

M.S.S. v. BELGIUM AND GREECE (EUROPEAN COURT OF HUMAN RIGHTS): THE INTERPLAY BETWEEN EUROPEAN UNION LAW AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE POST-LISBON ERA

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I. INTRODUCTION

A recent decision of the European Court of Human Rights (ECHR), in *M.S.S. v. Belgium and Greece* (*M.S.S.*),¹ raises interesting questions concerning the effects of the Charter of Fundamental Rights of the European Union (Charter)² on decisions of governments of Member States of the European Union (EU or Union), the relationship between the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),³ and the relationship between the ECHR and the Court of Justice of the European Union (CJEU).⁴

II. FACTS ON WHICH THE ECHR JUDGMENT IS BASED

The judgment of the ECHR concerns an Afghan citizen (“the applicant” or “M.S.S.”), who left Afghanistan in 2008 and travelled to Greece via Iran and Turkey.⁵ On December 7, 2008 in Greece (Mytilene), his fingerprints were taken.⁶ He was then detained for a week and ordered to leave the country.⁷ He left Greece without having applied for political asylum.⁸

After travelling through France, he applied for political asylum in Belgium.⁹ However, after the Belgian authorities took his fingerprints it became clear to them (via a Eurodac “hit” report)¹⁰ that the applicant had

¹ *M.S.S. v. Belgium and Greece*, 2011 Eur. Ct. H.R. 108. “The President of the Chamber to which the case had been assigned acceded to the applicant’s request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).” *Id.* para. 1.

² Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 389 [hereinafter Charter].

³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 [hereinafter European Convention].

⁴ See Gabriel M. Wilner, *Reflections on Regional Human Rights Law*, 25 GA. J. INT’L & COMP. L. 407 (1996) (explaining the sources of law in regional human rights systems and concluding that the regional enforcement of human rights in Europe and the Americas is based on adjudicatory institutions which administer treaty-based rights).

⁵ *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 9.

⁶ *Id.*

⁷ *Id.* para. 10.

⁸ *Id.*

⁹ *Id.* para. 11.

¹⁰ “Eurodac” was established on December 11, 2000 for the comparison of fingerprints for the effective application of the Dublin Convention determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (which was replaced in 2003 by the Dublin Regulation *infra* note 12). Council

previously illegally crossed the border into Greece).¹¹ On March 18, 2009, the Belgian authorities (Aliens Office) requested the Greek authorities to take charge of the asylum application, in accordance with Article 10(1)¹² of Regulation 343/2003/EC (the Dublin Regulation).¹³ The Dublin Regulation has replaced the Dublin Convention determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, signed in Dublin on June 15, 1990 (generally known as the “Dublin Convention”).¹⁴ Hence the informal name of “Dublin Regulation” for the regulation that replaced the Dublin Convention.

When the Greek authorities failed to reply within the two-month period of Article 18(1)¹⁵ of the Dublin Regulation, the Belgian authorities took that as tacit acceptance of their request, in accordance with Article 18(7)¹⁶ of the Dublin Regulation.¹⁷

On May 19, 2009, the Aliens Office issued an order directing the applicant to leave the country.¹⁸ He was taken into custody on the same day.¹⁹ On May 27, 2009, the Aliens Office scheduled his departure for

Regulation 2725/2000, 2000 O.J. (L 316) 1 (EC).

¹¹ *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 12.

¹² Council Regulation 343/2003, art. 10(1), 2003 O.J. (L 50) 1 (EC) [hereinafter Dublin Regulation] (establishing the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one of the Member States by a third-country national).

¹³ *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 14.

¹⁴ Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Community, Aug. 19, 1997, 1997 (C 254) 1 [hereinafter Dublin Convention].

¹⁵ *Id.* art. 18(1).

¹⁶ *Id.* art. 18(7).

¹⁷ *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 14.

¹⁸ *Id.* para. 17. The judgment records that [t]he reasons given for the order were that, according to the Dublin Regulation, Belgium was not responsible for examining the asylum application; Greece was responsible and there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters under Community law and the 1951 Geneva Convention relating to the Status of Refugees. That being so, the applicant had the guarantee that he would be able, as soon as he arrived in Greece, to submit an application for asylum, which would be examined in conformity with the relevant rules and regulations. The Belgian authorities were under no obligation to apply the derogation clause provided for in Article 3 § 2 of the Dublin Regulation.

Id.

¹⁹ *Id.* para. 18.

Greece for May 29, 2009.²⁰ On May 29, 2009, he filed an appeal with the Aliens Appeals Board to have the order of the Aliens Board set aside.²¹ The applicant's lawyer did not attend the hearing scheduled on the same day (May 29, 2009) and the application was rejected for failure to attend.²² The applicant refused to board the aircraft and was again ordered to be detained.²³

On June 4, 2009, the Greek authorities confirmed their responsibility under Articles 18(7) and 10(1) of the Dublin Regulation to examine the applicant's asylum request and indicated that he was entitled to submit an application for asylum when he arrived in Greece.²⁴

After his departure date was rescheduled for June 15, 2009, the applicant, through a new lawyer, filed a second request with the Aliens Appeal Board to have the Belgian expulsion order set aside.²⁵ This request was again rejected²⁶ but only after the applicant had already been transferred to Greece, on June 15, 2009.²⁷ Four days before the applicant's transfer to Greece, he applied to the ECHR, through his Belgian counsel for an order suspending his transfer to Greece.²⁸ The ECHR refused the application "but informed the Greek [g]overnment that its decision was based on its confidence that

²⁰ *Id.* para. 20.

²¹ *Id.* para. 21. The court summarized the reasons for the appeal as follows:

The reasons given, based in particular on Article 3 of the [European] Convention, referred to a risk of arbitrary detention in Greece in appalling conditions, including a risk of ill-treatment. The applicant also relied on the deficiencies in the asylum procedure in Greece, the lack of effective access to judicial proceedings and his fear of being sent back to Afghanistan without any examination of his reasons for having fled that country.

