rights is not only a formal guardian of human rights but much rather an active and important agent of change. Its power in the area of asylum policy can trigger substantial changes and thereby increase and improve human rights protection in the entire European Union.

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