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Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored

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Abstract

This article explores access to refugee protection, which in practice means access to a place of refuge, in light of various barriers to protection erected by European States. First, European States increasingly extend their border controls beyond their territorial borders and co-operate in order to prevent those seeking protection from reaching their territory. Yet, legal obligations, in particular the principle of *non-refoulement*, may continue to apply to these activities, as the concept of 'jurisdiction' in human rights law develops. Second, they engage a further, diametrically opposed move, where they purport to act as a single zone of protection, and allocate responsibility for asylum claimants in a manner that also hinders access to protection. The aim of this article is to explore the recent responses of Europe's two supranational courts, the European Court of Human Rights (ECtHR or 'Strasbourg') and the Court of Justice of the European Union (CJEU or 'Luxembourg'), in confronting these attempts to limit and manage access to protection in the EU. Its focus is the ECtHR ruling in *Hirsi Jamaa v Italy* (condemning Italy's pushback of migrants intercepted on boats in the Mediterranean to Libya), as well as that in *MSS v Belgium and Greece* (concerning the Dublin system for allocation of responsibility for processing asylum claims) and the subsequent CJEU ruling in *NS/ME.*

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1. Introduction

This article explores issues of access to protection. Refugee protection depends, in practice, on access to a place of refuge. A practically effective right to seek asylum remains elusive: even the *non-refoulement* principle presupposes some kind of contact between the State and the protection-seeker. However, the EU and its Member States employ many means to preclude that contact. As has been noted for some time, '[l]iberal democratic states publicly avow the principle of asylum but use fair means and foul to prevent as many asylum seekers as possible from arriving on their territory where they could claim its protections'.[1] Border controls have been 'offshored and outsourced', to use Gammeltoft-Hansen's memorable phrase,[2] meaning that they have been extended beyond the territory of the state, and privatised. At first glance, it might be assumed that precluding access to territory would successfully limit states' legal obligations. However, that is not so, as has been ably demonstrated in recent exemplary scholarship on this topic.[3] Depending on the means used, the deflection activity may amount to an exercise of 'jurisdiction' by the State concerned, and accordingly be subject to International Human Rights Law (IHRL) and refugee law obligations. The particular aim of this article is to explore the expanding and mutually reinforcing role of Europe's two supranational courts, the European Court of Human Rights (ECtHR or 'Strasbourg') and the Court of Justice of the European Union (CJEU or 'Luxembourg'), in securing access to protection for asylum seekers entering the EU, in the face of the many barriers erected by the EU and its Member States, often in collaboration with third states.

Section 2 sets the scene by briefly outlining some offshore border control practices. The article then briefly outlines the extent to which the legal obligation of *non-refoulement*, in particular under the Convention relating to the Status of Refugees (RC),[4] the European Convention on Human Rights (ECHR)

1 Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Politics of Asylum* (Cambridge: Cambridge University Press, 2004) at 229. See also Hathaway, 'The Emerging Politics of Non-entrée' (1992) 91 *Refugees* 40.

2 Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (Cambridge: Cambridge University Press, 2011) at 2.

3 Ibid.; den Heijer, *Europe and Extraterritorial Asylum* (Oxford/Portland, Oregon: Hart Publishing, 2012); and Ryan and Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (The Hague: Martinus Nijhoff, 2010).

4 Convention relating to the Status of Refugees 1951, 189 UNTS 137.

and EU law,[5] track this extension of border practices.[6] While the evolving notion of 'jurisdiction' under the ECHR has been well-analysed,[7] the dramatic developments in the Grand Chamber ruling in *Al-Skeini v United Kingdom*[8] (concerning UK jurisdiction in Iraq) and *Hirsi Jamaa v Italy*[9] (concerning Italy's push-backs of migrants intercepted in international waters to Libya) are set in context. EU law may provide means to enhance access to asylum, given the express commitments to respect *non-refoulement* in EU primary and secondary law, including the Schengen Borders Code (SBC).[10]

Section 3 follows the journey of the protection seeker further in her attempt to reach a place of refuge. On reaching the jurisdiction of an EU State, she will encounter an additional layer of legal deflection, namely the mechanisms for allocation of responsibility for asylum claims, under 'safe third country' (STC) rules as embodied in the Asylum Procedures Directive (PD)[11] and the Dublin System for allocation of responsibility between European states.[12] The RC seems to allow at least some STC practices, subject to conditions. Examining the case law on extra-territorial border controls and transfers of asylum seekers together reveals instrumental manipulation of jurisdiction. When States extend their borders abroad, they often attempt to rely on

5 *Non-refoulement* is also a principle of customary international law, perhaps also *jus cogens*, but that fact is not determinative of its scope of application. For endorsements of the customary status of *non-refoulement*, see Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd edn (Oxford: Oxford University Press, 2007) at 346, fn 421 ('Although a sound case can be made for the customary international law status of the principle of *non-refoulement*, its claim to be part of *jus cogens* is much less certain'). See also the Separate Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others v Italy* Application No 27765/09, Merits and Just Satisfaction, 23 February 2012 (Grand Chamber) at 67.

6 I examine only the 'offshoring angle'. For assessment of the accountability of states for private border control actions, see Gammeltoft-Hansen, supra n 2 at Ch 5.

7 Generally, see De Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2010) at Ch 2; and Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011).

8 *Al-Skeini v United Kingdom* Application No 55721/07, Merits and Just Satisfaction, 7 July 2011 (Grand Chamber). See Ronchi, 'The Borders of Human Rights' (2012) 128 *Law Quarterly Review* 20; and Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 *European Journal of International Law* 121.

9 *Hirsi Jamaa v Italy*, supra n 5.

10 Parliament and Council Regulation (EC) No 562/2006, establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L105/1.

11 See, in particular, Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection' (2005) 7 *European Journal of Migration and Law* 35.

12 The Dublin System comprises in the main the Dublin Regulation (Council Regulation (EC) No 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50) (DR). The DR replaces the Dublin Convention (Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1) and the Eurodac database (Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1).

constrained territorial constructions of jurisdiction to avoid responsibilities. Yet, when it comes to Dublin cases, we see States attempting to rely on further legal fiction that they form a uniform expanded area of protection, such that transfers of asylum seekers may be assumed to be safe. The ECtHR has over time come to insist on the responsibility of transferring states. The article traces the development of the Strasbourg caselaw from *TI v United Kingdom*[13] to *KRS v United Kingdom*[14] and to the 2011 Grand Chamber ruling in *MSS v Belgium and Greece*.[15] In December 2011 in *NS* and *ME*[16], the CJEU finally ruled on states' EU law responsibilities under the Dublin Regulation (DR),[17] following Strasbourg's strong lead rather than developing any distinctive EU principles.

2. Access to Protection

A. The Migration of Border Controls

The EU and its Member States employ an array of means to control their borders, extending well beyond the territory of the Member States. States deflect would be migrants, often protection-seekers, in territorial and international waters. The marine context brings with it a complex interplay of legal regimes, including the international law of the sea;[18] and international criminal law on

13 *TI v United Kingdom* 2000-III.

14 *KRS v United Kingdom* Application No 32733/08, Admissibility, 2 December 2008.

15 *MSS v Belgium and Greece* 53 EHRR 2. For commentary, see Mallia, 'Case of *M.S.S. v Belgium and Greece*: A Catalyst in the Re-thinking of the Dublin II Regulation' (2011) 30 *Refugee Survey Quarterly* 107; Maiani and Hruschka, 'Le partage des responsabilités dans l'espace Dublin, entre confiance mutuelle et sécurité des demandeurs d'asile' (2011) 2 *Revue suisse pour la pratique et le droit d'asile (ASYL)* 12; Carlier and Sarolea, 'Le Droit d'Asile dans l'Union européenne contrôlé par la Cour européenne des droits de l'homme' (2011) 6436 *Journal des Tribunaux* 353; Moreno Lax, 'Dismantling the Dublin System: *MSS v Belgium and Greece*' (2012) 14 *European Journal of Migration and Law* 1; and Clayton, 'Asylum Seekers in Europe : *MSS v Belgium and Greece*' (2011) 11 *Human Rights Law Review* 758.

16 Joined Cases C-411/10, *NS v Secretary of State for the Home Department* and C-493/10, *ME v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* 21 December 2011. For analysis, see Henderson and Pickup, 'The Saeedid/NS judgment: Using the EU Charter of Fundamental Rights in Dublin cases and more widely', paper presented at ILPA/Doughty Street Seminar, 25 January 2012; and Costello, 'The Ruling of the Court of Justice in *NS/ME* on the Fundamental Rights of Asylum Seekers under the Dublin Regulation: Finally, an End to Blind Trust Across the EU?' (2012) 2 *Asiel & Migrantenrecht* 83.

17 See supra n 12.

18 Concerning obligations at sea, see Fischer-Loscano and Löhr, *Border Control at Sea: Requirements under International Human Rights and Refugee Law* (Berlin: European Centre for Constitutional and Human Rights, 2007); Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations accruing at Sea' (2011) 23 *International Journal of Refugee Law* 174; Goodwin-Gill, 'Opinion: The Right to Seek Asylum: Interception at Sea and the Principle of *Non-refoulement*' (2011) 23 *International Journal of Refugee Law* 443; and Papastavridis, '"Fortress Europe and FRONTEX":

smuggling[19] and trafficking,[20] a comprehensive analysis of which is beyond the scope of this article.[21] The EU co-operates with countries of transit and origin and engages in joint border control missions under the auspices of the EU Borders Agency, Frontex.[22] Frontex activities frequently involve patrols in international waters and in the territorial waters of third countries.[23] The legal underpinnings of patrols in foreign waters are often informal memoranda of understanding between individual EU Member States and the third country in question.[24]

States also often extend their borders by stationing their officials in other countries, under various guises. The EU Network of Immigration Liaison Officers[25] posts officials to transit and sending countries, although they do

Within or Without International Law?' (2010) 79 *Nordic Journal of International Law* 75. Papastravridis argues, for example, that the law of the sea references to 'slavery' may be extended to trafficking activities, with novel legal effects. See more generally, Barnes, 'The International Law of the Sea and Migration Control', in Ryan and Mitsilegas (eds), supra n 3 at 103–49.

19 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2241 UNTS 507 (entered into force 2004). Note Article 19 on *non-refoulement*.

20 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2237 UNTS 319 (entered into force 2003). Note Article 14 on *non-refoulement*.

21 Ryan and Mitsilegas, supra n 3; and Moreno Lax, 'Seeking Asylum in the Mediterranean', supra n 18.

22 Council Regulation 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Council Regulation 863/2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004, as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L199/30, and Council Regulation 1168/2011, amending Council Regulation (EC) 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1.

23 Relevant Frontex operations include Operation Nautilus (now Operation Chronos) in the Mediterranean and Operation Hera off the Canary Islands. For an overview, see Moreno Lax, 'Seeking Asylum in the Mediterranean', supra n 18. See also Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (Human Rights Watch, September 2009); Klepp, 'A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea' (2010) 12 *European Journal of Migration and Law* 1; Andrijasevic, *How to Balance Rights and Responsibilities on Asylum at the EU's Southern Border of Italy and Libya* (Compas Working Paper No 27, Oxford, 2006); and Carrera, 'The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands' (CEPS Working Document No 261, Brussels, 2007).

24 Papastavridis, Fortress Europe and FRONTEX, supra n 18 at 87–92; Rijpma, 'Frontex: Successful Blame Shifting of the Member States?' (2010) 68 *Análisis del Real Instituto Elcano (ARI)*, at 4, available at: http://www.realinstitutoelcano.org/wps/portal/rielcano.eng/Content?WCM.GLOBAL.CONTEXT=/elcano/elcano.in/zonas.in/ari69-2010 [last accessed 20 March 2012]. See also Agreement between Spain and Mauritania of 1 July 2003; and Agreement between Spain and Senegal of 5 December 2006.

25 Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network [2004] OJ L64/1; Parliament and Council Regulation (EU) No 493/2011 of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network [2011] OJ L141/13.

not purport to exercise official border control functions abroad. In contrast, the UK's juxtaposed controls in France purport to place the UK border in France, in that the underlying bilateral agreement stipulates that the UK officials in France are enforcing UK immigration law.[26] Distant consulates and embassies process visa applications, and may be faced with more direct pleas for refuge.

In any of these scenarios, State actors may encounter protection-seekers. The key legal question is the extent to which legal obligations, in particular *non-refoulement*, apply irrespective of the location of the activities in question.

B. Access to Protection under UDHR, RC and IHRL

Article 14(1) of the Universal Declaration of Human Rights (UDHRs) states that 'everyone has the right to seek and to enjoy . . . asylum from persecution'. The formulation was controversial, reflecting states' unease at inclusion of a right to be granted asylum lest it create a subjective right to enter their territory.[27] However, Article 14 UDHR does seem to necessitate a right to an asylum procedure of some sort in order to be meaningful.[28] However, the RC does not create a right of admission to the territory *per se*. As Goodwin-Gill and McAdam put it:

> States were not prepared to include in the [RC] any article on admission of refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum.[29]

The geographical scope of the RC duty of *non-refoulement* remains contentious. It clearly protects those within the state's territory. The weight of authority is now that it also applies to rejection at the frontier.[30] Analysis of the ordinary meaning of the text, its object and purpose, and the subsidiary interpretative material provided by its drafting history support a reading inclusive of 'at least border situations and possibly an even wider application'.[31] To determine

26 Le Touquet Treaty TS 23(2007), Cm 7219 (signed 4 February 2003; entered into force 18 June 2007); and Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003. See further Clayton, 'The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control', in Ryan and Mitsilegas (eds), supra n 3 at 397–423.

27 Goodwin-Gill and McAdam, supra n 5 at 358–61.

28 Gammeltoft-Hansen and Gammeltoft-Hansen, 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 *European Journal of Migration and Law* 439.

29 Ibid. at 206–7.

30 Lauterpacht and Bethlehem, 'The Scope and Content of the Principle of Non-refoulement', in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) at 87, 113–5.

31 Gammeltoft-Hansen, supra n 2 at 68; and Noll, *Negotiating Asylum* (The Hague: Martinus Nijhoff, 2000) at 427. See, generally, Goodwin-Gill and McAdam, supra n 5 at 244–57.

the width of this 'wider application' requires recourse to general developments in IHRL on the meaning of 'jurisdiction'. In other words, Article 33 RC ought to be read constructively in light of evolving IHRL precepts on jurisdiction.[32] Although the text of the ICCPR is ambiguous,[33] the Human Rights Committee, displaying considerable creativity, interprets it as applying 'to anyone within the power or effective control of that State party, even if not situated within the territory of the State party'.[34] Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) contains no geographical limitation, leading to a broad construction of its scope of application.[35] The CAT Committee has confirmed that jurisdiction may arise *de jure* (ie where the State is entitled to act under traditional precepts of public international law) or *de facto* where there is control over persons or territory.[36] In the *Marine I* case, that Committee held that Spain exercised the requisite degree of control over migrants rescued at sea 'from the time [the migrants'] vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou [Mauritania's second city]. In particular, [Spain] exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant *de facto* control over the alleged victims during their detention in Nouadhibou'.[37] As will be seen in the next section, while the ECtHR is at the vanguard of developments on the meaning of 'jurisdiction' in that it has been confronted with a variety of extra-territorial scenarios, it has tended to emphasise a high threshold of 'control' to determine jurisdiction under Article 1 ECHR, in contrast to the apparently looser approach of the HRC and CAT.

32 UNHCR Advisory Opinion on the Extraterritorial Application of *Non-refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 2007, available at: http://www.unhcr.org/refworld/pdfid/45f17a/a4.pdf [last accessed 18 June 2012]; Lauterpacht and Bethlehem, supra n 30 at 110–11; and Klug and Howe 'The Concept of State Jurisdiction and the Applicability of the *Non-refoulement* principle to Extraterritorial Interception Measures' in Ryan and Mitsilegas (eds), supra n 3 at 69–102.

33 Article 2(1) International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR) states that the rights apply to all individuals within a state's 'territory and subject to its jurisdiction.' To read this phrase cumulatively would exclude extraterritorial effects.

34 Human Rights Committee, General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant, 12 May 2004, HRI/GEN/1/Rev.7 at 195; 11 IHRR 905 (2004). The ICJ subsequently confirmed this view in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 136 at 179. Cf. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 *International Journal of Refugee Law* 542 at 557, for a more skeptical assessment of the Human Rights Committee's attempt 'to rework the cumulative criteria' in Article 2(1) ICCPR.