Id.

²² *Id.* para. 22.

²³ *Id.* para. 23. This "detention was upheld by order of the *chambre du conseil* of the Brussels Court of First Instance." *Id.* para. 25.

²⁴ *Id.* para. 24.

²⁵ *Id.* para. 27. The court described his reasoning saying that "[i]n addition to the risks he faced in Greece, he claimed that he had fled Afghanistan after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul" and supported his claim by presenting certificates confirming the interpreter role. *Id.* para. 32.

²⁶ *Id.* para. 29.

²⁷ *Id.* para. 33.

²⁸ *Id.* para. 32 (discussing his reasoning for the appeal that "[i]n addition to the risks he faced in Greece, he claimed that he had fled Afghanistan after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul" and that he presented certificates confirming his interpreter role).

Greece would honour its obligations under the [European] Convention and comply with EU legislation on asylum.”²⁹

The applicant was transferred to Greece on June 15, 2009 and applied for asylum upon arrival.³⁰ The reception the applicant received was far from pleasant. Four days after the applicant’s arrival in Greece, the applicant’s Belgian lawyer received a message (subsequently relayed to the ECHR) that

upon arrival the applicant had immediately been placed in detention in a building next to the airport, where he was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.³¹

The applicant was released on June 18, 2009, given an asylum seeker’s card, and ordered to report within two days to the Aliens Directorate of the Attica Police Asylum Department in Athens to provide his home address in Greece, so that he could be kept informed of the progress in respect to his asylum application.³² Since the applicant had no means of subsistence and no address, he did not report to the Attica police headquarters, joined other Afghan asylum seekers, and lived in a park in central Athens.³³

²⁹ *Id.* Specifically the ECHR wrote to the Government of Greece:

That decision was based on the express understanding that Greece, as a Contracting State, would abide by its obligations under Articles 3, 13 and 34 of the [European] Convention. The Section also expressed its confidence that your Government would comply with their obligations under the following:

- the Dublin Regulation referred to above;
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

I should be grateful therefore if your Government would undertake to inform the Court of the progress of any asylum claim made by the applicant in Greece as well as the place of detention, if he is detained on arrival in Greece.

Id.

³⁰ *Id.* paras. 33, 41.

³¹ *Id.* para. 34.

³² *Id.* para. 35.

³³ *Id.* paras. 36–37.

Apparently as a result of his lawyer's further communication, the Registrar of the Second Section of the ECHR, which decided on the applicant's earlier request for suspension of the Belgian expulsion order, sent a letter to the Greek government to inquire about the applicant and requested a reply by June 29, 2009.³⁴ The Greek government apparently did not reply. On July 2, 2009, the ECHR, by way of interim measure,³⁵ ordered Greece not to deport the applicant pending the outcome of the proceedings before the ECHR.³⁶ Subsequently, the Greek government informed the ECHR that the applicant had applied for asylum, that the asylum procedure had been set in motion, and that the applicant had failed to report to the Attica police headquarters.³⁷ "In the meantime the applicant's counsel kept the [ECHR] informed of his exchanges with the applicant."³⁸

On August 1, 2009, the applicant tried to leave Greece by plane and was arrested at the airport while he was in possession of a false Bulgarian identity card.³⁹ He was detained again, and on August 3, 2009 he was sentenced by the Athens Criminal Court to a suspended sentence of two months imprisonment for attempting to leave Greece with false papers.⁴⁰ On August 4, 2009, the Ministry of Public Order of Greece initiated an administrative expulsion procedure.⁴¹ It released the applicant during the pending procedure.⁴²

³⁴ *Id.* paras. 38–39.

³⁵ Rule 39 (Interim Measures) provides:

1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
2. Notice of these measures shall be given to the Committee of Ministers.
3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

European Court of Human Rights, Rules of Court, Rule 39 (Registry of the Court, Apr. 2011).

³⁶ *M.S.S.*, 2011 Eur. Ct. H.R. 108, paras. 38–40.

³⁷ *Id.* para. 41.

³⁸ *Id.* para. 42.

³⁹ *Id.* para. 43.

⁴⁰ *Id.* paras. 44–45.

⁴¹ *Id.* para. 46.

⁴² *Id.*

On December 18, 2009 and June 18, 2010, the applicant renewed his asylum card at the Attica police headquarters.⁴³ He also requested the Ministry of Health and Social Solidarity to help him find a home.⁴⁴ There was some follow-up to this request, but the Greek authorities were not able to contact the applicant in the absence of an address where he could be contacted.⁴⁵

On January 20, 2010, the decision to expel the applicant was revoked, due to his application for asylum before his arrest.⁴⁶

On July 2, 2010, the applicant failed to attend an interview at the Attica police headquarters.⁴⁷ Previously, he personally received notice (in Greek) of this interview on June 21, 2010 and signed the notice in the presence of his interpreter.⁴⁸

Finally, the judgment quotes a message from the applicant to his lawyer on September 1, 2010, in which he informed his attorney that he attempted to leave Greece for Italy in order to find better conditions than in Greece and not to have to live on the street.⁴⁹ The applicant was stopped by the police in Patras, taken to Salonika, and then taken to the Turkish border for expulsion.⁵⁰ At the last moment, however, the Greek police did not expel him.⁵¹ According to the applicant, the expulsion did not occur because of the presence of the Turkish police.⁵²

III. THE JUDGMENT OF THE ECHR

The application in this case was filed against Belgium and Greece under Article 34 of the European Convention⁵³ on June 11, 2009, just before his

⁴³ *Id.* paras. 47, 50.

⁴⁴ *Id.* para. 47.

⁴⁵ *Id.* para. 49.

⁴⁶ *Id.* para. 48.

⁴⁷ *Id.* para. 51.

⁴⁸ *Id.*

⁴⁹ *Id.* para. 53.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ European Convention, *supra* note 3, art. 34.

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the

expulsion from Belgium to Greece on June 15, 2009.⁵⁴ In respect of Belgium the applicant alleged that his expulsion violated Articles 2⁵⁵ and 3⁵⁶ of the Convention. In respect of Greece, he alleged treatment prohibited by Article 3. In respect of both Belgium and Greece he complained of the lack of a remedy that would enable him to have his complaints examined, in contravention of Article 13⁵⁷ of the Convention.⁵⁸ At the same time, the applicant requested an order from the ECHR suspending the Belgian expulsion order;⁵⁹ however, this request was denied.⁶⁰

The application was assigned to the Second Section of the ECHR.⁶¹ A Chamber of that Section communicated the application to the governments of Belgium and Greece on November 19, 2009.⁶² On March 16, 2010 the Chamber (consisting of seven judges) relinquished jurisdiction in favor of the Grand Chamber of the ECHR (consisting of seventeen judges), thereby indicating the importance of the case in the jurisprudence of the ECHR.⁶³

Following the submission of written observations by the applicant and the defendant governments, a hearing took place on September 1, 2010.⁶⁴ This was around the time that the applicant was stopped by the Greek police attempting to leave Greece for Italy and came close to being expelled to Turkey.⁶⁵

[European] Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Id.

⁵⁴ *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 31.

⁵⁵ European Convention, *supra* note 3, art. 2 (“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”).

⁵⁶ *Id.* art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

⁵⁷ *Id.* art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).

⁵⁸ *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 3.

⁵⁹ *Id.* para. 31.

⁶⁰ *Id.* para. 32.

⁶¹ *Id.* para. 4.

⁶² *Id.*

⁶³ *Id.* The transfer of jurisdiction occurred pursuant to Article 30 of the European Convention and Rule 72. *Id.* In accordance with Article 29(1) of the European Convention, the Grand Chamber decided to examine issues of admissibility and the merits of the case together. *Id.* para. 6.

⁶⁴ *Id.* paras. 6–7.

⁶⁵ *Id.* para. 53.

The ECHR judgment of January 21, 2011, sitting in Grand Chamber, found several violations:

(1) Greece violated Article 3 of the Convention, because of the conditions of the applicant's detention in Greece and the conditions under which the applicant had to live in Greece pending the decision on his application for political asylum.⁶⁶

(2) Greece violated Article 13 of the Convention in conjunction with Article 3, "because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he face[d] of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy."⁶⁷

(3) Belgium violated Article 3 of the Convention because the Belgian authorities knew or ought to have known that the applicant had no guarantee that his asylum application would be considered seriously by the Greek authorities.⁶⁸ Due to the knowledge of the Belgian authorities about the situation in Greece, they should not have assumed that the applicant would be treated in conformity with the standards of the Convention, but rather should first have verified how the Greek authorities applied their legislation on asylum in practice.⁶⁹

(4) Belgium also violated Article 3 of the Convention by transferring the applicant to Greece because "the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment."⁷⁰

(5) Belgium violated Article 13 of the Convention in conjunction with Article 3, because of the lack of adequate procedures for the applicant under Belgian law that would offer a realistic opportunity to stop his deportation to Greece.⁷¹

⁶⁶ *Id.* paras. 234, 264.

⁶⁷ *Id.* para. 321. The Court stated that there was no need for it to examine the applicant's complaints lodged under Article 13 in conjunction with Article 2. *Id.* para. 322.

⁶⁸ *Id.* paras. 358, 360.

⁶⁹ *Id.* para. 359. The Court again stated that there was no need to examine the applicant's complaint under Article 2. *Id.* para. 361.

⁷⁰ *Id.* paras. 367–368.

⁷¹ *Id.* paras. 385–396 .

IV. IMPLICATIONS OF THE ECHR JUDGMENT FOR THE EU LEGAL SYSTEM

What makes the case of M.S.S. interesting from an EU law point of view is that the transfer of the applicant from Belgium to Greece was carried out pursuant to a mechanism established under EU law. Therefore, the court reviewed actions and decisions of Belgium and Greece that were taken in the context of the “Dublin” asylum system of the EU.⁷²

The Dublin Convention first set out the rules that determine which Member State is responsible for examining an application for asylum filed by a citizen of a third country.⁷³ In 2003, the Dublin Convention was replaced by the Dublin Regulation.⁷⁴

Under Article 10(1) of the Dublin Regulation, when an asylum seeker “has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum.”⁷⁵ Under article 10(1), Belgium relied heavily on the ‘Eurodac’ mechanism to establish that Greece was the first Member State of the EU that M.S.S. had entered illegally. Article 10(1) further provides that “[t]his responsibility shall cease 12 months after the date on which the irregular border crossing took place.”⁷⁶ This entitled Belgium to request that Greece deal with the applicant’s request for asylum, even though it was filed in Belgium.⁷⁷ According to Article 19(1) of the Dublin Regulation, it is the responsibility of the Member State where the asylum application was lodged (in this case Belgium) to notify the applicant for asylum of its decision not to examine the asylum application and of its obligation to transfer the applicant to the other Member State.⁷⁸ Article 19(3) stipulates such transfer must occur within six months of the acceptance of the request (in this case by Belgium) to the requested Member

⁷² *Id.* paras. 65–86.

⁷³ Dublin Convention, *supra* note 14, art. 3.

⁷⁴ Dublin Regulation, *supra* note 12, art. 1.

⁷⁵ *Id.* art. 10(1).

⁷⁶ *Id.*

⁷⁷ *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 24. Articles 17 and 18 of the Dublin Regulation provide for notification by one Member State to another in such situations. Dublin Regulation, *supra* note 12, arts. 17–18. Article 18(7) specifically provides that failure to reply to such notification by the notified Member State is tantamount to accepting the request. *Id.* art. 18(7).

⁷⁸ Dublin Regulation, *supra* note 12, art. 19(1).