35 Goodwin-Gill and McAdam, supra n 5 at 248.

36 Committee Against Torture, General Comment No 2: Implementation of article 2 by States Parties, 23 November 2007, CAT/C/GC/2/CRP.1/Rev.4; 15 IHRR 311 (2008) at para 16.

37 UN Committee Against Torture, *J.H.A. v Spain* (323/2007) CAT/C/41/323/2007 (2008); 16 IHRR 484 (2009) at para 8.2. For analysis, see Wouters and den Heijer, 'The *Marine I* Case: A Comment' (2010) 22 *International Journal of Refugee Law* 1.

The importance of anchoring the RC in regional human rights protection mechanisms may be illustrated by reference to the legal controversy surrounding the US Supreme Court ruling in the *Sale* case.[38] The US Supreme Court held that Article 33 RC did not apply to the US naval interdiction of protection-seekers from Haiti in international waters. When a case concerning the same interdiction practices came before the Inter-American Commission of Human Rights some time later, it expressly disagreed with the US Supreme Court's interpretation of Article 33 RC, rather endorsing the view of the Office of the United Nations High Commissioner for Refugees (UNHCR) that Article 33 'had no geographical limitation'.[39] Nonetheless, the United States insists on its interpretation of the RC.[40] Australian courts too take this mischievously restrictive view of the scope of *non-refoulement*.[41] The views of international human rights monitoring bodies have little impact internally, so these domestic misinterpretations persist.[42] In the European context in contrast, national and supranational courts are more closely enmeshed, so we expect aberrant national practices and decisions to be challenged before supranational courts more promptly, routinely and effectively than in other regions.

Even if we accept that *non-refoulement* applies whenever the State exercises jurisdiction, there is a further in-built limitation to the notion of 'refugee' under the RC, namely that refugeehood is premised on the refugee being outside her home state. If likely receiving states move their borders all the way to sending states, this exilic bias of refugee law seems to preclude applicability of the RC. So held the UK House of Lords (now the Supreme Court) in the *Roma Rights Case*.[43] However, a different interpretation was put forward in a powerful UNHCR Intervention, written by Goodwin-Gill, emphasising legal duties of

38 *Sale v Haitian Center Council* 11 SCt 2549, 509 US 155. See though the powerful dissenting opinion of Justice Blackmun.

39 Case 10.675, *Case 10,675 v United States (Haitian Interdiction Case)* Report No 51/96 (1997).

40 See CATCom, 'Consideration of Reports Submited by States Parties under Article 19 of the Convention, Second Periodic reports of States parties due in 1999, Addendum: United States of America [6 May 2005]', CAT/C/48/Add.3, 29 June 2005, at para 38, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/425/90/PDF/G0542590.pdf?OpenElement [last accessed 19 June 2012]; and 'List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America' (n.d.), at 32–37, available at: http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/listUSA36.En.pdf [last accessed 19 June 2012].

41 See *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] 204 CLR 1 at 45 (*per* Gummow J); and *Minister for Immigration and Multicultural Affairs v Khawar* [2002] 210 CLR 1 at 42 (*per* McHugh and Gummow JJ).

42 See, for example, Australia's repeated infractions of the right to liberty in relation to automatic detention of asylum seekers: *A v Australia* (560/1993), CCPR/C/59/D/560/1993 (1997); 5 IHRR 78 (1998) (finding Australia in breach of Article 9(1) and (4) and Article 2(3) of the Covenant); and Human Rights Committee, *Baban v Australia* (1014/2001), CCPR/C/78/D/1014/2001 (2003); 11 IHRR 159 (2004) (finding Australia in breach of Article 9(1) and (4) of the Convention).

43 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 ('*Roma Rights Case*'). For detailed analysis, see Kesby, 'The Shifting and Multiple Border and International Law' (2007) 27 *Oxford Journal of Legal Studies* 101.

good faith and the applicability of *non-refoulement* at the border.[44] The House of Lords held that the RC *non-refoulement* obligations did not extend to the 'virtual UK frontier' that had been set up in the Czech Republic. However, the House of Lords accepted that other international human rights protections, namely those prohibiting racial discrimination, were applicable.[45] As is argued in Section 2.C, Strasbourg jurisprudential developments suggest that the ECHR would be applicable to UK actions now.

C. Access to Protection under the ECHR

(i) The evolving concept of 'Jurisdiction' under Article 1 ECHR

The ECtHR has provided a forum in which to contest States' attempts to designate zones as beyond their territorial jurisdiction in order to evade legal obligation. For instance *Amuur v France*,[46] concerned France's deeming the 'international zone' of a Paris airport to be extra-territorial. The ECtHR rejected this legal fiction, and held it was on French territory, so the ECHR obligations were applicable. Even if *de facto* effective control is in dispute, the Court holds the formal territorial sovereign to have jurisdiction, as may be seen in *Ilaşcu and Others v Moldova and Russia*.[47] The ECtHR has also rejected fictions of non-presence. For example, in *D v United Kingdom*, the ECtHR stated that '[r]egardless of whether [the applicant] ever entered the UK in the technical sense it is to be noted that he has been physically present there and thus within the jurisdiction within the meaning of Article 1'.[48] These cases are important in clarifying that states cannot excise territory in order to escape responsibility under the ECHR. The concept of territory includes the territorial waters of the State, usually 12 nautical miles from the shore.[49]

The ECtHR has been confronted with various extra-territorial scenarios. The jurisprudence has evolved significantly from the Court's falter on the

44 'Document, *R (ex parte European Roma Rights Centre et al) v Immigration Officer at Prague Airport and another (UNHCR intervening)*' (2005) 17 *International Journal of Refugee Law* 427.

45 The applicants succeeded in their discrimination claim, as the checks treated Roma less favourably on racial grounds.

46 *Amuur v France* 1996-III; 22 EHRR 533.

47 *Ilaşcu and Others v Moldova and Russia* 2004-VII; 40 EHRR 1030. The Court held that both Moldova and Russia had jurisdiction, Moldova as the *de jure* territorial sovereign over the territory of the 'Moldovan Republic of Transnistria', Russia as having 'effective control'. Although Moldova lacked effective control, it was under a positive obligation under Article 1 ECHR to 'take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention' (at para 331).

48 *D v United Kingdom* 1997-III; 24 EHRR 423.

49 Article 2(1) United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3 (entered into force 16 November 1994).

ill-conceived 'espace juridique' notion in *Banković*[50] to the 2011 Grand Chamber ruling in *Al-Skeini v United Kingdom*.[51]

Banković[52] concerned victims of the NATO bombing of Belgrade in 1999. The Court's starting premise was that one state's jurisdiction is normally 'defined and limited by the sovereign territorial rights of . . . other relevant States',[53] so that Article 1 of the ECHR should be interpreted 'to reflect this ordinary and essentially territorial notion of jurisdiction'.[54] Accordingly, extra-territorial jurisdiction only arose in 'exceptional cases'.[55] Citing its case-law on Turkish jurisdiction over Northern Cyprus,[56] it stated that only where the respondent State 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercise[d] all or some of the public powers normally to be exercised by that Government'[57] would that State be deemed to have jurisdiction under Article 1 ECHR. The other extra-territorial scenarios mentioned concerned acts of consular agents abroad and activities on board vessels of that State's flag.[58] The applicants in *Banković* did not fall within the NATO states' jurisdiction, mainly as the Federal Republic of Yugoslavia (FRY) was not within the Convention's 'espace juridique'.[59] The Court added this gloss in a manner that suggested a further limitation on jurisdiction, confining it to the Council of Europe States. It also rejected the applicant's contention that jurisdiction for the purposes of the claim could be established by the rights violation in question, on the basis that this 'cause and effect' approach would render the notion of 'jurisdiction' superfluous.[60] It also objected on the basis that 'dividing and tailoring' the notion of jurisdiction was inappropriate.[61] A conceptualisation of jurisdiction as unitary and exclusive clearly informs the reasoning.

In the intervening years, the Court moved away from the 'espace juridique' notion and found jurisdiction in several cases not dissimilar to *Banković*.[62] Finally in *Al-Skeini*, the Grand Chamber expressly abandoned both the 'espace

50 *Banković and Others v Belgium and Others* 2001-XII; 44 EHRR SE5 at para 80.
51 *Al-Skeini v United Kingdom*, supra n 8. See Ronchi, supra n 8; and Milanovic, supra n 8.
52 Supra n 50.
53 Ibid. at para 59.
54 Ibid. at para 61.
55 Ibid. at para 67.
56 Ibid. at paras 70–71, citing *Loizidou v Turkey* 1996-VI; 23 EHRR 513 and *Cyprus v Turkey* 2001-VI; 35 EHRR 731.
57 Ibid. at para 71.
58 Ibid. at para 73.
59 Ibid. at para 80.
60 Ibid. at para 75.
61 Ibid.
62 *Issa v Turkey* 41 EHRR 567; *Pad and Others v Turkey* Application No 60167/00, Admissibility, 28 June 2007; and *Isaak and Others v Turkey* Application No 44587/98, Admissibility, 28 September 2006.

juridique' notion[63] and its objection to 'dividing and tailoring' jurisdiction.[64] The case concerned the killing of six Iraqi nationals by British troops in Iraq. The UK House of Lords relied on an overblown version of the 'espace juridique' concept of *Banković*, and particularly stringent approaches to both territorial and personal control.[65] On the former, it held that although the UK was the occupying power, it did not have effective overall control in Southern Iraq. On the latter, it found that the requisite degree of control only in the case of one applicant, Baha Mousa, who was held in UK detention in Iraq. It rejected the argument for UK jurisdiction in the cases of the other applicants, shot in separate incidents in the course of activities conducted by UK forces in Iraq.[66] In contrast, the ECtHR held that all the applicants were under UK jurisdiction, not based on control over the territory of Southern Iraq, but rather focused on the UK's exercise of 'public powers normally to be exercised by a sovereign government'[67] pursuant to the pertinent UN Security Council Resolutions and regulations of the Coalition Provisional Authority in Iraq.[68] The British soldiers 'exercised authority and control over individuals killed in the course of . . . security operations' such as to establish UK jurisdiction.[69] The result is that killing *per se* does not trigger jurisdiction, there must be a background exercise of governmental authority. The UK was the occupying power in the areas concerned, yet the Court did not determine whether that fact alone would establish jurisdiction under Article 1 of the ECHR. Rather, it emphasised both the personal and territorial dimensions of control. Although the reasoning in *Banković* no longer stands, it is arguable that the outcome would be the same if the same facts came before the Court today, as the NATO forces were not exercising 'public powers' in the FRY at the time of the airstrikes.[70] Of course, this turns on the assumption that the planning and execution of the airstrikes was not the exercise of 'public powers' in the pertinent sense, which may be contested by those who wish to expand the *Al-Skeini* reasoning. The Court's subsequent explanation in *Hirsi Jamaa* was that there was no jurisdiction in *Banković* as the act in question was 'instantaneous'.[71] However, this

63 *Al-Skeini v United Kingdom*, supra n 8 at para 142. The concept had been powerfully criticised: see, for example, Ben-Naftali and Shany, 'Living in Denial: The Co-application of Humanitarian Law and Human Rights Law to the Occupied Territories' (2004) 37 *Israel Law Review* 17; and Wilde, 'The "legal space" or "espace juridique" of the European Convention on Human Rights: is it relevant to extraterritorial State Action?' (2005) *European Human Rights Law Review* 115.

64 Ibid. at para 137.

65 *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26. For a critique, see Milanovic, above n 8 at 125–7.

66 Ibid.

67 *Al-Skeini v United Kingdom*, supra n 8 at para 149.

68 Ibid. at paras 143–8.

69 Ibid.

70 For a similar view, see Milanovic, supra n 8 at 130.

71 *Hirsi Jamaa v Italy*, supra n 5 at para 73.

seems unconvincing, given that the airstrikes were part of a prepared and concerted military action.

Judge Bonello, in his separate Concurring Opinion in *Al-Skeini*, criticised the Court for failing to articulate a 'coherent and axiomatic regime'.[72] He urged a move away from territorial fixation to a functional approach focusing on the capability of the State to fulfil the human rights obligations in question.[73] In the absence of any such overarching unifying principle, we must instead fall back on a casuistic method and identify from the case law the various scenarios where the ECHR applies extra-territorially. The case law acknowledges that either *de jure* and *de facto* jurisdiction may arise. The inclusion of *'de facto* jurisdiction' reflects the fact that human rights law does not simply track the state's traditional scope of entitlement to act under public international law, but establishes distinct forms of accountability for human rights violations.[74] Either *de jure* or *de facto* jurisdiction may trigger the application of the ECHR. The former refers to recognised lawful exercises of authority extra-territorially, such as acts of consular or diplomatic agents abroad and activities on board vessels of that State's flag.[75] *De facto* jurisdiction can arise in at least three ways. The first is a territorial conception based on the occupying power-type scenario. The second scenario is personal and involves individuals subject to the State's physical power or control. The third reflects a combination of the territorial and personal elements of the first two, with an emphasis on the background exercise of governmental authority.[76] Its scope depends on our reading of the *Al-Skeini* notion of public powers.

Examples of the first scenario arise where the State is deemed to have 'effective control' over the territory in question as seen in the cases on Northern Cyprus.[77] An example of the second is seen in *Medvedyev v France*,[78] where the Court found France to have exercised jurisdiction when its military personnel intercepted and boarded a boat (of Cambodian flag) in international waters, and brought it to a French port. The *'de facto* continued and uninterrupted control exercised by France over the [vessel] and its crew' was decisive.[79] In *Al-Skeini*, the Court explained that the decisive factor in

72 Ibid. at Concurring Opinion of Judge Bonello, para 4.
73 Ibid. at paras 11–20.
74 See, for example, Klug and Howe, supra n 32 in particular 98–99.
75 *Banković*, supra n 50 at para 73.
76 This tripartite typology resembles that put forward by Milanovic, *Extraterritorial Application of Human Rights Treaties*, supra n 7, to the extent this his first heading is a spatial model of jurisdiction and his second a personal model of jurisdiction. However, my third heading differs from his. He reads the third heading a mix of the first two under which the distinction between positive and negative obligations is decisive. While illuminating, I do not endorse a sharp distinction between positive and negative obligations in this context.
77 *Loizidou v Turkey*, supra n 56; and *Cyprus v Turkey*, supra n 56.
78 *Medvedyev v France* Application No 3394/03, Merits and Just Satisfaction, 29 March 2010 (Grand Chamber).
79 As *per* the Grand Chamber in *Hirsi Jamaa v Italy*, supra n 5 at para 80. See also ibid. at para 67.

Medvedyev was the 'exercise of physical power and control over the person in question'.[80] In this, the Grand Chamber implicitly admits that it is 'dividing and tailoring' jurisdiction in a manner it had rejected in *Banković*.[81] Similarly the Court held in *Al-Saadoon and Mufdhi v United Kingdom*[82] that the UK had exercised jurisdiction when it held the applicants in custody in Iraq and handed them over to the Iraqi authorities. The Court held that 'given the total and exclusive *de facto,* and subsequently also *de jure,* control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the UK's jurisdiction'.[83] The Court rejected the UK's argument that it lacked jurisdiction as it had a legal obligation under its bilateral agreement with Iraq to hand over the detainees.[84] The puzzle with this notion of control over the person as the basis for jurisdiction is how to delimit it. The Court rejects the notion of a cause-and-effect jurisdiction, as liable to render the notion of jurisdiction coterminous with the victim requirement. However, it is hard to justify the distinction between custody (which will trigger jurisdiction) and capacity to kill (which will not).[85]

Al-Skeini illustrates the combined personal and territorial elements. It also emphasises the decisiveness of the exercise of public powers generally held by the territorial State. The ECtHR has yet to elucidate the meaning of 'public powers' in this context,[86] and much will turn on whether this is conceived as a general basis for jurisdiction, or merely a gloss on the notion of territorial or personal control. The earlier case of *Drozd and Janousek v France and Spain*[87] illustrates that not all exercises of authority will be treated as exercises of official authority by the respondent state. The case concerned the particular situation of French and Spanish judges seconded to courts in Andorra. In that context, the Court held that neither France nor Spain was answerable under the ECHR. Admittedly, the scenario is an atypical one, as the judges were not purporting to exercise official authority on behalf of France or Spain, but rather

80 *Al-Skeini v United Kingdom*, supra n 8 at para 136, citing also *Öcalan v Turkey* 2005-IV; 41 EHRR 985; *Issa v Turkey,* supra n 62; *Al-Saadoon and Mufdhi v United Kingdom* Application No 61498/08, Admissibility, 30 June 2009; and *Al-Saadoon and Mufdhi v United Kingdom* Application No 61498/08, Merits, 2 March 2010. The inclusion of *Issa v Turkey* in this category is noteworthy. Some commentators had interpreted the decision as reflective of a broader anti-circumvention principle whereby the ECHR precludes states from taking action in the territory of another State, which it is prohibited from doing on its own. Fischer-Lescano, Löhr and Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256 at 276.