(in this case Greece), subject to limited exceptions.⁷⁹ In the case of M.S.S., Belgium complied with this deadline.⁸⁰

There is no strict requirement under the Dublin Regulation for Member States of the EU to transfer applicants for asylum from third countries to another Member State that has been designated by the Regulation as being responsible for examining the asylum application.⁸¹ This means that in the case of M.S.S., Belgium could have examined the asylum application itself, rather than opting to transfer the applicant to Greece. Also, Article 15(1) of the Dublin Regulation allows any Member State, even if it is not responsible under the Dublin Regulation, to bring family members and other dependent relatives together on humanitarian grounds, based especially on family and cultural considerations.⁸² Thus, Belgium retained considerable flexibility in deciding how to deal with the applicant.

The case of M.S.S. was initiated before the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) entered into force on December 1, 2009.⁸³ The Treaty of Lisbon brought into force the amended version of the Treaty on European Union (TEU)⁸⁴ and the Treaty on the Functioning of the European Union (TFEU),⁸⁵ which is the renamed and amended version of the former Treaty establishing the European Community.⁸⁶ As part of the new TEU, the Charter acquired a new status because Article 6(1) of the TEU provides that “[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7

⁷⁹ *Id.* art. 19(3).

⁸⁰ *M.S.S.*, 2011 Eur. Ct. H.R. 108, paras. 24, 33 (stating that Greece confirmed their responsibility to examine the applicant’s asylum request on June 4, 2009 and the applicant was transferred to Greece on June 15, 2009).

⁸¹ Dublin Regulation, *supra* note 12, art. 3(2). The ECHR refers to this as the “sovereignty” clause. *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 74.

⁸² Dublin Regulation, *supra* note 12, art. 15(1). The ECHR refers to this as the “humanitarian” clause. *M.S.S.*, 2011 Eur. Ct. H.R. 108, para. 75.

⁸³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

⁸⁴ Consolidated Version of the Treaty on European Union, Mar. 3, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU].

⁸⁵ Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

⁸⁶ Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 33.

December 2000, as adapted at Strasbourg, on 12 December 2007, *which shall have the same legal value as the Treaties.*⁸⁷ The Charter was originally proclaimed as a political document on December 7, 2000 by the European Parliament, the European Council, and the European Commission.⁸⁸ However, as of December 1, 2009, the Charter has enjoyed the same legal status as the TEU and TFEU by virtue of Article 6(1) of the TEU, which provides that the Charter “shall have the same legal value as the Treaties [the TEU and TFEU].”⁸⁹ While the Treaty Establishing a Constitution for Europe⁹⁰ would have included the Charter in the Constitution itself, Article 6(1) of the TEU achieves the same result through an incorporation by reference. This means that a written “Bill of Rights” has become part of EU law, against which acts of EU institutions and Member States can be reviewed. However, the Charter only addresses the Member States when they are implementing Union law.⁹¹

The revised TEU also requires the EU to become a party to the European Convention.⁹² This has not yet happened as of the date of writing this Article. Until recently, only Members of the Council of Europe could become parties to the European Convention.⁹³ However, Protocol No. 14,

⁸⁷ TEU art. 6(1) (emphasis added).

⁸⁸ *The EU Charter of Fundamental Rights*, EUROPEAN MOVEMENT (May 2008), <http://www.euromove.org.uk/index.php?id=7015>.

⁸⁹ TEU art. 6(1) (“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”).

⁹⁰ Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1.

⁹¹ Charter, *supra* note 2, art. 51(1) (“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.” (emphasis added)). Further, the TEU provides that “[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties,” and that “[t]he rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.” TEU art. 6(1).

⁹² TEU art. 6(2) (“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”).

⁹³ European Convention, *supra* note 3, art. 59(1) (“This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.”). *See also* Statute of the

which entered into force on June 1, 2010, allowed the EU to accede to the European Convention.⁹⁴ Once this happens, there will be a double system of human rights protection in the EU. The Charter can be relied on in litigation involving questions of EU law, both in actions brought directly before the CJEU, pursuant to Article 263 TFEU (actions for judicial review),⁹⁵ and in proceedings before the CJEU, pursuant to requests for preliminary rulings from the courts of the Member States under Article 267 TFEU.⁹⁶ In addition, the EU's accession to the European Convention means that private parties will have the right to allege non-compliance of the EU with its obligations under the European Convention and to have such complaints adjudicated by the ECHR.⁹⁷ Assuming that the approach of Article 51 of the Charter will be followed, acts of the Member States of the EU will also be covered by the EU's accession to the extent that the Member States implement Union law. Although all Member States of the EU are already parties to the European Convention in their own right, they might try to disclaim responsibility for acts constituting violations of the European Convention when such acts are required by EU law. The accession by the EU should take care of this.

The future accession by the EU to the European Convention also opens the possibility of judgments of the CJEU being reviewed by the ECHR in cases with alleged violations of the European Convention by institutions of the EU or by the EU Member States (when implementing Union law). Although there appears to be a strong institutional tendency in either court to respect and apply each other's jurisprudence,⁹⁸ it remains to be seen if that

Council of Europe, art. 4, May 5, 1949, E.T.S. No. 1 ("Any European State which is deemed to be able and willing to fulfill the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers.").

⁹⁴ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention art. 17, May 13, 2004, Council of Europe T.S. No. 194 [hereinafter Protocol No. 14] ("The European Union may accede to this Convention.").

⁹⁵ TFEU art. 263.

⁹⁶ *Id.* art. 267.

⁹⁷ See European Convention, *supra* note 3, art. 34 ("The [ECHR] may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."); see also *id.* art. 33 (indicating additional rights of Parties to "refer to the Court any alleged breach of the provisions of the Convention and the protocols").