81 *Al-Skeini v United Kingdom*, supra n 8 at para 137 ('compare *Banković,* supra n 50 at para 75').

82 *Al-Saadoon* (Admissibility), supra n 80.

83 Ibid. at para 88.

84 *Al-Saadoon* (Merits), supra n 8 at paras 126–8, 140–5.

85 For an insightful analysis, see den Heijer, *Europe and Extraterritorial Asylum*, supra n 3 at 34–48.

86 Ronchi, supra n 8 at 22.

87 *Drozd and Janousek v France and Spain* A 240 (1992); 14 EHRR 745.

only Andorra. Nonetheless, the Court did countenance jurisdiction arising where acts of the State authorities 'produce effects' outside the State's territory.[88]

(ii) The ECtHR on extra-territorial migration control activities

Applying these principles, the ECtHR has considered the migration control actions of naval vessels in international waters in two rulings. In the admissibility decision in *Xhavara et al v Italy and Albania*,[89] the ECtHR assumed that Italy was subject to the Convention when its naval vessel, in an attempt to intercept an Albanian boat, collided with it resulting in the death of irregular migrants on board. The 2012 Grand Chamber decision in *Hirsi Jamaa v Italy*[90] concerned migrants intercepted in international waters, 35 miles south of Lampedusa, as part of Italy's official 'push-back' policy. The migrants were taken on board an Italian military vessel and brought to Libya, apparently against their protests. The UNHCR intervened, arguing that by taking the migrants onto its Italian-flagged vessels, Italy was exercising jurisdiction as it had 'full and effective control of the persons throughout the 'push-back' operations'.[91] The Grand Chamber ruling is a resounding endorsement of the responsibility of states for their migration control activities at sea. The Italian government sought to distinguish *Medvedyev*, on the basis that in *Hirsi* their officials were engaged in a search and rescue operation, 'had not boarded the boats and had not used weapons'.[92] The Court, unsurprisingly, rejected this argument, basing its conclusion on two distinct bases. First, there was *de jure* jurisdiction as the Italian flagged vessel was in international waters.[93] Secondly, the individuals were under the *de facto* control of Italy as the events took place on Italian armed forces' vessels, 'the crews of which were composed exclusively of Italian military personnel'[94] such that the applicants were under the both '*de jure* and *de facto* control of the Italian authorities'.[95] In contrast in *Medvedyev*, it will be recalled, the vessel in question was flying the flag of a third state, but the French troops had seized it and taken control of the crew, exercising *de facto* control only.[96]

88 Ibid. at para 91, cited in Klug and Howe, supra n 32 at 88.
89 *Xhavara et al v Italy and Albania*, Application No 39473/98, Admissibility, 11 January 2001, cited by Rijpma and Cremona, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law* (EUI Working Papers Law 2007/1) at 22. The application was declared inadmissible on other grounds.
90 Supra n 5.
91 Submission by the Office of the United Nations High Commissioner for Refugees in the case of *Hirsi Jamaa v Italy* Application No 277765/09, March 2010, at para 4.3.2, available at: http://www.unhcr.org/refworld/docid/4697778d2.html [last accessed 19 June 2012].
92 *Hirsi Jamaa v Italy,* supra n 5 at para 66.
93 Ibid. at paras 77–81.
94 Ibid. at para 81.
95 Ibid.
96 Ibid. at para 80.

While the conclusion in *Hirsi Jamaa* on Article 1 of the ECHR is unimpeachable, the Court's reasoning suggests perhaps an over-synthesis of the previous cases. It cites *Al-Skeini* as an example of a case where exceptionally the facts led to the conclusion that there was extra-territorial jurisdiction, based on 'full and exclusive control over a prison or a ship'.[97] However, the operative reasoning in *Al-Skeini* clearly went beyond the notion of control over a place of detention as decisive. Recall that the UK House of Lords had focused on control over the detainee as decisive, but the ECtHR employed a broader construction when finding that all of the applicants, not merely the one in detention, fell within the UK's jurisdiction.[98]

To recapitulate, the jurisprudence indicates that either *de jure* or *de facto* jurisdiction will trigger application of the ECHR. There are three approaches to *de facto* jurisdiction, one based on control over territory (as in *Loizidou*), a second based on control over persons (as in *Medvedyev)* and a third based on a combination of the territorial and personal factors and a background exercise of public powers (as in *Al-Skeini*). The thresholds of 'control' in the first two scenarios are high, such that Klug and Howe argue that the ECtHR standard 'seems to be much higher than that adopted by other supervisory bodies'.[99] With this in mind, we can turn to examine whether some common extra-territorial migration-control practices fall within the ECHR notion of jurisdiction.

Consulates and Embassies

Consulates and embassies embody a well-established scenario of *de jure* extra-territorial jurisdiction. They have a range of migration control functions, from dealing with direct pleas for refuge from those physically present to dealing with visa requests.

The UK Court of Appeal considered the particular issue of diplomatic asylum in *B v Secretary of State for the Foreign and Commonwealth Office*.[100] The Court of Appeal was willing to assume, based on the Strasbourg interpretation of Article 1 ECHR, that Convention rights were applicable to the actions of officials in a British consulate in Australia.[101] The officials had returned asylum seeker children to asylum detention in that country, in spite of evidence of the detention's indefinite duration and inhuman conditions. However, the particular context of a consulate, which is by definition located on the territory of a foreign country by its consent, prompted the Court to alter the legal standards: rather than applying the normal *Soering* test, it took into account the legal duty of non-intervention in the affairs of the host State,

97 *Hirsi Jamaa v Italy,* supra n 5 at para 73.
98 Supra n 65.
99 Klug and Howe, supra n 32 at 99.
100 [2004] EWCA Civ 1344.
101 Ibid. at para 66.

holding that only if 'the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity' or if it was 'clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury', would a duty to afford diplomatic asylum arise.[102] The UK relied on *B* in *Al-Saadoon and Mufdhi,*[103] but the ECtHR distinguished between embassies and the scenario at issue in *Al-Saadoon*, where the UK authorities had taken the applicants into custody. In contrast, it acknowledged that '[d]iplomatic and consular premises have a particular status under international law' so that when an individual seeks refuge at an embassy, the duties owed to the territorial State are 'known and apply *ab initio*'.[104] It chose not to comment on the standards applicable to diplomatic asylum (as it was not at issue in the case), but cited a previous decision of the European Commission of Human Rights in *WM*, which applied the *Soering* standard.[105]

Visa processing raises more difficult questions given its remoteness from the impact on access to protection. It has been suggested that where there is a causal link between the rejection of a visa application and the appropriate level of risk to trigger an Article 3 ECHR violation, the responsibility of the State should be engaged.[106] An even wider view is endorsed by the Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa*, subjecting the state's entire 'visa policy' to IHRL.[107] However, strictly speaking, the Court has only examined visa issuance where there is a pre-existing link between the applicant and the State in question, as is apparent in its caselaw where family members based outside the State concerned rely on their links with those in the Contracting State to launch an ECHR claim.[108]

Border controls abroad

Formal border controls abroad, particularly juxtaposed controls, may involve exclusive control over small portions of foreign territory, with the consent of the territorial state. While the ECtHR has tended to find this form of

102 Ibid. at paras 88–89. For a cogent critique, see Moreno Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) Non-*Refoulement* in EU Law' in Maes, Foblets and De Bruycker (eds), *External Dimensions of EU Migration and Asylum Law and Policy* (Brussels: Bruylant, 2011) 385, in particular at 429–34. On diplomatic asylum as a subspecies of extraterritorial asylum, and the attendant limits on the right to *grant* it, see den Heijer, supra n 3 at 106–20.

103 *Al-Saadoon* (Merits), supra n 80 at paras 139–43.

104 Ibid. at para 140.

105 *M v Denmark* Application No 17392/90, Admissibility, 14 October 1992. See further Moreno Lax, 'Must EU Borders have Doors for Refugees?' (2008) 10 *European Journal of Migration and Law* 315 at 343, 361.

106 Noll, 'Seeking Asylum at Embassies', supra n 34 at 564–70.

107 *Hirsi Jamaa v Italy,* supra n 5 at Concurring Opinion of Judge Pinto de Albuquerque: '[A] country's visa policy is subject to its obligations under [IHRL].'

108 *Haydarie v Netherlands* Application No 8876/04, Admissibility, 20 October 2005 (failure to issue a visa to an applicant in Pakistan); and *Tuquabo-Tekle and Others v Netherlands* Application No 60665/00, Merits and Just Satisfaction, 1 December 2005.

jurisdiction in the occupying power scenario, there are some examples where smaller zones were at issue.[109] It is arguable that a juxtaposed border zone could be treated as within the jurisdiction of the border State on the basis of territorial control. Arrest and detention at border checks would amount to the taking control of persons, triggering the second head of *de facto* jurisdiction. However, routine border controls do not seem to amount to taking control over the person, so it would be more difficult to establish jurisdiction on the basis of person control in this context.[110] Aside from these *de facto* bases of jurisdiction, we can also consider whether some border controls abroad are a straightforward *de jure* exercise of jurisdiction, falling squarely within the notion of activities 'in accordance with custom, treaty or other agreement, [whereby] authorities of the [respondent State] carry out executive or judicial functions on the territory of another State'.[111] The most promising approach is to apply the *Al-Skeini* reasoning, emphasising elements of territorial and personal control, as well as the exercise of official authority. On this basis, the operations of some formalised border controls abroad would clearly trigger Article 1 of the ECHR.

Admittedly, the previously mentioned *Roma Rights Case*[112] sets an ambivalent precedent as regards border controls abroad. It will be recalled that the UK House of Lords held that while the RC non-*refoulement* guarantee was inapplicable in the migrants' country of origin, IHRL (ICCPR, CERD and customary international law) on non-discrimination was applicable to the exercise of UK border controls in Prague Airport.[113] Yet, concerning the ECHR, Lord Bingham expressed 'the very greatest doubt' as to whether the functions performed by UK immigration officers at Prague 'could possibly be said to be an exercise of jurisdiction in any relevant sense over non-UK nationals such as the appellants'.[114] However, the matter was not given extensive consideration, so the ruling does not detract from the cogency of the arguments set out in the preceding paragraph.

Juxtaposed controls are at the more formal end of the co-operative spectrum. States also employ less overt forms of border co-operation, which are more difficult to fit within current conceptions of jurisdiction under the ECHR. Consider, say, Italy's provision of boats and staff for border controls conducted under the Libyan flag, often in Libyan waters. Would the resulting

109 *Issa*, supra n 80.

110 Cf. *Women on Waves and Others v Portugal* Application No 31276/05, Merits and Just Satisfaction, 3 February 2009, discussed infra at n 124.

111 *Al-Skeini v United Kingdom,* supra n 8 at para 135.

112 Supra n 43.

113 Ibid., see in particular the judgment of Lord Steyn at paras 44–45 and that of Baroness Hale at paras 98–103, with whom the other Judges agreed.

114 Ibid., at para 21 *per* Lord Bingham. He went on to state that in any event the facts did not raise any issues on Article 2 or 3 ECHR, which he implicitly treated as exhausting the relevant ECHR Articles.

border control activities then fall within Italy's obligations under the ECHR? The thresholds of control over territory or persons would be difficult to meet in these circumstances. However, building on *Al-Skeini* and depending on the role of its officers on board the Libyan boats, there may be some exercise of official authority in international waters or on the Libyan territory such as to warrant a determination that jurisdiction is being exercised. Another avenue of argumentation would look to general international legal principles on State responsibility. State responsibility may be incurred for complicity when aiding and abetting another State in committing an international wrong.[115] The ECtHR has not yet explored these principles carefully, possibly as it would in some cases require it to determine the wrongfulness of the third state's conduct. Nonetheless, it should do so. In addition, it has developed various techniques to capture the wrongs involved in joint conduct.[116] For instance, in *Rantsev v Cyprus and Russia*,[117] both states were found in breach of distinct positive obligations under the ECHR to prevent human trafficking.

The more attenuated a State's role in the border control practices in question, the more impediments will emerge to establishing legal accountability. Establishing jurisdiction under Article 1 of the ECHR, it should be recalled, is but the first step in establishing legal accountability. For instance, applying the 'victim' requirement may be tricky. In some cases, the Court has dismissed actions for lack of proximity between the victim and the underlying policy of the Contracting State.[118] While intensified border controls may imperil human life, in that tighter border controls seem to encourage use of more dangerous migration routes, establishing legal accountability is another matter. It is well-established that Article 2 of the ECHR creates positive obligations for States, yet, it may be difficult to show cause and effect between intensified border controls and deaths of irregular migrants, particularly at sea.[119]

There are many examples of the EU's involvement in expansive border practices. For example, in June 2010, the European Commission and Libya signed a Memorandum of Understanding, with the Commission undertaking to provide EU technical assistance to Libya 'manage migration'.[120] When the EU gets

115 Article 16, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission 2001*, Vol II (Part 2). Article 17 deals with the situation where a State incurs responsibility when it 'directs and controls' the acts of another; Article 18 when it 'coerces' another state.

116 For an overview, see den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (ACIL Research Paper No 2012-04 SHARES Series).

117 *Rantsev v Cyprus and Russia* Application No 25965/04, Merits and Just Satisfaction, 7 January 2010.

118 See, for example, *Segi and Others v 15 States of the European Union* 2002-IV.

119 See further Spijkerboer, 'The Human Costs of Border Control' (2007) 9 *European Journal of Migration and Law* 137.

120 European Neighbourhood and Partnership Instrument, Libya: Strategic Paper and National Indicative Programme 2011–2013, European Commission, 2010, available at: http://ec.europa.eu/world/enp/pdf/country/2011_enpi_csp_nip_libya_en.pdf [last accessed 19 June 2012].

involved, this brings an additional hurdle to establishing jurisdiction under the ECHR. Pending EU access to the ECHR, the ECtHR presumes that the EU system provides 'equivalent protection' to human rights. A litigant seeking to take action against the EU (via an action against the Member States collectively) must rebut the presumption by demonstrating a 'manifest deficiency' in EU protection.[121] While the EU and its Member States collectively engage with third states in seeking to deny access to asylum in the EU, establishing legal accountability under the ECHR is more difficult than if they act alone. However, as will be explored further below in Section 2.D, EU law potentially provides greater access to protection than the ECHR.

(iii) Conclusion on the ECHR

The Strasbourg case law has evolved considerably from *Bankovic* to *Al-Skeini* and *Hirsi*. Yet, the limits are as yet unclear, and the Court's typical casuistic approach means that further challenges to extra-territorial border control practices are required. The powerful Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi* urges a decisive move to a broad, more encompassing construction of State jurisdiction. Under his approach, jurisdiction would embrace all official border control-related activities, irrespective of where they were carried out.[122] He states that the

> the full range of conceivable immigration and border policies, including denial of entry to territorial waters, denial of visa, denial of pre-clearance embarkation or provision of funds, equipment or staff to immigration control operations performed by other States or international organisations on behalf of the Contracting Party, remain subject to the Convention standard. They all constitute forms of exercise of the State function of border control and a manifestation of State jurisdiction, wherever they take place and whoever carries them out.[123]

The litmus test under this conception of jurisdiction was simply whether the border control is carried out 'on behalf of' the ECHR state.

While the case law on extra-territorial jurisdiction may not yet have evolved to support such a broad reading, it is noteworthy that in some contexts, once

121 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi (Bosphorus Airways) v Ireland* 2005-VI; 42 EHRR 1. See Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 *Human Rights Law Review* 87; and on the subsequent case law, Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 *Human Rights Law Review* 529.

122 *Hirsi Jamaa v Italy,* supra n 5 at 79 (Concurring Opinion of Judge Pinto de Albuquerque).

123 Ibid. at 79–80.

an identifiable State act is seen to violate a human right, the jurisdictional objection is not raised. For example, in *Women on Waves v Portugal*,[124] Portugal was found to have violated the rights of the Dutch applicant organisation, which seeks to raise awareness of reproductive rights issues, by refusing its entry to Portuguese waters. The government adopted an express edict prohibiting the entry of the Women on Waves boat, and sent a warship to prevent such entry. The applicants sought relief in the Portuguese courts, alleging breaches *inter alia* of their rights to freedom of expression and association. Having exhausted their domestic remedies, they brought proceedings to the ECtHR, which deemed the case admissible and found an Article 10 ECHR violation, although it declined to examine the pleas under Articles 5, 6 and 11 ECHR and Article 2 of Protocol 4. Notably, Portugal did not contest the existence of its jurisdiction. Clearly its edict and policy had an impact on the applicant organisation, as did the dispatch of the warship. In this context, no attempt was made to argue that the acts were extra-territorial because their impact was felt on a foreign would-be entrant to the territory. In contrast, when migration is at issue, States tend to invoke constrained territorial conceptions of their jurisdiction.

Overall, the ECHR tracks many extra-territorial State activities. The potential of the ECHR as an instrument for securing access to protection is evident. In 2000, Noll identified the ECHR as providing 'a rather impressive inherent right to access'.[125] Since then, the case law on Article 1 of the ECHR has opened up further possibilities for extra-territorial applications. Nonetheless, these duties have not been institutionalised in the migration context, in spite of practical suggestions to that effect.[126] Without such institutionalisation, the legal principles in the case law may have limited impact beyond the particular cases. Bringing legal challenges against opaque and distant border practices faces considerable practical obstacles. Recall, in this respect, the significant efforts which brought the *Roma Rights Case* and *Hirsi Jamaa v Italy* to judicial determination. A pioneering NGO brought the *Roma Rights Case*, having gathered data to reveal the systematic discriminatory practices at the UK border in Prague.[127] Italian lawyers in *Hirsi Jamaa* went to great efforts to ensure contact with those who had been pushed-back to Libya. The ECtHR

124 *Women on Waves v Portugal*, supra n 110. For analysis, see Papanicolopulu 'Donne sulle onde: libertà di espressione, libertà di navigazione o libertà di circolazione?' (2010) 4 *Diritti Umani e Diritto Internazionale* 205.

125 Noll, supra n 31 at 454.

126 See, for example, on protected entry procedures, Noll, Fagerlund and Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (Brussels: Danish Centre for Human Rights/European Commission, 2002).

127 See *Roma Rights Case*, supra n 43 at paras 92–94.

had deemed a previous similar case inadmissible for lack of proper legal authority.[128] This background is a reminder that while extra-territorial border controls do not take place in a legal vacuum, the practical impediments to ensuring legal accountability are many, obscuring the processes whereby lives are lost and access to protection precluded.

D. Access to Protection under EU Law

EU human rights law has several interrelated sources. The Charter of Fundamental Rights of the European Union (EUCFR) is now binding and the general principles of EU law remain in place.[129] The ECHR is the principal source of the general principles, and forms a floor below which the protection of rights under the EUCFR must not fall.[130] Accordingly, the intriguing question is not whether EU law meets the standards of the ECHR, for it must, but rather to what extent it offers additional protections, in particular by overcoming some of the statist constraints in the Strasbourg jurisprudence.

EU law seems to provide an ideal context to move to a functional approach to jurisdiction. In addition, the EUCFR contains a right to asylum, which suggests further potential for innovative legal developments.[131] A minimum requirement would have EU fundamental rights track the notion of 'jurisdiction' under Article 1 ECHR. Alternatively, EU law may develop its own autonomous notion of jurisdiction. If we look into the organising premises of the Strasbourg caselaw, we see that even in *Al-Skeini* it takes territorial jurisdiction as the norm. It also originally assumed that jurisdiction was unitary and exclusive, rather than divisible and shared. Both ontological organising premises are ill-fitting in the EU context. The EU's approach to jurisdiction, across a range of fields, is functional rather than territorial. Moreover, the EU is the embodiment of divisible and shared jurisdiction. EU fundamental rights obligations apply to the Member States whenever they act within the scope of EU law.[132] There is no territorial component. The EU itself has no territory in law, so it would be particularly inapt for its Court to absolve it from fundamental rights obligations when it acts extra-territorially.

128 *Hussun and Others v Italy* Application Nos 10171/05, 10601/05, 11593/05 and 17165/05, Strike Out, 19 January 2010. A similar case against Spain was also rejected by the UN Committee Against Torture: *J.H.A v Spain*, supra n 38, in particular at paras 8.2–8.3.

129 Article 6(1) TEU and Article 6(3) TEU. Article 6(2) TEU requires EU accession to the ECHR.

130 Article 52(3) EUCFR.

131 Article 18 EUCFR states: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.'

132 Article 51 EUCFR.

However, a functional view of jurisdiction is not a panacea. The CJEU took a functional, but troublingly limited, view of competence in the *Airport Transit Visas* case.[133] At the time, the EC Treaty contained a legal base for adopting rules concerning 'crossing the external borders of the Member States'.[134] However, the Council argued successfully that airport transit did not amount to such a border crossing, so the measure was lawfully adopted under the EU (rather than EC) base. The CJEU took a legalistic view of border crossing, deeming the EC base only applicable in cases where third-country nationals were 'not only present on the territory of a Member State but . . . also duly authorised to move within that territory'.[135] This holding seems to go against the grain of the ECtHR decision in *Amuur v France*.[136] However, the case concerned an inter-pillar EU competence dispute, and reflects peculiar EU institutional concerns, so it should not be accorded general significance. We should recall that 'jurisdiction' in human rights law is a distinctive concept.

It has been argued that Article 18 of the EUCFR indicates that 'the right to be granted asylum has become a subjective right of individuals under the Union's legal order'.[137] Irrespective of the inevitable interpretative controversies surrounding the Charter, the Qualification Directive (QD) indisputably creates a 'subjective right to be granted asylum'.[138] As AG Maduro stated in *Elgafaji*, the QD aims to vindicate 'the fundamental right to asylum'.[139] As of yet, the CJEU has not been drawn on the implications of the right to asylum. In *ME/NS* it instead focused on the orthodox obligations of *non-refoulement*, as it could resolve the case by reference to Article 4 EUCFR, which reflects Article 3 ECHR. Whether this right to asylum will secure greater access depends on further doctrinal and institutional questions.

133 C-170/96, *Commission* v *Council* [1998] ECR I–2763.
134 Article 100c EC [repealed by the Treaty of Amsterdam].
135 Supra n 133 at para 23.
136 Supra n 46.
137 Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 *Refugee Survey Quarterly* 33 at 34. Cf. Harvey, 'The Right to Seek Asylum in the European Union' (2004) 1 *European Human Rights Law Review* 17.
138 Gil-Bazo, ibid. at 231, referring to both Articles 13 and 18 of the Council Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12 [QD]. Although both provisions speak of access to particular statuses, as the UNHCR observes, 'the [QD] appears to use the term "refugee status" to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR's view, better described by the use of the word "asylum"'. See UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)' (Geneva: UNHCR, January 2005) at 10–11.
139 C-465/07, *Elgafaji v Saatssecreteris van Justitie* [2009] ECR I-0000, Opinion at para 30.

Space precludes an exhaustive review of EU secondary norms on border controls. Suffice to note that they contain preambular endorsements of adherence to fundamental rights and textual references to *non-refoulement* in particular.[140] Regarding the reach of the SBC, it defines borders both territorially[141] and functionally, in that it contains explicit rules on extra-territorial border controls.[142] Den Heijer identifies 'a certain discrepancy between the definitional provisions of the Borders Code – which may be seen to reflect a narrow geographical understanding of the external border – and the scope of activities covered by the Code – which are much broader and extend to measures of extraterritorial control'.[143] To resolve this discrepancy and avoid legal protection gaps, he urges a functional interpretation of border controls, to ensure that even those that take place at a distance from the formal external border are nonetheless subject to the SBC.[144] If this approach is adopted, we have an additional basis for the application of *non-refoulement* extra-territorially. Article 3(b) SBC states that the regulation is 'without prejudice to . . . the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'. Accordingly, it is contended that Schengen states may not contest the applicability of *non-refoulement* to those of their extra-territorial border practices that are subject to the SBC.[145] Similarly, the Frontex Regulation[146] and its surrounding mandates for extra-territorial border controls affirm the applicability of *non-refoulement*.[147]

140 See Moreno Lax, supra n 102 at 439–47; and Moreno Lax, supra n 105.

141 Article 2(2) SBC.

142 Annex VI SBC.

143 den Heijer, 'Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in Ryan and Mitsilegas, supra n 3 at 178–179. See also, den Heijer, supra n 3 at 193–19.

144 Ibid. at 180.

145 Moreno Lax, supra n 102 at 445. This reading is supported by the analysis of the European Commission: see Letter from Mr Jacques Barrot, Vice-President of the European Commission to the Parliament's Committee on Civil Liberties, Justice and Home Affairs, cited in *Hirsi Jamaa v Italy*, supra n 5 at para 34. See also UNHCR Submission in the Case of Hirsi v Italy, supra n 91 at para 2.

146 Council Regulation 2007/2004, supra n 22.

147 Paragraph 1(2), Part I, Annex, Supplementing Decision 'No person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle.' See Council Decision 2010/252/EU supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ L 111/20. For analysis, see Moreno Lax, 'The EU Regime on Interdiction, Search and Rescue, and Disembarkation: The Frontex Guidelines for Intervention at Sea' (2010) 25 *The International Journal of Marine and Coastal Law* 62. The European Parliament has contested the Council's competence to adopt the decision under the comitology procedure chosen: see C-355/10, *Parliament v Council* (Application under Article 263 TFEU for annulment of Council Decision 2010/252/EU) (pending).

The EU asylum *acquis*, in contrast, is remarkably silent on its application beyond the EU borders. The key EU asylum instruments (PD, DR and Reception Conditions Directive (RCD)) all apply to those who apply at the borders or within the territory of the Member States.[148] Battjes asserts that '[t]here is no reason to assume that the [QD] serves to harmonise the disparate domestic legislation on [extra-territorial processing]'.[149] The scope of the QD, on this reading, is determined by the PD.[150] However, this reading of the QD is open to question.[151] It is noteworthy in this respect that the Recast QD still leaves this question as to the QD's geographical scope open,[152] leaving the matter ultimately for the CJEU to resolve. In so doing, the legislation must be interpreted in conformity with *non-refoulement* and other EU human rights norms and principles.[153]

3. Allocating Responsibility for Protection-Seekers

A. The 'Safe Country' Concepts

The preceding part reveals that some contact between the protection-seeker and State authorities is needed to trigger the *non-refoulement* guarantee. However, even triggering this guarantee does not guarantee access to a full asylum procedure. Rather, it precludes states from returning asylum seekers to their countries of origin, but not necessarily elsewhere. States assert a right to allocate responsibility to process asylum claims by forcibly removing asylum seekers to STCs.[154] While there is no explicit basis for these practices in the RC, that instrument has not prevented their widespread proliferation.

STC practices shift responsibility for asylum seekers back to countries in which they could have claimed asylum in the course of their flight. These practices were originally conceived of by individual states, but their logic is

148 Battjes, *European Asylum Law and International Law* (Leiden: Martinus Nijhoff Publishers, 2006) at 208–9. See also Letter from Mr Jacques Barrot, supra n 145.

149 Ibid. at 210.

150 Ibid. at 211.

151 den Heijer, 'Europe Beyond its Borders' supra n 143 at 174–6; and den Heijer, supra n 3 at 203–6.

152 Parliament and Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 ('Recast QD').

153 See Article 51 EUCFR.

154 Various terms are used, but throughout I use the term STC. The PD also refers to 'First Country of Asylum', but STC rules are more common. See further, Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', supra n 11; and Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* 567.

extra-territorial, so they spread across the EU,[155] and were eventually reflected in non-binding EU resolutions.[156] STC practices are now embedded in the PD and Dublin System. As Lavenex characterises them, Member States' STC practices 'unilaterally incorporated third countries outside their legal and political domain . . . into their system of redistribution for handling asylum claims'.[157]

From initial unilateral incorporation, Member States and then the EU have come to use readmission agreements to underpin STC practices,[158] some of which raise serious *refoulement* concerns. For example, a 2004 study of the Greek-Turkish readmission agreement revealed that all those returned to Turkey during the period of the study were Iranian or Iraqi, and all were subsequently returned to their home countries.[159] The Italy–Libya push-back condemned in *Hirsi Jamaa* is a powerful illustration of the continuing abuse of the STC notion by EU Member States. As the ECtHR determined, Libya does not meet even basic protection standards against inhuman and degrading treatment and *refoulement*.[160]

B. The PD on STC

The PD not only permits the maintenance of STC rules, but also introduces the notion of 'supersafe third countries' in the European region. The generalised assessment of safety inherent in safe country practices is always likely to be controversial. Moreover, no matter how rigorous this general assessment is, in all instances human rights law demands assessment of whether the third country is safe for the individual applicant, usually conceived of in terms of whether the third country will provide 'effective protection'.[161] Concerning the basic STC rule in the PD, the generalised assessment of safety is based on minimal criteria, firstly that 'life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political

155 For an account of their origins and spread, see Byrne, Noll and Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' (2004) 6 *European Journal of International Law* 355.

156 Council of the European Communities, 'Conclusions of the Ministers Responsible for Immigration' (London, 30 November to 1 December 1992). See also Council Resolutions of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries; Resolution on Manifestly Unfounded Applications for Asylum; Conclusions on Countries in which there is generally no risk of persecution.

157 Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe* (Budapest: Central European University Press, 1999) at 76.

158 For a survey of the dense web of bilateral readmission agreements between EU Member States and transit and sending countries, see Mirem, *Inventory of Agreeements Linked to Readmission* (Updated January 2010), available at: http://www.mirem.eu/datasets/agreements/index?setlanguage=en [last accessed 19 June 2012].

159 Apap, Carrera and Kirişci, 'Turkey in the European Area of Freedom, Security and Justice' *CEPS EU-Turkey Working Papers No. 3* (Brussels: CEPS, 2004) at 22–3.

160 *Hirsi Jamaa v Italy,* supra n 5.

161 See further Costello, supra n 11 at 57–9.

opinion'; secondly, respect of the principle of *non-refoulement*; and, thirdly the possibility to request refugee status and, if found to be a refugee, 'to receive protection in accordance with the [RC]'.[162] This threshold requirement would clearly not be met by some of the states with whom EU Member States (and the EU itself) have readmission agreements.

There is thus no explicit requirement to demonstrate that the protection standards under the RC are actually adhered to, merely that the possibility exists to seek and be accorded such protection. The Original Proposal for the PD provided that a country could be regarded as safe for an individual application only if 'there are no grounds for considering that the country is not a [STC] in [the applicant's] particular circumstances'.[163] No agreement could be reached on this text, and the PD requires Member States to set out 'rules on the methodology' used by authorities to determine whether the rule is applicable to 'a particular country or to a particular applicant'.[164] These rules must be:

> [I]n accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the [STC] concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.[165]

This clause was inserted in the April 2004 draft, in order to avoid the violation of international law inherent in the previous draft, which denied access to the asylum procedure altogether.[166] However, that clause does not seem to go far enough, requiring only an assessment of Article 3 ECHR concerns, rather than wider human rights and effective protection issues.

The 'supersafe third country' provision allows Member States to deny access to the procedure to all asylum seekers who arrive 'illegally' from designated countries.[167] The underlying assumption is that these European countries 'observe particularly high human rights and refugee protection standards'.[168] The countries potentially at issue, neighbouring the enlarged EU, include

162 Article 27(1)(a)–(d) PD.

163 Article 22, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status 24 October 2000 [2001] OJ C62 E/231, ('Original Proposal'); and Article 28, Revised Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status 18 June 2002 [2002] OJ C291 E/143 ('Revised Proposal').

164 Article 27(2)(b) PD.

165 Article 27(2)(c) PD.

166 Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?' (2004) 15 *European Journal of International Law* 963 at 981.

167 Article 36 PD. The practice may be applied either where the Council has agreed a common list of such supersafe countries (Article 36(3)) or, in the absence of such a list, Member States may maintain their own in force on 1 December 2005 (Article 36(7)).