⁹⁸ See e.g., *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 2005-VI

will be sufficient to avoid contradictory findings in all cases. The CJEU has had a long tradition of relying on provisions of the European Convention and the interpretation of the Convention by the ECHR in developing its jurisprudence of “general principles of Union law,” which includes the protection of human rights, under the rubric of “any rule of law relating to [the] application of [the TEU and TFEU]” in the second paragraph of Article 263 TFEU.⁹⁹ This line of jurisprudence has been equally applied by the CJEU and in fact was started in deciding cases under Article 267 TFEU¹⁰⁰ pursuant to requests for preliminary rulings from courts of the Member States.¹⁰¹ Moreover, since the Treaty of Lisbon entered into force, the CJEU has in its arsenal the Charter as a legally binding instrument that has the same legal status as the TEU and TFEU.¹⁰² To the extent that the European Convention and the Charter overlap, the CJEU is instructed by Article 52(3) of the Charter to give the Charter the same interpretation.¹⁰³ These provisions should help in avoiding “collisions” between the ECHR and the CJEU.

Eur. Ct. H.R. 440 (concerning alleged violations of the property rights of Bosphorus, a Turkish charter company, which leased tow aircraft owned by the Yugoslav national airline JAT). In 1993, the European Community implemented U.N. sanctions against Yugoslavia (at that time consisting of Serbia and Montenegro) by EC regulation and as a result Ireland seized the leased aircraft. *Id.* para. 23. The ECHR dismissed the complaint. *Id.* para. 167. The Court of Justice of the European Communities (as it was then called) dealt with this case nine years earlier under European Community law, on a reference for a preliminary ruling from the Supreme Court of Ireland. Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transp., Energy & Commc'n*, 1996 E.C.R. I-3953 (resulting in the Court of Justice dismissing the claim).

⁹⁹ TFEU art. 263. *See, e.g.*, Joined Cases C-402/05 & C-415/05, *Kadi v. Council and Comm'n*, 2008 E.C.R. I-6351.

¹⁰⁰ TFEU art. 267.

¹⁰¹ *See, e.g.*, Case 26/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419 (deciding under the mechanism now found in article 267 TFEU, beginning the line of jurisprudence of the CJEU that provides protection to human rights as part of general principles of Community/Union law).

¹⁰² TEU art. 6(1).

¹⁰³ Charter, *supra* note 2, art. 52(3) (“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”).

V. THE APPROACH ADOPTED BY THE CJEU IN TWO RECENT CASES WITH FACTS SIMILAR TO THOSE OF *M.S.S.*

Very recently the CJEU had the opportunity, in its judgment in Cases C-411/10 and C-493/10, of December 21, 2011, to deal with the same types of issues, within the framework of EU law, as were previously addressed by the ECHR in the case of *M.S.S.*¹⁰⁴ Case C-411/10 involved a reference for a preliminary ruling under Article 267 TFEU from the Court of Appeal of England and Wales; Case C-493/10 involved a similar reference from the High Court of Ireland. Before that, Advocate General Trstenjak delivered an Opinion in Case C-411/10 on September 22, 2011.¹⁰⁵ Although the Advocate General's opinions are advisory only and do not bind the CJEU,¹⁰⁶ the CJEU in many instances follows the conclusions of those Opinions, which turned out to be true in this case.

In both these cases, the CJEU was requested to interpret the following provisions of EU law:¹⁰⁷ Article 3(2) of the Dublin Regulation, various provisions of the Charter (Articles 1, 4, 18, 19(2) and 47)¹⁰⁸ and Protocol

¹⁰⁴ Joined Cases 411 & 493/10, *N.S. v. Sec'y of State for Home Dep't and M.E. v. Refugee Applications Comm'r*, paras. 34–50 (Dec. 21, 2011) (not yet reported) [hereinafter Judgment], available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=656108>.

¹⁰⁵ Case C-411/10, *N.S. v. Sec'y of State for Home Dep't*, Opinion of the Advocate General (Sept. 22, 2011) (not yet reported), available at <http://curia.europa.eu/juris/celex.jsf?celex=62010CC0411&lang1=en&type=NOT&ancre=->. Paragraph 7 of the Opinion refers to a parallel opinion delivered by the Advocate General in Case C-493/10 on the same day as her opinion in Case C-411/10. *Id.* para. 7. However, no such separate opinion was published on the website of the CJEU.

¹⁰⁶ See GEORGE A. BERMANN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 65 (3d ed. 2010); T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW* 50 (7th ed. 2010); DAMIAN CHALMERS ET AL., *EUROPEAN UNION LAW* 145 (2d ed. 2010).

¹⁰⁷ Judgment, *supra* note 104, para. 1.

¹⁰⁸ Article 1: "Human dignity is inviolable. It must be respected and protected." Charter, *supra* note 2, art. 1. Article 4: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Id.* art. 4. Article 18: "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 (hereinafter referred to as 'the Treaties')." *Id.* art. 18. Article 19(2): "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." *Id.* art. 19(2). Article 47: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in

No. 30 (to the TEU and TFEU) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.¹⁰⁹

The first case (C-411/10) concerned an asylum application filed by an Afghan citizen (N.S.) in the United Kingdom (U.K.). This applicant passed through Greece, without applying for asylum, before arriving in the U.K., where he made such an application, so that under the system of the Dublin Regulation, the U.K. was entitled to request Greece to examine the asylum application.¹¹⁰ The second case concerned five litigants, from Afghanistan, Iran, and Algeria but not connected with each other.¹¹¹ Each of them had entered Greece illegally and had been arrested there.¹¹² They subsequently travelled to Ireland, where they applied for asylum.¹¹³ The Eurodac system¹¹⁴ confirmed that the five applicants had previously been in Greece but had not applied for asylum there.¹¹⁵ The central issue in both these proceedings was the extent to which the United Kingdom and Ireland have an obligation under EU law to make an assessment regarding whether deportation to Greece would likely result in serious violations of fundamental rights (an assessment that the ECHR ruled that Belgium should have made in the case of M.S.S.) and, if so, not to deport the applicants to

compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." *Id.* art. 47.

¹⁰⁹ Protocol (No 30), On the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, 2010 O.J. (C 83) 313. The Czech Republic was promised a similar "opt-out" from the Charter by the European Council in October 2009 (at the time of the next revision of the TEU and TFEU resulting from one or more accessions of new Members to the EU) as an inducement for Czech ratification of the Treaty of Lisbon. Brussels European Council, 15265/09, Oct. 29–30, 2009, Presidency Conclusions, Annex I, at 14. The Czech Republic was the last Member State of the EU to ratify the Treaty of Lisbon. *Treaty of Lisbon: In Your Country*, EUROPA, http://europa.eu/lisbon_treaty/countries/index_en.htm# (last visited Aug. 20, 2011).

¹¹⁰ Pursuant to Article 10(1) of the Dublin Regulation. The facts, the legal proceedings and the questions asked by the Court of Appeal of England and Wales may be found in the judgment of the CJEU. Judgment, *supra* note 104, paras. 34–50.

¹¹¹ The facts, the legal proceedings and the questions asked by the High Court of Ireland may be found in the judgment of the CJEU. *Id.* paras. 51–53.

¹¹² *Id.* para. 51.

¹¹³ *Id.*

¹¹⁴ See *supra* text accompanying note 10.

¹¹⁵ Judgment, *supra* note 104, para. 51.

Greece to have their applications for political asylum examined there. The President of the CJEU decided to merge the written procedure of Case C-411/10 with that of Case C-493/10 because of the similar subject matter in these cases.¹¹⁶

The CJEU answered the questions put to it within the broader context of relevant treaties and the EU's Common Asylum System.¹¹⁷ As to the relevant treaties, the CJEU referred to the Convention relating to the Status of Refugees¹¹⁸ (known as the Geneva Convention) and the Protocol relating to the Status of Refugees¹¹⁹ (known as the 1967 Protocol).¹²⁰ All Member States are party to the Geneva Convention and the 1967 Protocol; the EU is not.¹²¹ However, Article 78 TFEU commits the EU to developing a common policy on asylum, which must be in accordance with the Geneva Convention and the 1967 Protocol, and Article 18 of the Charter provides for a right to asylum with due respect for the rules of the Geneva Convention and the 1967 Protocol.¹²²

As to the Common European Asylum System, which is currently based on Articles 78 (prescribing a common asylum policy) and 80 (principle of solidarity and fair sharing between the Member States) of the TFEU, the CJEU mentioned the Dublin Regulation, Directive 2003/9 (laying down minimum 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)¹²³ and Directive 2005/85 (on minimum standards on procedures in Member States for granting and withdrawing refugee status)¹²⁴ as its component parts.¹²⁵ In this context, the

¹¹⁶ Order of the President of the Court, Nov. 9, 2010, in accordance with Article 43 of the Rules of Procedure. Judgment, *supra* note 104, para. 54.

¹¹⁷ *Id.* paras. 3–33.

¹¹⁸ Signed in Geneva, on 28 July 1951, United Nations Treaty Series, Vol. 189, p. 150, No. 2545 (1954), which entered into force on 22 April 1954.

¹¹⁹ Signed on 31 January 1967, United Nations Treaty Series, Vol. 606, p. 267, No. 8791 (1967), which entered into force on 4 October 1967.

¹²⁰ Judgment, *supra* note 104, para. 3.

¹²¹ *Id.* para. 4.

¹²² *Id.*

¹²³ Council Directive 2003/9, of 27 January 2003, laying down minimum standards for the reception of asylum seekers, 2003 O.J. (L 31) 18.

¹²⁴ Council Directive 2005/85/EC, of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005 O.J. (L 326) 13, 13–34.

¹²⁵ Judgment, *supra* note 104, para. 11.

CJEU also mentioned Directive 2001/55/EC, of 20 July 2001 (on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof)¹²⁶ and Regulation 2725/2000, which established the “Eurodac” system.¹²⁷

The CJEU first addressed the question (posed by the Court of Appeal of England and Wales in Case C-411/10) whether the decision adopted by a Member State on the basis of Article 3(2) of the Dublin Regulation to examine a claim for asylum which is not its responsibility under the criteria of Chapter III of the Dublin Regulation falls within the scope of EU law for the purposes of Article 6 TEU and Article 51 of the Charter.¹²⁸ It answered that question in the affirmative,¹²⁹ primarily because Article 3(2) of the Dublin Regulation constitutes “an integral part of the Common European Asylum System provided for by the [TFEU] and developed by the European Union legislature.”¹³⁰ Thus a Member State exercising the power of Article 3(2) of the Dublin Regulation is in principle subject to the constraints of the Charter. Next the CJEU examined a cluster of four questions, drawn from Case C-411/10 and Case C-493/10: (1) whether the national authorities of the Member State that is considering the transfer of an applicant for asylum (transferring Member State) to another Member State that is primarily responsible for the asylum application under Article 3(1) of the Dublin Regulation (the receiving Member State), must first examine whether the receiving Member State complies with the fundamental rights of the EU set out in Directives 2003/9 (laying down minimum standards for the reception of asylum seekers),¹³¹ 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),¹³² and 2005/85 (on minimum standards on procedures in

¹²⁶ Council Directive 2001/55/EC, of 20 July 2001, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001 O.J. (L 212) 12, 12–23. Judgment, *supra* note 104, para. 12.

¹²⁷ Judgment, *supra* note 104, para. 13.

¹²⁸ *Id.* para. 54.

¹²⁹ *Id.* paras. 64–69.

¹³⁰ *Id.* para. 65.

¹³¹ Council Directive 2003/9, *supra* note 123.