168 Recital 24 PD.

Albania, Belarus, Croatia, Macedonia, the Russian Federation, Serbia and Montenegro, Norway, Turkey, Ukraine and Switzerland. Many of these countries, although they may have adopted asylum laws, implement them only in a very limited fashion and in effect cannot provide access to a proper procedure. There is much evidence to rebut any generalised assumption of safety in relation to these countries.[169]

These STC rules permit transfer to countries outside the EU. They operate in conjunction with the Dublin System, which allocates responsibility for asylum seekers across the EU. In addition, some Member States continue to use bilateral arrangements to transfer asylum seekers, evading the Dublin safeguards.[170]

C. The Dublin System

The Dublin System sets up an allocation mechanism for processing asylum claims across its contracting parties (the EU Member States with Norway, Iceland and Switzerland). Its core obligation as between EU Member States requires responsible countries to take back asylum seekers and process their claims. The allocation mechanism across the Member States is based on the following considerations. In order of priority and in outline, the State responsible is the one where,

- A family member of an unaccompanied minor is legally present, or if there is no such state, where the unaccompanied minor makes her application.[171]
- A family member has been recognised as a refugee or has an outstanding asylum application.[172] Note however that the definition of family member is narrow.[173]

169 For instance on Turkey, see Human Rights Watch, *Stuck in a Revolving Door: Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union* (New York: Human Rights Watch, 2008). On Ukraine, see Human Rights Watch, *Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine* (New York: Human Rights Watch, 2010) at 3 ('While Ukraine is engaged in building and renovating migrant detention centers, it appears unable or unwilling to adequately feed the migrants it currently detains and charges the detainees with the costs of their own detention and transportation between facilities').

170 *Sharifi and others v Italy and Greece* Application No 16643/07, communicated 13 July 2009, is still pending. It concerns transfers of asylum seekers from Italy to Greece under the Readmission Agreement signed between the Italian and the Greek Governments on 30 March 1999. UNHCR reports that Italy does not apply the Dublin II Regulation to asylum seekers it wishes to return to Greece, invoking instead the Readmission Agreement as its basis for such returns. United Nations High Commissioner for Refugees, 'Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece (Application No 16643/09)', at 7, available at: http://www.unhcr.org/refworld/docid/4afd25c32.html [last accessed 19 June 2012].

171 Article 6 DR.

172 Articles 7–8 and Article 14 DR.

173 Article 2(i) DR.

- A visa or residence permit has been issued.[174]
- The irregular external border crossing took place.[175]
- The application was first lodged.[176]

In practice, the allocation criteria are so often ignored that they are characterised as 'unworkable and dysfunctional',[177] in that 'responsibility ultimately lies, in the vast majority of cases, with the State where the application was first filed'.[178] Nonetheless, an unlucky minority of asylum seekers find themselves at the sharp end of the Dublin System, facing return to Dublin States where their fundamental rights are imperilled. While there is a duty on the responsible State to take back asylum seekers, transfer is subject to such extensive exceptions as to be more akin to a privilege than a duty. Under the so-called 'sovereignty clause',[179] Member States may process claims, irrespective of the other rules in the DR. In *NS/ME*,[180] the CJEU confirmed that the exercise of the sovereignty clause falls within the scope of EU law. Accordingly EU human rights law will sometimes require Member States to refuse to transfer the asylum seeker. The CJEU has held that this duty is triggered if the transferring Member State authorities cannot be unaware that systemic deficiencies amount to substantial grounds for believing that there is a real risk of treatment contrary to Article 4 EUCFR (Article 3 ECHR),[181] as discussed below.

The DR also permits transfer outside the EU under STC rules, as did the Dublin Convention.[182] Article 3(3) provides that '[a]ny Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the provisions of the [RC]'.

The DR does not simply allocate responsibility for processing asylum claims, but in effect determines in which Member State the refugee will have to make her home. There is no duty of mutual recognition of positive determinations, in other words recognition as a refugee or SP beneficiary still leaves the refugee confined to one Member State.[183] An amendment to the Long Term

174 Article 9 DR.
175 Article 10 DR.
176 Article 13 DR.
177 Maiani and Vevstad, *Reflection Note on the Evaluation of the Dublin System and the Dublin III Proposal* (European Parliament, March 2009) at 1, available at: http://www.ulb.ac.be/assoc/odysseus/CEAS/PE410.690.pdf [last accessed 19 June 2012].
178 Ibid. at 2.
179 Article 3(2) DR.
180 Joined Cases C-411/10, *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and others v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, 21 December 2011, references from the UK Court of Appeal and Irish High Court respectively. See discussion in Part 3.E infra.
181 Ibid. at para 94; see also para 106 where this test is stated as a requirement of Article 4 EUCFR.
182 Article 3(5) DC.
183 Admittedly, the RC does provide some rights to onward movement, but these are couched in tentative terms. See further, Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 840–74. At the EU level, the Council's

Residents Directive to include beneficiaries of international protection has been agreed,[184] which will give some rights to cross-border movement and residence after 5 years. However, rejection of an asylum claim does have consequences beyond the particular deciding state, and the rejected asylum seeker becomes legally unwanted across the EU. The asymmetry in treatment between recognition and rejection of asylum claims is perhaps the most vivid example of negative mutual recognition in the EU system. From the point of view of the protection-seeker, therefore, the incentives to avoid detection and seek asylum in the Member State of choice are strong. For example, the UNHCR QD Study noted that 67% of asylum applications in the Slovak Republic were closed as the asylum seekers were no longer present, presumably having travelled further west as irregular migrants, rather than risk rejection (or even recognition) there.[185]

The Dublin System presupposes a degree of similarity between protection standards, procedures and most importantly outcomes that simply does not exist. Divergent recognition rates across the EU remain. Neumayer's study stands out, being based on recognition rates for asylum seekers from different countries from 1980 to 1999 across Western Europe.[186] He finds substantial variation across the countries examined, with a lack of convergence, such that he describes the situation as a 'frontal assault on the ethical standards of fairness and non-discrimination supposedly underlying the process of granting asylum'.[187] The divergences in treatment of Iraqi asylum seekers are another case in point, with recognition rates varying from 0% and 90% across different EU Member States.[188]

While the Asylum Directives may gradually contribute a degree of convergence, evidence suggests that they have brought their own interpretative discrepancies. Studies of the QD's implementation demonstrate its diverse interpretation and application, attributable both to ingrained local

discussion of the Commission proposal to extend the LTRD to refugees has halted: see Commission Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection, Brussels, 6 June 2007, COM(2007) 298 final.

184 Parliament and Council Directive 2011/51/EU amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

185 UNHCR, *Asylum in the European Union: A Study on the Implementation of the Qualification Directive* (Geneva: UNHCR, 2007) at 24 ('UNHCR QD Study').

186 Being Norway, Switzerland, and the 14 countries (excluding Luxembourg) that formed the EU in 1999.

187 Neumayer, 'Asylum Recognition Rates in Western Europe - Their Determinants, Variation and Lack of Convergence' (2005) 49 *Journal of Conflict Resolution* 43 at 44.

188 ECRE, *Five Years on Europe is still ignoring its responsibilities towards Iraqi refugees*, AD1/03/2008/ext/ADC, available at: http://www.unhcr.org/refworld/pdfid/47e1315c2.pdf [last accessed 19 June 2012]. The rates concern first instance decisions. See further Sperl, 'Fortress Europe and the Iraqi 'intruders': Iraqi asylum-seekers and the EU, 2003-2007' (2007) *New Issues in Refugee Research Research Paper No 144* at 6. A 2011 UNHCR study examined the treatment of Iraqi, Somali and Afghan Asylum Seekers, finding significant divergences in the treatment of all three. See UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence* (Geneva: UNHCR, 2011).

interpretative and institutional peculiarities, and to the textual novelties and strained drafting of the QD itself.[189] The PD also has facilitated, and probably encouraged, disparate procedural practices.[190] The Dublin System presupposes sufficient similarities across the EU (and beyond) to engender the requisite trust for the system to work. However, the diverse empirical reality stands in tension with the institutionalisation of mutual recognition.

D. The ECHR Response to STC and the Dublin System

(i) From *TI v United Kingdom* to *KRS v United Kingdom*

Systems of mutual recognition are premised on trust in spite of diversity. However, blind trust is simply unacceptable in this human rights-sensitive field, as is reflected in the Strasbourg case of *TI v United Kingdom*.[191] In *TI,* the ECtHR held that

> [i]ndirect removal . . . to an intermediary country, which is also a Contracting State, [did] not affect the responsibility of the [transferring State] 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.[192]

The UK sought to remove the applicant, a Sri Lankan asylum seeker, to Germany under Dublin. However, there was a risk of chain *refoulement*, as Germany had already issued a deportation order against the applicant, having refused him asylum there. In determining that the UK was permitted to send the applicant to Germany, the ECtHR relied on the fact that he would be entitled to make a fresh domestic asylum application there, and that these proceedings would provide effective protection of the applicant's Article 3 rights. In addition, in assessing the applicant's Article 13 claim, the ECtHR noted the practice of the English courts to carefully review Dublin Convention removals in light of divergences in national asylum laws and practices. In light of the existence of this safeguard, the ECtHR found compliance with Article 13. The ruling clearly implies that transfers to third countries are only permissible under the ECHR where such safeguards are in place.

189 Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Nijmegen: Wolf Legal Publishers, 2007); UNHCR QD Study, supra n 185 at 13; ECRE, *The Impact of the Qualification Directive on International Protection* (Brussels: ECRE, 2008); and UNHCR, ibid.

190 UNHCR, *Improving Asylum Procedures Comparative Analysis and Recommendations for Law and Practice: A UNHCR Research Project on the Application of Key Provisions of the Asylum Procedures Directive in Selected Member States* (Geneva: UNHCR, 2010).

191 Supra n 13.

192 Ibid. at 15.

In the background was the fact that although the ECtHR had clarified that Article 3 ECHR protected against risks from non-State actors,[193] this case law was not reflected in German asylum practice. Noll expresses discomfort that 'the ECtHR seems to endorse *de facto* a situation by which the German organs interpret their obligations under Article 3 ECHR in a way which is at loggerheads with the ECtHR's own case law'.[194] The ECtHR permitted removal on the basis of the German assurances that protection was available under domestic law, despite admitting that the provision in question had never been used to reopen an asylum case.[195] Shockingly, as Mole reports '[d]espite the assurances given to the Court in *TI* by the Government of Germany, [TI] was permitted neither to submit a fresh claim nor to access the discretionary procedure and was sent by the border guards onward to his own country where he was arrested and ill-treated'.[196]

Following *TI*, and despite its somewhat equivocal message, some national courts took Strasbourg's prompt and refused removal under Dublin on the basis of their ECHR obligations. The UK experience is particularly instructive as it reveals a tension between governmental and judicial readings of *TI*.

In *Ex p Adan and Aitseguer*,[197] the applicants had (to borrow Endicott's characterisation) 'fled to Germany to escape persecution by a rival clan [in Somalia]; then . . . fled to Britain to escape the German interpretation of the [RC]'.[198] Previous domestic authority had required cooperation with other judiciaries unless their standards were 'outside the range of tolerance'.[199] In contrast, the House of Lords in *Adan* applied *TI* and refused removal. The UK government's response was to introduce legislation containing an irrebuttable statutory presumption that EU Member States were 'safe' for the purposes of

193 As recently reiterated in *Salah Sheekh v Netherlands* Application No 1948/04, Merits and Just Satisfaction, 11 January 2007.

194 Noll, 'Formalism v Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) 70 *Nordic Journal of International Law* 161 at 180.

195 *TI v United Kingdom*, supra n 13 at 18 ('It is true that the Government have not provided any example of Section 53(6) being applied to a failed asylum seeker in a second asylum procedure. . . . While it may be that on any re-examination of the applicant's case the German authorities might still reject it, this is largely a matter of speculation and conjecture.').

196 Mole and Meredith, *Asylum and the European Convention on Human Rights* (Strasbourg: Council of Europe, 2010) at 79.

197 *R v Secretary of State for the Home Dept ex parte Adan and Aitseguer* [2001] 2 AC 477. See further, Noll, '*Formalism v Empiricism*' supra n 194; and Nicol and Harrison, 'The Law and Practice of the Application of the Dublin Convention in the UK' (1999) 1 *European Journal of Migration and Law* 465.

198 Endicott, '"International Meaning": Comity in Fundamental Rights Adjudication' (2002) 14 *International Journal of Refugee Law* 280.

199 *Kerrouche v Secretary of State for the Home Department* [1997] Imm AR 610, *per* Lord Woolf, cited in ibid. at 285.

return, thus precluding judicial enquiry into whether those states would provide effective protection.[200]

In 2007, the UK High Court in *Nasseri*[201] precluded the return of a 17-year-old Afghan to Greece, although he had previously claimed asylum there. As the statutory presumption rendered it impossible for him to challenge the safety of Greece in his case, and there was considerable evidence that Greece would not be 'safe', the High Court declared the provision incompatible with Article 3 of the ECHR. A 'declaration of incompatibility' is the most extreme remedy under the Human Rights Act 1998, connoting that it is not possible for courts to reinterpret the impugned provision in line with the UK's ECHR obligations.[202] However, the Court of Appeal and the House of Lords overruled the High Court, and upheld the irrebuttable presumption of safety. In the Court of Appeal, Laws LJ accepted that the Greek asylum procedures were 'to say the least shaky' yet noted that there were no deportations or removals to Afghanistan.[203] In 2009, the House of Lords upheld the Court of Appeal's ruling largely on the basis of the Strasbourg ruling in *KRS*, discussed below.[204] (Nasseri brought new judicial review proceedings later that year, and, for reasons specific to the case, he was replaced as lead applicant by Saeedi (NS), the applicant in the case with the reference to Luxembourg.)[205]

Before discussing *KRS,* a brief account of growing concerns about conditions in Greece is helpful to illustrate the absence of common standards in the EU. For some time, there have been concerns about Dublin returns to Greece, not only due to the detention and reception conditions there, but also as Dublin returnees were deemed to have abandoned their claims in Greece and as a result were denied access to procedures.[206] In April 2008, the UNHCR advised EU Member States to suspend returns to Greece, due to the reception conditions for Dublin returnees; treatment of 'interrupted' claims; and the dubious adjudication practices.[207] At the European level, in July 2007, the European Parliament urged the Member States not to transfer people to another State under the DR if it was known that that country does not properly

200 Section 11(1) Immigration and Asylum Act 1999. As Thomas notes, 'The Effect of the 1999 Act has been to Nullify the Effect of *Adan*': Thomas, 'The Impact of Judicial Review on Asylum' [2003] *Public Law* 479 at 496–7. The presumption is now contained in Para 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

201 *Nasseri v Secretary of State for the Home Department* [2007] EWHC 1548 (Admin).

202 Sections 2 and 3 Human Rights Act 1998.

203 *R (Nasseri) v Secretary of State for the Home Department* [2008] EWCA Civ 464, at para 41.

204 *R (Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23; [2009] WLR (D) 148.

205 Henderson and Pickup, supra n 16 at para 6.

206 UNHCR, *The Return to Greece of Asylum-Seekers with "Interrupted" Claims* (Geneva: UNHCR, 2007).

207 UNHCR, *Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"* (Geneva: UNHCR, 2008).

consider Iraqi asylum claims.[208] In early 2008, the European Commission brought infringement proceedings against Greece for failure to readmit asylum seekers returned under the DR to the procedure. The infringement mechanism proceeds softly, softly, aiming to achieve a settlement with the offending State. Greece did introduce a new refugee law in July 2008 to comply with the basic Dublin obligation to process the claims of those returned, apparently in response to the Commission's infringement action. However, the UNHCR has expressed qualms about other aspects of the procedure and in 2009 announced it would not cooperate with it.[209] A coalition of NGOs has submitted a voluminous complaint to the European Commission alleging Greece's ongoing violation of all the EU asylum measures.[210]

In the meantime, concerns about the Greek practices led to an increasing volume of emergency applications to the ECtHR to preclude transfers.[211] Of these, one unexpectedly came to a full ruling, being *KRS v United Kingdom.*[212] *KRS* concerned an Iranian asylum seeker resisting transfer from the UK back to Greece. The Court granted a Rule 39 order suspending his removal to Greece, on the basis of the April 2008 UNHCR intervention.[213] Nonetheless, the Chamber took an entirely different view. Whilst accepting the 'independence, reliability and objectivity' of UNHCR, and the genuineness of its concerns about the standards of asylum reception and adjudication in Greece,[214] the ECtHR nonetheless 'consider[ed] that they cannot be relied upon to prevent the UK from removing the present applicant to Greece'.[215] The reasoning is open to criticism on three main grounds. First, Strasbourg only considered removal practices, rather than the Greek asylum system more generally. Secondly, the supposition that Article 3 ECHR violations would be adequately dealt with in the Greek domestic system is open to empirical challenge. Thirdly, and most disturbingly, the Chamber judgment was premised on a presumption that the entire EU asylum system protected fundamental rights 'as regards both the substantive guarantees offered and the mechanisms controlling their observance'[216] and complied with the EU Asylum Directives.[217]

208 European Parliament, Resolution of 12 July 2007 on the humanitarian situation of Iraqi refugees Member States.

209 UNHCR will not participate in the new asylum procedure in Greece unless structural changes are made, UNHCR Press Release No 32/09, 17 July 2009.

210 Dutch Council for Refugees, ProAsyl, Refugee Advice Centre, Refugee and Migrant Justice (endorsed by 19 other NGOs), 'Complaint to the Commission of the European Communities Concerning Failure to Comply with Community Law Against Greece' (Amsterdam, 10 November 2009).

211 See further, ECRE Information Note, 'ECtHR Interim Measures (Rule 39) to stop Dublin transfers' (Brussels: ECRE, 19 June 2009).

212 *KRS v United Kingdom*, supra n 14.

213 Ibid. at 3.

214 Ibid. at 16–17.

215 Ibid. at 17.

216 Ibid. at 16.

217 Ibid. at 17.

In effect, no individual assessment of the risks posed to the applicant was carried out.

KRS, in this respect, represents a significant shift from *TI*. In *TI*, the ECtHR simply ignored the UK's submission that it was sufficient that the applicant could make a fresh application to Strasbourg under Rule 39 on return to Germany if any risk of onward *refoulement* emerged. Instead, the Court emphasised the importance of a domestic remedy in the German system of submitting a fresh asylum application.[218] This aspect of *KRS* is particularly troubling as *Soering* was at least in part motivated by the irreparability of harm threatened. If there are substantial grounds for believing that there is a real risk of treatment contrary to Article 3 ECHR, non-removal, admittedly a somewhat ill-fitting response, is required, as any other remedy may result in subjecting the individual to inhuman treatment. Even if we were to accept the empirical plausibility of an effective *post-facto* remedy in a country that does mete out inhuman treatment, that remedy would always be, at least in some respects, inadequate, due to the nature of the harm. *TI v United Kingdom*[219] asserted States' duties to consider all the likely risks on removal of an asylum seeker. In contrast, *KRS*[220] evidences the abandonment of scrutiny to blind trust. The ECtHR Chamber erred in its conceptualisation of the Dublin mechanism, which creates a discretionary power, rather than a duty to transfer. Moreover, it erred in treating the mere existence of the EU Directives as raising such a strong presumption of compliance by one of its own Contracting Parties, in the face of ample empirical evidence to the contrary.

Post-*KRS*, domestic courts and indeed governments across the Dublin System took divergent views of their EU and ECHR obligations in the context of Dublin returns.[221] As a result, the Strasbourg Court's Rule 39 jurisdiction came under immense strain, as thousands of asylum seekers resisting Dublin transfer sought a supranational judicial remedy.[222]

(ii) *MSS v Belgium and Greece*

MSS v Belgium and Greece[223] provided the much needed opportunity for the Grand Chamber to revisit the *KRS* ruling. It distinguished *KRS* on the facts, without overruling it, attaching 'critical importance' to the UNHCR letter of April 2009 requesting Belgium to suspend transfers to Greece in light of the

218 Noll, supra n 194 at 179.
219 Supra n 13.
220 Supra n 14.
221 See, for example, UNHCR Information Note, 'National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece' (Geneva: UNHCR, 16 June 2010).
222 Statement of the President of the European Court of Human Rights concerning requests for interim measures (Rule 39 of the Rules of the Court), 11 February 2011.
223 Supra n 15.

deteriorating situation there.[224] The judgment is a resounding reassertion of each state's responsibility to ensure that the ECHR guarantees were practical and effective. It held unanimously that the detention conditions in Greece violated Article 3 of the ECHR, and by a majority (16:1), that the living conditions in Greece violated Article 3 ECHR. The Grand Chamber in *MSS* also held unanimously that the Greek asylum procedures violated Article 13 ECHR. For our purposes, of greatest interest is the finding by a majority (15:2) that Belgium violated Article 3 of the ECHR, in exposing the applicant to risks linked to the deficiencies both in the asylum procedure and in the detention and living conditions in Greece (15:2). Of note is that the ECtHR applied its standard test concerning Article 3 risks, and found Belgium in breach as it 'knowingly' exposed the applicant to conditions which violated Article 3 of the ECHR.[225] The Court also held that Belgium violated Article 13 of the ECHR in failing to provide an adequate remedy to prevent the transfer to Greece.

As one separate Concurring Opinion noted, the focus is entirely on the conditions in Greece, rather than on the specific risks posed if removed to Afghanistan.[226] The ECtHR laid great emphasis on a series of reports published since 2006 by the Council of Europe, EU, UNHCR and respected NGO sources.[227] Its assessment of the detention conditions was premised on the reports' evidence of the 'systematic' practice of detaining asylum seekers on arrival for periods from a few days to a few months.[228] Similarly generalised findings were accepted in relation to the poor detention conditions.[229] Also pertinent was the fact that the Court had in the previous two years found degrading detention conditions in three cases against Greece.[230] Whether the applicant had been subjected to the prevailing practices was in dispute, but the Court treated the general information as supporting the applicant's allegations. Even Judge Sajó, who otherwise dissented, shared this finding in spite of his hesitancy to ground the finding relating to the particular applicant on general information 'relating to conditions at *other* premises at times *other* than the material one'.[231] Decisive for him was the failure of the Greek government to prove that the detention did not take place in an 'overcrowded place in appalling conditions of hygiene and cleanliness'.[232]

224 *MSS*, supra n 15 at para 344.
225 Ibid. at paras 365–7.
226 Ibid. at 93–9 (Concurring Opinion of Judge Villiger).
227 Ibid. at para 160 lists.
228 Ibid. at para 167.
229 Ibid. at para 230.
230 *SD v Greece* Application No 53541/07, Merits and Just Satisfaction, 11 June 2009; *Tabesh v Greece* Application No 8256/07, Merits and Just Satisfaction, 26 November 2009; and *AA v Greece* Application No 12186/08, Merits and Just Satisfaction, 22 July 2010.
231 *MSS*, supra n 15 at 100.
232 Ibid. at 101.

(iii) *Hirsi Jamaa v Italy* on 'unsafe' third countries

Hirsi Jamaa v Italy also contains important safeguards concerning returns to third countries. The Court found an Article 3 violation due to the conditions in Libya and the risk of onward *refoulement*. Concerning the conditions in Libya, like in *MSS*, the applicants relied on general evidence, being various IGO and NGO reports,[233] and in particular on the Council of Europe's Committee for the Prevention of Torture (CPT) report evidencing the inhuman and degrading conditions for irregular migrants in Libya, particularly those of Somali and Eritrean origin.[234] On this basis, they argued that Italy 'could not have been unaware of [the] increasingly worsening situation when it signed bilateral agreements with Libya and carried out the push-back operations at issue'.[235] The Court found that those returned to Libya were 'systematically arrested and detained in conditions that outside visitors, such as the delegations from the UNHCR, Human Rights Watch and Amnesty International, could only describe as inhuman'.[236] Italy was not entitled to rely on assurances from Libya or the terms of the Italy-Libya Friendship Treaty (2008) in the face of evidence from 'reliable sources' of 'practices . . . manifestly contrary to the principles of the Convention'.[237] (In the face of this finding, it is troubling that the Court's proposed remedy was to seek assurances from the Libyan authorities.[238]) As in *MSS*, the Court was willing to impute knowledge to the transferring state. Italy argued that the applicants had not applied for asylum. To this, the Court responded that it was for the Italian authorities, who faced a situation which involved systematic violations of human rights, to 'find out about the treatment to which the applicants would be exposed after their return,' irrespective of whether the applicants had expressly requested asylum.[239]

The Court also found an Article 3 violation due to the risk of arbitrary repatriation to Eritrea and Somalia. Here again the evidence was damning: the UNHCR reported that Libya frequently conducted collective expulsions, such that there was a high risk of 'chain *refoulements*'.[240] Libya had not ratified the RC, and the Court unsurprisingly rejected the Italian government's

233 These include a UNHCR press release of 7 May 2009 (at para 33); a letter of 15 July 2009 of Jacques Barrot, Vice-President of the European Commission (at para 34); Report of the Council of Europe's Committee for the Prevention of Torture (28 April 2010) (at paras 34–5); Human Rights Watch Report of 21 September 2009 (at paras 37–9); report of a visit of Amnesty International from 15 to 23 May 2009 (at paras 40–1) and other international material (at para 42).

234 *Hirsi Jamaa v Italy,* supra n 5 at para 88, citing the CPT Report of 28 April 2010, which in turn is outlined at paras 35–6.

235 Ibid. at para 89.

236 Ibid. at para 125.

237 Ibid. at para 128.

238 Ibid. at para 211.

239 Ibid. at para 133.

240 Ibid. at para 143.

argument that the UNHCR presence in Tripoli was sufficient to ensure protection against arbitrary repatriation. Accordingly, it held that Italy breached Article 3 ECHR as it 'knew or should have known' of the lack of protection in Libya.[241]

While the Article 3 analysis is orthodox and unsurprising given the brutality of the Libyan regime, *Hirsi Jamaa v Italy* established important new legal principles on collective expulsions under Article 4, Protocol 4.[242] Italy argued that the provision was inapplicable, as the applicants were refused entry, rather than expelled.[243] The Court, for the first time, gave effect to this provision extra-territorially. It noted that its purpose was to 'prevent States being able to remove certain aliens without examining their personal circumstances' and so without affording them the opportunity to put forward their arguments against expulsion.[244] As the ECHR was to be a 'living instrument', its meaning should track the changing nature of border controls.[245] In addition, effectiveness demanded that the prohibition apply also to migrants who encounter their destination State at sea, as well as by land.[246] Coherence across Convention articles was one further reason weighing in favour of its extra-territorial scope. Accordingly, its scope should track all exercises of jurisdiction under Article 1 of the ECHR.[247] The absence of any individual examination of the applicants' situation was sufficient to lead to the conclusion that Article 4, Protocol 4 had been violated.[248] The application of the prohibition of collective expulsion at the borders has significant procedural implications. To avoid findings of collective expulsion requires individual procedures. Border controls must involve screening, not deflecting.

The complete absence of screening procedures also amounted to an Article 13 violation. The Court reiterated its Article 13 case law, in particular on suspensive effect.[249] On the facts, Italy had violated Article 13 due to the absence of information provided on how to access asylum procedures.[250] The applicants had no way to access any domestic remedy in order to have a 'thorough and rigorous assessment of their requests before the removal measure was

241 Ibid. at paras 156–7.
242 Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Article 4 of Protocol No 11 ('Collective expulsion of aliens is prohibited').
243 Ibid. at para 160. Notably, this interpretation is also supported by den Heijer, *Europe and Extraterritorial Asylum*, supra n 3 at 122.
244 Ibid. at para 177.
245 Ibid. at para 175.
246 Ibid.
247 Ibid. at para 180.
248 Ibid. at paras 185–6.
249 Ibid. at para 200, citing *Gebremedhin v France* 2007-II at para 66; and *MSS*, supra n 15 at para 293.
250 Ibid. at para 204.

enforced'.[251] The Court ordered a specific remedy, namely that the Italian Government take 'all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated'.[252] In contrast, the separate Concurring Opinion of Judge Pinto de Albuquerque went further, suggesting that the remedy required by the Court was insufficient. He urged that the Italian Government should also have a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy.[253]

On the issue of jurisdiction, recall that in *Banković* the Court rejected the idea of partial application of the ECHR. The objection to 'dividing and tailoring' was a manifestation of the notion that Convention obligations were indivisible. While the Court resiled from this position in *Al-Skeini*, the *Hirsi* approach is nonetheless noteworthy, in that we see the Court asking whether particular rights should apply in given extra-territorial scenarios. While the Court ultimately holds that Article 4, Protocol 4 has the same extra-territorial scope as Article 3 ECHR,[254] that conclusion follows an examination of the specificities of the right, reflective of the tailoring of ECHR obligations to the extra-territorial context.

E. The CJEU on Dublin transfers: The NS/ME *Ruling*[255]

The applicant in *NS* was an Afghan asylum seeker resisting removal from the UK to Greece under the DR. His domestic appeal rights were precluded by the previously mentioned UK irrebuttable statutory presumption.[256] On this basis, the High Court in London dismissed his claim, but allowed the appeal to the Court of Appeal, which in turn referred seven detailed questions to Luxembourg. The applicants in *ME* were five asylum seekers variously from Afghanistan, Iran and Algeria, similarly resisting removal to Greece. The Irish High Court referred two questions on the transferring Member States' obligations to assess the receiving States' compliance with Article 18 EUCFR, the Asylum Directives and DR, and the consequences of finding the receiving State in breach. The Irish authorities had applied *KRS* and assumed that there was no breach of Article 3 ECHR.

Both references predated *MSS*,[257] so at the time Strasbourg's guidance to national courts, in the form of contradictory and inaccessible Rule 39

251 Ibid. at para 205.
252 Ibid. at para 211.
253 *Hirsi Jamaa v Italy*, supra n 5 at 82 (Concurring Opinion of Judge Pinto de Albuquerque).
254 Ibid. at para 178.
255 This section draws on my note, Costello, supra n 16.
256 Opinions of AG Trstenjak in C-411/10, *NS v Secretary of State for the Home Department* and C-493/10, *M.E. and others v Refugee Application Commissioner & Minister for Justice, Equality and Law Reform*, 21 September 2011, see *NS* Opinion at para 47.
257 *ME* Opinion, ibid. at paras 53 and 55.

rulings[258] and *KRS*,[259] was unclear. However, the Luxembourg ruling post-dates *MSS* and, as will be seen, follows it closely.

Twelve Member States[260] intervened, together with Switzerland (a participant in the Dublin System) and the European Commission. In addition, due to their interventions in the domestic proceedings, UNHCR, the AIRE (Advice on Individual Rights in Europe) Centre, Amnesty International and the UK Equality and Human Rights Commission (in *NS* only) also made submissions. The contribution of the interveners is noteworthy. In previous refugee law cases before the Luxembourg court, even the UNHCR was precluded from intervening, as it had not secured intervention rights in the domestic proceedings.[261]

Although the cases were joined and there is a single judgment, AG Trstenjak gave two Opinions.[262] The *NS* Opinion is the more comprehensive, with that in *ME* citing the former extensively.

The legal issues examined were as follows:

(i) Does the exercise of the 'sovereignty clause' fall within the scope of EU law?

The first *NS* question was whether decisions under Article 3(2) fall within the scope of EU law. The governments of Ireland, the UK, Belgium and Italy argued that they did not. The *NS* Opinion noted that the EUCFR binds the Member States when 'implementing EU law', which, as the Explanations to the Charter clarify,[263] is to be read as co-extensive with the pre-existing caselaw, covering both cases where Member States 'implement' and 'derogate from' EU norms.[264] As for the DR, the AG noted that it established 'exhaustive rules' on the allocation of responsibility for the processing of asylum claims, and rules governing the consequences of decisions under Article 3(2). Accordingly, these decisions do amount to 'implementing EU law'.[265] The Court followed this conclusion.[266]

258 For an overview of some of the practical difficulties surrounding Rule 39 measures in light of the burgeoning numbers of requests, see ELENA, *Research on ECHR Rule 39 Interim Measures* (Brussels: ELENA, April 2012).

259 Supra n 14.

260 Belgium, Germany, Finland, France, Greece, Ireland, Italy, the Netherlands, Austria, Poland, the UK and the Czech Republic.

261 For example, in C-31/09, *Bolbol* [2010] ECR I-0000, AG Sharpston referred (at para 16) to the brief of UNHCR as an 'informal amicus curiae brief' but there were in fact no formal NGO or IO interventions.