¹³² Council Directive 2004/83/EC, of 29 April 2004, on minimum standards for the

Member States for granting and withdrawing refugee status),¹³³ and in the Dublin Regulation itself;¹³⁴ (2) whether any such obligation on the transferring Member State would preclude the operation of a conclusive presumption that the receiving Member State will observe the claimant's fundamental rights under EU law or the minimum standards required by the three Directives concerned;¹³⁵ (3) whether, if the receiving Member State is found not to respect fundamental rights, the transferring Member State is under an obligation to examine the asylum application itself under Article 3(2) of the Dublin Regulation;¹³⁶ and (4) whether a provision of the domestic law of a transferring Member State requiring that receiving Member States be treated as "safe countries" is compatible with Article 47 of the Charter (right to an effective remedy and to a fair trial).¹³⁷ The CJEU decided that these questions should be considered together.¹³⁸

The CJEU took as its starting point held that the Common European Asylum System "was conceived in a context making it possible to assume that all the participating States, whether Member States or third States,¹³⁹ observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the [European Convention], and that the Member States can have confidence in each other in that regard."¹⁴⁰

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 O.J. (L 304) 12, 12–23.

¹³³ Council Directive 2005/85/EC, *supra* note 124.

¹³⁴ Judgment, *supra* note 104, para. 70.

¹³⁵ *Id.* para. 71.

¹³⁶ *Id.* para. 72.

¹³⁷ *Id.* para. 73.

¹³⁸ *Id.* para. 74.

¹³⁹ The European Community (as it then was) concluded an Agreement with Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway. *Id.* para. 25. Similarly, the European Community has concluded an Agreement with Switzerland concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, and a Protocol to that Agreement between the European Community and Switzerland and Liechtenstein. *Id.* para. 26. Denmark is not bound by the Directives making up the Common European Asylum Policy but concluded an Agreement with the European Community by which it extended the application of Regulation 2725/2000 (establishing Eurodac). *See supra* text accompanying note 10. Judgment, *supra* note 104, para. 25. Also, the Dublin Regulation does not apply to Denmark. Council Directive 2003/9/EC (laying down minimum standards for the reception of asylum seekers) does not apply to Ireland. *See id.* para. 23.

¹⁴⁰ Judgment, *supra* note 104, para. 78.

The CJEU considered “it not however inconceivable that the system may, in practice experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State be treated in a manner incompatible with their fundamental rights.”¹⁴¹ The CJEU made it clear, however, that it would not be compatible with the aims of the Dublin Regulation if the slightest infringement of Directives 2003/9, 2004/83, or 2005/85 by the receiving Member State were to be sufficient to prevent the transfer to that Member State.¹⁴²

The CJEU takes a different approach to cases in which “there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.”¹⁴³ Article 4 of the Charter provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹⁴⁴ Article 4 of the Charter is identical to Article 3 of the European Convention. In this context the CJEU specifically referred to the findings of the ECHR in the *M.S.S.* case as follows:

In a situation similar to those at issue in the cases in the main proceedings, that is to say the transfer, in June 2009, of an asylum seeker to Greece, the Member State responsible within the meaning of Regulation No 343/2003, the European Court of Human Rights held, inter alia, that the Kingdom of Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (European Court of Human Rights, *M.S.S.*

¹⁴¹ *Id.* para. 81.

¹⁴² *Id.* para. 84.

¹⁴³ *Id.* para. 86.

¹⁴⁴ Charter, *supra* note 2, art. 4.

v. *Belgium and Greece*, § 358, 360 and 367, judgment of 21 January 2011¹⁴⁵

The CJEU added that “[t]he extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.”¹⁴⁶ The CJEU also stated that “information such as that cited by the [ECHR] enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate [the] risks [of violations of fundamental rights].”¹⁴⁷ The CJEU concluded:

In situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of [the Dublin Regulation] 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 or degrading treatment within the meaning of Article 4 of the Charter.¹⁴⁸

In such a situation, the transferring Member State, subject to its right to examine the asylum application itself (pursuant to Article 3(2) of the Dublin Regulation), must examine if Chapter III of the Dublin Regulation makes another Member State responsible for the examination of the asylum application, other than Greece (which would normally be responsible pursuant to Article 10(1)), bearing in mind that Article 5(1) of the Dublin Regulation provides that the criteria of Chapter III apply in the order in

¹⁴⁵ Judgment, *supra* note 104, para. 88.

¹⁴⁶ *Id.* para. 89.

¹⁴⁷ *Id.* para. 91.

¹⁴⁸ *Id.* para. 94.

which they are set out in that chapter.¹⁴⁹ If no other Member State is responsible under Chapter III of the Dublin Regulation, then Article 13 provides that “the first Member State with which the application for asylum was lodged shall be responsible for examining it.”¹⁵⁰ The CJEU further cautioned that the Member State in which the asylum seeker is present must “ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time,” and that “[i]f necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of [the Dublin Regulation].”¹⁵¹

Not surprisingly, the CJEU also held that “an application of [the Dublin Regulation] on the basis of the conclusive presumption that the asylum seeker’s fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply [the Dublin Regulation] in a manner consistent with fundamental rights”¹⁵² and that any such presumption created by the law of a Member State must be regarded as rebuttable.¹⁵³ The same is true for any conclusive presumption in the law of a Member State that certain States are “safe third countries.”¹⁵⁴

One question asked by the Court of Appeal (England and Wales), in Case C-411/10, concerned the scope of the protection of fundamental rights in relation to the Dublin Regulation under EU law, by virtue of general principles of EU law and, in particular, Articles 1 (on human dignity), 18 (on the right to asylum) and 47 (on the right to an effective remedy), and under the European Convention. Specifically the Court of Appeal asked whether the protection provided by EU law is wider than that conferred by Article 3

¹⁴⁹ *Id.* paras. 95–96.

¹⁵⁰ *Id.* para. 97.

¹⁵¹ *Id.* para. 98.

¹⁵² *Id.* para. 99, referring to para. 131 of the Opinion of the Advocate General; *see also id.* para. 106.

¹⁵³ *Id.* para. 104; *see also id.* para. 100.