262 *NS* Opinion and *ME* Opinion, supra n 256. For analysis, see Peers, Statewatch Analysis, *Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"?* available at: www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf [last accessed 19 June 2012].

263 Article 52(7) EUCFR. The Explanations are found at [2007] OJ C303/17.

264 *NS* Opinion, supra n 256 at paras 76–8.

265 *NS* Opinion, supra n 256 at para 80; in paras 81–2 the AG drew an analogy with the seminal case of Case 5/88 *Wachauf* [1989] ECR 2609.

266 Judgment at paras 64–9.

(ii) When is transfer under the DR prohibited?

The opinions

The AG opined that if there was a 'serious risk' of violations of human dignity (Article 1 EUCFR) or of 'inhuman or degrading treatment' (Article 4 EUCFR), removal should be precluded, as well as in cases where Article 19(2) EUCFR applied.[267] The duty not to return derived from the positive protective function inherent in Articles 1 and 4.[268] In addition, the right to asylum under Article 18 EUCFR precluded both direct and indirect *refoulement*,[269] so that if transferees were 'at risk' of indirect *refoulement*, Dublin transfer would also be prohibited.[270] While the reasoning focuses on these particular Articles, the AG's conclusions envisage breaches of *any* fundamental right enshrined in the Charter as precluding transfer.[271] Article 4 EUCFR risks should be assessed first, with Article 1 being regarded as inapplicable if a violation of the more specific rights were identified.[272] In contrast, not all breaches of the Asylum Directives would prevent transfer. Only where breaches of the Directives also entail breaches of fundamental rights would these be pertinent.[273]

The judgment

The Court emphasised that the Dublin System was a product of 'the principle of mutual confidence' between all the participating states (EU and non-EU) that all observe fundamental rights, leading to a presumption that the treatment of asylum seekers in all Member States complies with the requirements of the RC, the EUCFR and the ECHR.[274] For the Court, the 'raison d'être' of the EU was at issue. In a remarkably unclear paragraph, it stated:

> At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.[275]

267 *NS* Opinion, supra n 256 at para 112; and *ME* Opinion, supra n 256 at para 64 ('If there were a serious risk . . . of a violation of the asylum seekers' fundamental rights, as enshrined in Articles 1, 4 or 18 of the [EUCFR], the other Member States may not transfer asylum seekers . . . but are obliged, in principle, to exercise the right to assume responsibility for the examination under Article 3(2) [DR].')
268 *NS* Opinion, supra n 256 at para 112; and *ME* Opinion, supra n 256 at fn 17.
269 Ibid. at para 114; and ibid. at para 62.
270 Ibid. at para 115.
271 Ibid. at paras 127 and 178(2); and *ME* Opinion, supra n 256 at para 79(1).
272 Ibid. at fn 44.
273 Ibid. at paras 123–6; and *ME* Opinion, supra n 256 at para 66.
274 Judgment at para 80.
275 Ibid. at para 83.

As will be discussed further below in Section 3.G the reasoning seems to confuse the ends and means, the processes and products of European integration.

In sharp contrast to the Opinions, the Court held that not every infringement of fundamental rights would affect the obligations under the DR.[276] Nor would infringement of just any aspect of the Asylum Directives preclude transfer.[277] Apparently due to the importance attributed to mutual confidence and the presumption of compliance, the Court established a significantly higher threshold than that suggested by AG Trstenjak for precluding Dublin transfers. Member States, including national courts, may not transfer asylum seekers to the responsible State where they

> cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment within the meaning of Article 4 of the Charter.[278]

(iii) Is protection against removal under the EUCFR more extensive than under the ECHR?

The next issue was whether Articles 1, 18 and 47 of the EUCFR, and the general principles of EU law, were wider in scope than Article 3 ECHR. The salience of the question was high at the time when *KRS* was the governing Strasbourg ruling. If there was no Article 3 ECHR issue (as was held in *KRS*), could removal nonetheless breach the EUCFR? *MSS* made this question less important, so the AG chose not to answer it, instead clarifying the status of the *MSS* ruling in EU law.[279] In light of Article 52(3) EUCFR, Strasbourg caselaw, although not 'a source of interpretation with full validity,' had 'particular significance and high importance'[280] in the areas of overlap. The *NS* Opinion noted the *de facto*, but not *de jure*, parallel between the RC, ECHR and rights under EU law in this context.[281]

The Court emphasised that the ECtHR in *MSS* had 'reviewed its position [in *KRS*] in the light of new evidence'.[282] Following the AG, the Court simply stated that Articles 1, 18 and 47 EUCFR did not lead to a different response to the questions posed.[283] This statement clearly only applies to the case at

276 Ibid. at para 82.
277 Ibid. at para 84.
278 Ibid. at para 94. See also para 86 where the test is identified and para 106 where this test is stated as a requirement of Article 4 EUCFR.
279 *NS* Opinion, supra n 256 at paras 141–2.
280 Ibid. at para 146.
281 Ibid. at para 153.
282 Judgment at para 112.
283 Ibid. at paras 113–5.

hand, and does not exclude the possibility that these rights may provide more extensive protection against return in an appropriate case. In particular, the Court has yet to examine whether the right to asylum under the Charter was a free-standing right which prevented removal, or the extent to which the right to dignity added protection above the Strasbourg minimum.

(iv) How are the risks posed by transfer to be assessed?

The opinions

The AG opined that a conclusive presumption of compliance with fundamental rights was 'incompatible with the Member State's duty to interpret and apply [the DR] in a manner consistent with fundamental rights'.[284] Nor could there be a conclusive presumption regarding compliance with the Asylum Directives, which would have the same effect as the former presumption.[285] However, a rebuttable presumption was permissible, provided the asylum seeker was procedurally entitled to rebut the presumption in accordance with the principle of effectiveness.[286] The precise workings of the procedure for rebutting the presumption were considered to be 'a matter for the national legal orders of the individual Member States'.[287] No doubt questions should be referred to the CJEU on these workings, if it is felt that ostensibly rebuttable presumptions in national law are conclusive in practice. If this is so, then the domestic system can be said to violate the EU general principle of effectiveness.

The judgment

The Court integrated its response to the questions on the threshold to prevent removal and the evidential assessment.[288] Although it is not for the CJEU on a preliminary reference to assess the facts, it incorporated the Strasbourg finding in *MSS* that there was a 'systemic deficiency' in the Greek asylum system.[289] It noted that Strasbourg had taken into account the 'regular and unanimous reports' of NGOs, the input of the UNHCR, and Commission Reports on Dublin as well as the proposals for a Recast DR.[290] Accordingly, it rejected the arguments of the Belgian, Italian and Polish governments that they lacked the 'instruments necessary' to assess other Member States' fundamental rights compliance.[291] Following the Opinion, the Court held that conclusive

284 *NS* Opinion, supra n 256 at para 131.
285 Ibid. at para 132.
286 Ibid. at paras 133–136; and *ME* Opinion, supra n 256 at paras 74–7.
287 Ibid. at para 135; and ibid. at para 77.
288 Judgment at para 74.
289 Ibid. at para 87.
290 Ibid. at para 90.
291 Ibid. at para 91.

presumptions of compliance were incompatible with EU law,[292] and so were 'precluded' by EU law.[293]

(v) If removal is prohibited, is there a duty to process the claim?

The Opinion frames the entire case as if the prohibition of transfer implies a duty to process the claim.[294] In contrast, the Court held that even if transfer was prevented on fundamental rights grounds, this did not create an automatic duty to examine the application. Instead, the Member State could use the Dublin criteria to find yet another State responsible, subject only to the requirement that that process should not 'worsen a situation where the fundamental rights of the applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time'.[295]

This difference between the Opinion and Judgment could be highly significant in individual cases.

(vi) Protocol No 30 on the position of the UK and Poland under the EUCFR

The seventh question in *NS* relates to Protocol No 30 on the application of the EUCFR to Poland and to the United Kingdom. The Opinion confirms that Article 1(1) thereof is merely an 'express confirmation' of Article 51 EUCFR.[296] In contrast, Article 1(2) did seem to 'rule out new EU rights and entitlements being derived from Articles 27 to 38 [EUCFR]' against the UK or Poland.[297] These are the 'solidarity rights' in the Charter, including the right to family and professional life (Article 33) and the right to healthcare (Article 35). As these rights were not at issue in the case, the AG declined to go any further in her analysis.[298] Article 2 was also of limited effect,[299] so all in all, Protocol 30 did not alter the findings vis-à-vis the UK. The Court too affirmed that Article 1(1) of Protocol No 30 merely 'explains' Article 51 EUCFR, and does not exempt the Member States concerned.[300] This is an important clarification, as some had erroneously regarded this provision as amounting to an opt-out.[301]

292 Ibid. at para 99.
293 Ibid. at para 105.
294 *NS* Opinion, supra n 256 at para 3.
295 Judgment at para 108.
296 *NS* Opinion, supra n 256 at para 171.
297 Ibid. at para 173.
298 Ibid. at para 174.
299 Ibid. at para 176. It was not a 'general opt-out' as it only related to those provisions which refer to 'national laws and practices.'
300 Judgment at para 120.
301 See further, Barnard, 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?', available at: www.law.cam.ac.uk/faculty-resources/download/barnard-uk-opt-out-and-the-charter-of-fundamental-rights/7309/pdf [last accessed 19 June 2012].

However, it remains to be seen how the solidarity rights limitation in Article 1(2) will evolve. The CJEU was able to avoid this issue. Strasbourg had made the legal innovation in *MSS* using Article 3 ECHR to impugn the reception conditions in Greece, so the question of using these Charter provisions to prevent return to face extreme suffering from destitution or homelessness did not need examination.

F. Strasbourg and Luxembourg Interactions on Dublin Returns

The *NS/ME* test entails several elements: Dublin transfer is prohibited if the transferring Member State authorities cannot be unaware that systemic deficiencies amount to substantial grounds for believing that there is a real risk of treatment contrary to Article 4 of the EUCFR.[302] Each element warrants examination in turn, to understand its interaction with the applicable ECHR standards, as enunciated in *MSS*.

(i) 'Cannot be unaware'

Given that the test imports the demanding Strasbourg notion of 'substantial grounds', it would be difficult to justify an interpretation of this requirement that set a higher burden of proof than is applicable under the Strasbourg jurisprudence. The better reading is that the 'cannot be unaware' notion reflects the permissibility of a presumption of compliance with fundamental rights, with that presumption rebuttable on the basis of evidence in the public domain. If the requirements on the types and volume of evidence are too strict, it will infringe the EU general principle of effectiveness. For instance, there is some indication that English judges are reading *MSS* as in effect requiring a UNHCR statement akin to that made in relation to Greece, before transfer to other countries will be stopped.[303] Such strict readings of the Strasbourg caselaw and rigid evidential requirements are a dereliction of judicial authority. The notion of effective judicial protection requires judges to make a fulsome assessment of all types of available evidence, rather than establishing rigid requirements, which in effect delegate authority to other organisations.

302 Judgment at para 94. See also para 106 where this test is stated as a requirement of Article 4 EUCFR.

303 See, for example, concerning removal to Italy: *R (Medhanye) v SSHD* [2011] EWHC 3012 (Admin). Note, however, that final judgment in this case was stayed pending the CJEU ruling in *NS/ME*.

(ii) 'Systemic deficiencies'

The CJEU includes a requirement of 'systemic deficiencies' in the test to preclude removal.[304] It also refers in its assessment to the existence of 'major operational problems' imperilling fundamental rights.[305]

In contrast, in *MSS*, the ECtHR takes the various reports as evidence of systemic shortcomings, which then makes it easier for the applicant to establish the requisite risk in her individual case, in the sense that this information in the public domain is assumed to make his particular claim of being at risk stronger. As a matter of fact, it finds systemic deficiencies, but this is not a legal requirement under the ECHR. In this respect, *MSS* can be read with *NA v United Kingdom*[306] and *Sufi and Elmi v United Kingdom*,[307] as part of the general Strasbourg trend where general risks are sufficient to trigger protection under Article 3 ECHR, without the applicant having to show that she is somehow singled out from others exposed to that risk. Luxembourg's ruling in *Elgafaji*[308] may be seen as influential in this Strasbourg trend.

The CJEU test seems more difficult to meet that the ECtHR one, if we read 'systemic deficiencies' as an additional requirement to be met. However, I urge that such a reading be rejected. Luxembourg has no mandate to interpret Article 4 of the EUCFR in a manner that undermines Strasbourg's interpretation of Article 3 of the ECHR.[309] Moreover, the CJEU itself in *NS/ME* was emphatic that it was faithful to *MSS*. Accordingly, we should adopt an interpretation of the Luxembourg test which does not treat 'systemic deficiency' as an additional hurdle for applicants, but rather an element of the risk assessment.

This reading is also logically preferable. It is difficult to justify a test that protects only against risks from 'systemic deficiencies'. The Article 3 ECHR risk is no greater or lesser for emerging from systemic or non-systemic factors. It ought to be enough to show the requisite risk of torture, inhuman or degrading treatment.

(iii) 'Substantial grounds for believing there is a real risk'

The phrase 'substantial grounds for believing there is a real risk' mirrors the Strasbourg Article 3 case law,[310] and indeed the EU QD.[311] The 'substantial

304 Judgment at paras 89 and 94.
305 Ibid. at para 81.
306 *NA v United Kingdom* Application No 25904/07, Merits and Just Satisfaction, 17 July 2008.
307 *Sufi and Elmi v United Kingdom* Application Nos 8319/07 and 11449/07, Merits and Just Satisfaction, 28 June 2011.
308 C-465/07, *Elgafaji and Elgafaji* [2009] ECR I-921.
309 Article 52(3) EUCFR.
310 In the seminal *Soering v United Kingdom* A 151 (1989); 11 EHRR 439 (1989), the UK government suggested (at para 83) a test of 'certain, imminent or serious'. However, the ECtHR applied (at para 91) the test of 'substantial grounds' of a 'real risk' of treatment contrary to Article 3 ECHR.
311 Article 2(e) QD.

grounds' threshold is demanding. However, the Strasbourg case law has integrated concerns about the specificities of the asylum process and tempered the evidential assessment accordingly.[312] In a line of recent cases culminating in *Hirsi Jamaa* the Court has more readily accepted that information concerning general risks in the country of origin will meet this requirement.[313] The 'real risk' criterion in contrast is not so demanding. It means a 'foreseeable risk',[314] going beyond a mere possibility of ill-treatment. Article 19(2) of the EUCFR differs on its face from the Strasbourg caselaw, in that it refers to a 'serious risk' rather than a 'real risk'. However the Explanation to Article 19(2) stipulates that it is intended to reflect the Article 3 ECHR case law.[315] The AG's Opinions used the 'serious risk' criterion. In contrast, the Court integrates the Strasbourg test into Article 4 of the EUCFR, following Strasbourg's lead more faithfully. This is welcome, given that the Charter text itself purports to reflect the Strasbourg standards.

(iv) 'treatment contrary to Article 4 EUCFR'

The Judgment only deals with treatment contrary to Article 4 of the EUCFR. The extent to which breaches of other EU fundamental rights should prevent removal remains to be seen. The Opinions, in contrast, considered Articles 1, 4, 18 and 19 of the EUCFR, ultimately envisaging breaches of any fundamental rights enshrined in the Charter as potentially precluding transfer.[316] Given the extensive social rights in the Charter, this would have opened up the possibility for different *non-refoulement* claims, not only in the Dublin context, but more broadly. In limiting its judgment to Article 4 of the EUCFR, the Court has left for another day the extent to which other Charter rights entail non-*refoulement* obligations, although it does make clear that not just 'any infringement of a fundamental right' will do.[317]

Inevitably, further references will follow on this point,[318] particularly given that the Strasbourg case law prevents removal in cases of 'flagrant breach' of

312 *Said v Netherlands* 2005-VI at para 49 ('It is nevertheless incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail.') For further assessment, see Spijkerboer, 'Subsidiarity and "Arguability": The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' (2009) 21 *International Journal of Refugee Law* 48.

313 *NA v United Kingdom*, supra n 306; *MSS*, supra n 15; *Sufi and Elmi*, supra n 307; and *Hirsi Jamaa v Italy*, supra n 5.

314 *Soering*, supra n 310 at para 100.

315 See further, Eliantonio and Wiesbrock, 'EU Migration Law in National Courts: The Role of National Procedural Rules and the ECJ's Requirements in the Dutch Courts' (2011) 3 *Asiel & Migrantenrecht* 104.

316 *NS* Opinion, supra n 256 at para 127, 178(2); and *ME* Opinion, supra n 256 at para 79(1).

317 Judgment at para 82.

318 See the pending case of C-4/11, *Federal Republic of Germany v Kaveh Puid* [2011] OJ L 95/4.

other Convention rights. The EU Charter must protect human rights at least to the Strasbourg standard.[319] Luxembourg accords Strasbourg caselaw a privileged position in honing the general principles of EU law. The referring national courts in *NS/ME* invited the CJEU to go further than the ECHR, and explore the Charter's additional protections. However, the Court declined, instead focusing only on Article 4 of the EUCFR (Article 3 ECHR). There are many legally innovative paths not taken. The AG reads the right to asylum in terms of *non-refoulement*, avoiding its transformative potential as an individual right to be granted asylum (in contrast to the orthodox right to seek asylum).[320] The judgment is strikingly economical, in that the CJEU traces a path already worn by Strasbourg.

The CJEU only considers Article 4 EUCFR risks. In contrast, Strasbourg has examined *non-refoulement* claims in relation to other rights.[321] It has explicitly recognised this possibility, for instance, as regards Articles 4,[322] 5,[323] 6,[324] 8[325] and 9.[326] The 'flagrant breach' test reflects a hierarchy between Article 3 ECHR and other qualified ECHR rights. Advocate General Trstenjak's Opinions seemed to set an undifferentiated test for breaches of all fundamental rights, which would appear to protect against removal more than the ECHR. The Court focused on Article 4 EUCFR (Article 3 ECHR) risks alone. It remains to be seen whether the CJEU will follow the ECtHR and develop a rights hierarchy in the pending case on the EAW,[327] *Radu* and *Melloni*.[328]

The most pressing practical question is then the standard for rebutting the presumption of compliance with fundamental rights. As is discussed in the next section, Strasbourg has developed some important principles on this point.

319 Article 52(3) EUCFR.

320 See further, Gil-Bazo, supra n 137.

321 den Heijer, 'Whose Rights and Which Rights? The Continuing Story of *Non-refoulement* under the European Convention on Human Rights' (2008) 10 *European Journal of Migration and Law* 277.

322 *Ould Barar v Sweden* Application No. 42367/98, Admissibility, 19 January 1999, illustrates that the ECtHR is open to claims under Article 4 ECHR, but found no risk of treatment contrary to Article 4 ECHR on return in the particular case.

323 *Tomic v United Kingdom* Application No. 17837/03, Admissibility, 14 October 2003.

324 *Soering*, supra n 310; *Drozd and Janousek v France and Spain,* supra n 87; *Mamatkulov v Turkey* 2005-I; *Einhorn v France* 2001-XI; *Al-Moayad v Germany* Application No 35865/03, Admissibility, 20 February 2007; *Stapleton v Ireland* Application No 56588/07, Admissibility, 4 May 2010; and *Othman (Abu Qatada) v United Kingdom* Application No 8139/09, Merits and Just Satisfaction, 17 January 2012.

325 *F v United Kingdom* Application No 17341/03, Admissibility, 22 June 2004.

326 *Z and T v United Kingdom* 2006-III. Notably, this case is cited by AG Bot in Joined Cases C-71/11 and C-99/11, *Federal Republic of Germany v Y and Z*, 19 April 2012, in interpreting the concept of persecution on grounds of religion under the QD definition of 'refugee', which purports to reflect the RC.

327 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

328 C-396/11, *Radu* and C-399/11, *Melloni* (both pending).

(v) The burden of proof

The Court did not need to engage with the most pressing practical question, namely the standard for rebutting the presumption of compliance. To resolve the case at bar, it simply stated that a conclusive presumption is 'precluded' by EU law. *NS/ME* was an easy case, as the Strasbourg ruling in *MSS* was relied upon. The Court endorsed the approach of the Strasbourg Court, in particular its reliance on reports by NGOs, the UNHCR and EU bodies. Yet, it explicitly left it up to the national systems to establish the rules on the burden and standard of proof. The principles of equivalence and effectiveness are applicable here, and may be invoked to challenge discriminatory or unduly restrictive evidential rules.[329]

Strasbourg's approach to this matter has shifted over time. Although *TI v United Kingdom* established a strong principle, it was weak in practice given the low standards demanded in order to legitimise the transfer in practice. In light of *MSS*, it is tempting to sideline *KRS* as an aberrant Chamber decision, in particular for institutionalizing such strong presumptions of compliance as to allow for blind trust across the EU. The Grand Chamber in *MSS* reasserts *TI*'s strong principle of individual State responsibility, but additionally requires authorities to have regard to general information, to the benefit of asylum seekers resisting transfer. Luxembourg in *NS/ME* in turn strongly endorses *MSS*.

G. The Reasoning on Mutual Trust and Presumptions of Compliance with Fundamental Rights

The difference in approach between the AG and Court is informed by the Court's emphasis on mutual confidence and the presumption of compliance with fundamental rights as a necessary feature of the CEAS.[330] The Court's reasoning is flawed. If it means that mutual trust and the presumption of compliance are the *'raison d'ëtre'* of the CEAS, this is clearly wrong. Mutual recognition and the presumption of compliance are but one regulatory tool in the creation of the CEAS (and thereby the AFSJ).[331] The Court's reasoning also suggests that because the Dublin System embodies trust across the Member States, we must assume that that trust is justified by enshrining presumptions of compliance with fundamental rights. This comes close to asserting that because we believe it, it must be true. Just because there is trust, does not mean

329 For a general overview, see Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford: Oxford University Press, 2007)

330 Judgment at para 83.

331 See further, Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: Oxford University Press, 2004) at 5.

that trust is warranted. Moreover, trust between Member States would be better sustained by ensuring checks and enforcement of fundamental rights standards, rather than permitting governments to turn a blind eye to the others' shortcomings.[332]

In the case of the vulnerable category of asylum seekers, it is worth questioning the basis for the presumption of compliance with fundamental rights. Contrast say, the transfer of a criminal suspect under the EAW in *Stapleton v Ireland*.[333] In that case, the same criminal law and procedure as applies to UK citizens at home would be applied to the transferee. There is a sound empirical basis for assuming that the UK would protect fundamental rights in this case. In contrast, asylum seekers are inherently more vulnerable, as the ECtHR in *MSS* recognises. They are strangers to the polity, and no national is subject to the indignities of the asylum process. A strong presumption of compliance with fundamental rights has little rational basis in the asylum context. In addition, the structure of mutual recognition in the asylum context reflects its exclusionary logic. The CEAS enshrines more mutual recognition of negative than positive decisions. The recognition of an asylum seeker as a refugee in one Member State does not create EU obligations for the others, except under the recently adopted amendment to the Long-Term Residents Directive.[334] Member States use mutual recognition as a selective tool, to limit responsibility, rather than to share it.[335]

4. The Reform Process: Recasting Dublin and the PD

A. Recasting Dublin

The Court's systematic reading of the DR supports the view that there is a duty to apply the responsibility criteria in the DR. This reading of the DR belies the reality that the criteria are rarely applied in practice at all. The asylum seekers who find themselves caught up in Dublin proceedings are the unlucky few. Article 80 of the TFEU now, post-Lisbon, provides that EU asylum policy is to 'be governed by the principle of solidarity and fair sharing of responsibility,

332 See further, de Schutter 'The Promotion of Fundamental Rights by the Union as a contribution to the European Legal Space (I): Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice' **(**REFGOV-FR-2 Working Paper 2006).

333 Supra n 324.

334 Directive 2011/51/EU of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L132/1.

335 See further, Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630.

including its financial implications, between the Member States'.[336] The entire Dublin System violates this principle. The on-going reform process has failed to engage in a fundamental re-think of Dublin, much as it is needed.

The *NS/ME* ruling should not be seen as removing the need for a suspension mechanism. Just because the rules on when courts ought to suspend transfers have been clarified does not mean that the system has been fixed. However the test for preventing removal is formulated, there are inherent institutional limits to a judicial remedy of suspending transfer in individual cases. Any such fundamental rights exception will always be reactive and *ad hoc*, rather than proactive and systematic. Individuals evidently at risk of human rights violations should not have to go to Court one-by-one. A proactive and systematic mechanism to suspend Dublin transfers by all States when there are systematic failures in the asylum system in question is evidently required.

The Commission's proposal to recast the DR contained additional procedural safeguards for asylum seekers, such as the right to ask for a personal interview.[337] Importantly in light of the preceding discussion, it entailed a suspension mechanism empowering the political institutions to take a general decision to block transfers to particular States for a period. It aimed to ensure that Member States whose asylum systems were under particularly heavy pressure were not further burdened by transfers and, most importantly, to protect asylum seekers. Regrettably, the suspension mechanism has now been abandoned, due to political opposition within the Council. Instead, the Council supports merely a mechanism for 'early warning, preparedness and management of asylum crises', which would not affect transfers at all.[338] In this respect, the Council position shows scant regard for the case law examined above, in particular for the need to institutionalise human rights protections within the Dublin system.[339] The European Parliament has yet to give its approval for the Council compromise, and it should be recalled that is has considerable clout under the ordinary legislative procedure should it decide to exercise it.

336 See Vanhuele et al., Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, 'The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration' (European Parliament, 2011), available at: http://www.emnbelgium.be/sites/default/files/publications/study_solidarity_art_80_tfeu.pdf [last accessed 19 June 2012].

337 Article 31, Recast Proposal for the Dublin Regulation, COM(2008) 820 final.

338 See http://www.statewatch.org/news/2011/nov/eu-council-dublin-II-16782-11.pdf [last accessed 19 June 2012].

339 Peers goes further and identifies attempts to legislation over matters currently before the CJEU: see Peers, 'Statewatch Analysis: The revised 'Dublin' rules on the responsibility for asylum-seekers: The Council's failure to fix a broken system' (April 2012) at 5.

B. Recasting the PD

The Commission proposed a Recast of the PD in 2009,[340] and an Amended Recast Proposal in June 2011.[341] The Commission issued the second proposal as the first one failed to garner sufficient support from national governments in the Council, despite prolonged discussions. Before the Commission issued the Revised Proposal, the European Parliament issued its first reading position in April 2011.[342] While this might lead one to expect that the Revised Proposal would seek to incorporate the views of the Parliament (given that the Directive will ultimately be adopted by the ordinary legislative procedure, so affording the Parliament a power of co-decision), instead the Commission gave great sway to the diverse and even idiosyncratic views of national governments. Space precludes a thorough analysis of the Amended Recast Proposal, but various NGOs have commented extensively thereon,[343] as did UNHCR.[344]

On the issue of access to protection, the Revised Proposal extends the grounds for accelerating assessment, and in particular merges the grounds for acceleration and for border procedures (Article 31(6)), thereby greatly expanding the scope for border procedures to be used to make substantive asylum determinations. While border procedures must comply with the full array of EU, RC and IHRL obligations, this signals that EU states continue to regard the border zone as one where legal obligations may be attenuated, if not avoided. The Commission has also maintained the STC and so-called European or 'Supersafe Third Country' (SuperSTC) provisions in the Revised Proposal, in spite of the Strasbourg and Luxembourg rulings insisting on the fundamental rights obligations of transferring states. It merely makes a vague commitment to a later review of STC rules. Shockingly, in one respect, the procedural safeguards for the SuperSTC provision have been reduced: the right to an effective remedy no longer applies to them.[345]

340 COM (2009) 551 final, Brussels, 21 October 2009.

341 Revised Commission Proposal of 1 June 2011 on common procedures for granting and withdrawing international protection status (Recast) COM(2011) 319 final.

342 European Parliament, European Parliament legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, P7_TA(2011)0136.

343 ILPA Comments on the Revised Commission Proposal of 1 June 2011 on common procedures for granting and withdrawing international protection status (Recast) COM(2011) 319 final, 5 December 2011; ECRE Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Asylum Procedures Directive (COM (2011) 319 final), September 2011; International Commission of Jurists, Compromising Rights and Procedures: ICJ Observations on the 2011 Recast Proposal of the Asylum Procedures Directive, available at: http://www.icj.org/dwn/database/ICJSubmission_APD2011.pdf [last accessed 19 June 2012]; and Peers, *Statewatch Analysis: Revised EU Asylum Proposals 'Lipstick on a Pig'* (London: Statewatch, 2011).

344 UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM (2011) 319 final, January 2012.

345 Article 46(1)(a)(iv) Amended Recast Proposal.

5. Conclusions

Access to asylum depends practically on access to a place of refuge. Securing access to territory means overcoming both physical and legal barriers. The RC's *non-refoulement* guarantee applies at the border and beyond. The ECtHR provides a forum to scrutinise extra-territorial border controls, and vindicate the right to seek protection. In light of the evolving jurisprudence on the meaning of 'jurisdiction' under Article 1 of the ECHR, the potential to subject many extra-territorial border control activities to Strasbourg standards is evident. *Jamaa Hirsi v Italy* breaks new legal ground in finding the prohibition of collective expulsions applicable extra-territorially. Screening migrants and providing information about asylum procedures is required in order to avoid findings that states have engaged in collective expulsion, and to demonstrate compliance with the right to an effective remedy. We may speculate that the EU right to asylum, if read together with the evolving ECHR jurisdictional scope (or an autonomous EU functional criterion), has potentially dramatic implications for access to protection. After *Hirsi,* the need to formalise screening processes for migrants intercepted at sea, and indeed encountered in other scenarios triggering extra-territorial jurisdiction, is urgent.

Nonetheless, EU Member States continue to engage in a further layer of deflection activities, employing STC concepts in the PD and DR. These concepts turn on generalised assessments of safety of the State to which the asylum-seeker is to be transferred. The role of courts here has generally been to question these generalised assessments, and insist that the rights of asylum seekers be protected when there is evidence of a real risk of human rights violation, either due to the conditions in the third country or onward *refoulement*. Court rulings have sometimes met official resistance, leading to legislative change to bolster States' rights to presume safety and transfer, as the UK example shows. Asylum seekers attempting to resist transfer to under the DR have turned to the Strasbourg court for salvation, with thousands of applications for provisional measures received.

Strasbourg at first established clear duties on the transferring state, albeit ones that were easy to discharge in practice (*TI v United Kingdom*). Later, in *KRS v United Kingdom*, in light of the mere existence of EU legislative standards, it seemed to permit blind trust across the EU. However, in *MSS v Belgium and Greece*, the Grand Chamber asserted strong duties to protect human rights on all transferring states. Luxembourg's subsequent ruling in *NS/ME* follows the contours of the Strasbourg case law closely. Yet, a ruling of the Luxembourg Court is transformative, in that by precluding conclusive presumptions of safety it requires national judges to set aside national legislation enshrining such presumptions, and requires them to assess the risks of transfer. *Hirsi Jamaa v Italy* too makes it clear that States may not rely on cooperative arrangements in the face of clear evidence of human rights abuses.

The EU and its Member States have sought to hinder access to protection by manipulating conceptions of jurisdiction and responsibility. They excise parts of their own territory using legal fictions, and continue to insist on the exceptionality of border zones and procedures, in spite of clear and longstanding ECtHR authority in *Amuur v France* reinforcing jurisdiction. They extend their borders abroad, and attempt to rely on constrained territorial constructions of jurisdiction to avoid responsibilities. Yet, when it comes to Dublin cases, we see States attempting to rely on further legal fictions that they form a uniform expanded area of protection, such that transfers of asylum seekers may be assumed to be safe. In all instances, the response of the Strasbourg Court has been to reinforce States' responsibility in the face of these manipulations. Luxembourg in *NS/ME* has similarly insisted on the duties of individual Member States under the Dublin System. These endorsements of individual State responsibility are a hugely important corrective in the face of States' deflection practices.

Yet, real solutions to access must be collective ones. The Strasbourg cases reveal the chasm between EU legal standards and the reality for asylum seekers in many EU Member States. Meanwhile, the EU legislative reform process continues, without engaging in the fundamental re-think required, particularly of Dublin and STC practices. The Recast DR fails to provide an institutional mechanism to suspend transfers. The Recast PD even seems to diminish the procedural protections available in cases of transfer to 'supersafe' third countries. The reform process urgently needs to translate the Court rulings into collective, institutional commitments. European Parliamentarians, in particular, bear a heavy onus when they exercise their powers under the ordinary legislative procedure.