¹⁵⁴ *Id.* paras. 101–104. The CJEU pointed out, in paragraph 102, that “Article 36 of Directive 2005/85, concerning the safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a ‘safe third country’ where not only has it ratified the Geneva Convention and the [European Convention] but it also observes the provisions thereof.” *Id.* para. 102.

of the European Convention.¹⁵⁵ The CJEU was reluctant to answer this question in the abstract and tied its answer firmly to the facts of the cases before it. It restated its earlier conclusion that “a Member State would infringe Article 4 of the Charter [which is identical to Article 3 of the European Convention] if it transferred an asylum seeker to the Member State responsible within the meaning of [the Dublin Regulation] in the circumstances described in paragraph 94 of the present judgment,” *i.e.*, where the transferring Member State “cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in [the receiving] Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.”¹⁵⁶ After that, it stated tersely that “Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given [to the previous questions].”¹⁵⁷

Finally, the CJEU held, in answer to a specific question from the Court of Appeal (England and Wales), that Protocol No 30 does not affect its answers in relation to the United Kingdom. Specifically, the CJEU noted that Article 1(1) of the Protocol provides “that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.”¹⁵⁸ The CJEU cited with approval the interpretation of that provision by the Advocate General to the effect that “Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol.”¹⁵⁹ The CJEU concluded that “Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those

¹⁵⁵ *Id.* para. 109.

¹⁵⁶ *Id.* para. 113, referring to paras. 94–106.

¹⁵⁷ *Id.* paras. 114–115.

¹⁵⁸ *Id.* para. 118.

¹⁵⁹ *Id.* para. 119 (citing paras. 169–170 of the Advocate General’s Opinion). TEU art. 6(1).

provisions.”¹⁶⁰ However, the CJEU left open the possibility that its answer might be different with regard to rights contained in Title IV of the Charter and stated that there was no need to rule on the interpretation of Article 1(2) of Protocol No 30.¹⁶¹

The mechanism of Article 267 TFEU leaves it to the court of a Member States to apply the ruling of the CJEU in response to its questions about the interpretation of EU law, to the facts before it.¹⁶² The judgment of the CJEU in Cases C-411/10 and C-493/10 requires the courts of the United Kingdom and Ireland to make a determination whether they have substantial grounds for believing that the asylum seekers would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter if they were transferred to Greece. The judgment of the CJEU itself contains significant references to the judgment of the ECHR in the *M.S.S.* case, including to the documentary evidence on the basis of which the ECHR found that “the Belgian authorities knew or ought to have known that [M.S.S.] had no guarantee that his asylum application would be seriously examined by the Greek authorities” and that they knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.¹⁶³ In light of this recent evidence compiled in the *M.S.S.* case and the references in the CJEU to the serious systemic problems in Greece¹⁶⁴ it appears almost inevitable that the courts of the United Kingdom and of Ireland will stop the transfer of the asylum seekers concerned to Greece.

VI. CONCLUSIONS

A comparison of the judgment of the ECHR in *M.S.S.* and that of the CJEU in Cases C-411/10 and C-493/10 shows the direct impact of the jurisprudence of the ECHR on the CJEU in the development of its jurisprudence in respect of the protection of fundamental rights in relation to the Dublin Regulation in the post-Lisbon era. Although the two courts performed different functions in the cases being compared, *i.e.*, the ECHR adjudicating the validity of a complaint about violations of the European

¹⁶⁰ Judgment, *supra* note 104, para. 120.

¹⁶¹ *Id.* para. 121.

¹⁶² See T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW* 317–18 (2010).

¹⁶³ Judgment, *supra* note 104, paras. 87–90.

¹⁶⁴ Interestingly, the Advocate General’s Opinion contains a section entitled “The overloading of the Greek asylum system.” *Id.* paras. 99–105.

Convention, and the CJEU responding to requests from two courts of two different Member States for interpretations of provisions of EU law, the central issue before them was the same, i.e., whether the protection of fundamental rights in Europe necessitated stopping the transfer of applicants for asylum to Greece, being the country that was primarily responsible for the examination of the asylum application in all these cases under the Dublin Regulation.

The similarity of the approaches taken by the two courts was to be expected on the basis of the mutual respect they had shown for each other's case law in the past. In the post-Lisbon era, the respect of the CJEU for the jurisprudence of the ECHR was further reinforced by Article 52(3) of the Charter, which requires that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention." Given the significance of the text of Article 3 (prohibition of torture) of the European Convention and Article 4 (prohibition of torture and inhuman or degrading punishment) of the Charter in these cases, the similarity of the approaches of the two courts makes eminent sense.

When the EU becomes a party to the European Convention in its own right, there will be a need to delineate the spheres of responsibility of the Union and of the Member States under the European Convention. It now appears likely that a new paragraph 2.c in an amended Article 59 of the European Convention will circumscribe the legal responsibility of the EU under the European Convention as follows:

Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the Protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.¹⁶⁵

¹⁶⁵ Through the "Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms," which is Part I of the Appendix to the Report by the Steering Committee on Human Rights (of the Council of Europe) to the Committee of Ministers on the elaboration of legal instruments for the

Because the acts of the Member States when implementing EU law are not included in the responsibility of the EU under the European Convention (unlike what Article 51(1) of the Charter stipulates) the ECHR will not need to address the question of whether a Member State acted in its own right or to implement Union law in specific instances. For procedural purposes under the European Convention, it seems likely that a “co-respondent mechanism” will be created, which will make it possible to join the EU as a co-respondent to cases brought against Member States and *vice versa*. That will also make it unnecessary for the ECHR to determine whether in specific cases the EU or one or more Member States is responsible.¹⁶⁶

accession of the European Union to the European Convention on Human Rights, October 14, 2011, *available at* http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_MeetingReports/CDDH_2011_009_en.pdf.

¹⁶⁶ Through amendments to Article 36 of the European Convention, contained in the “Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms,” which is Part I of the Appendix to the Report by the Steering Committee on Human Rights (of the Council of Europe) to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, October 14, 2011; *see also* Part III of the Appendix, entitled “Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms,” paras. 31–54, *available at* http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDH-UE/CDDH-UE_MeetingReports/CDDH_2011_009_en.pdf.