its failure to consider the effect of human rights and *jus cogens* explains why some states have made interpretative declarations excluding human rights and humanitarian law from the Convention's scope, as a sign that they were not consenting to its denial of remedies to victims. This approach was reiterated in the ILC's working group report, which, again, was not addressed in the Court's reasoning.[21]

As for the relevance of its own prior decisions, the Court essentially read into them conditions and qualifications that did not quite underlie them when they were adopted. For example, the *Arrest Warrant* judgment did not expressly concern *jus cogens*. Instead, it was premised on a rationale directly contradicting the approach the Court adopted in the case at hand, namely, the need to avoid impunity and make sure that alternative remedies remained available. As for *Democratic Republic of the Congo v. Rwanda*, it did not concern immunities before national courts but *jus cogens* pleaded as an ancillary question on the Court's own jurisdiction, which would not obtain unless established by *jus cogens* as such. That situation differed qualitatively from the preexisting entitlement of national courts to jurisdiction on a basis other than one that confers or denies immunities.

All these reasons suggest that the principal aspects of the Court's reasoning and conclusions are fundamentally flawed. By not engaging in a proper analysis of the sources of law, the Court failed to demonstrate the plausibility of its major findings and thus the consistency of its approach with the state of positive international law. The result is legally deficient if not morally suspect. The Court's decisions do not create precedent, and the continuing value of this judgment is compromised in any event by Italy's repeated admissions in Germany's favor (on customary law and acts *jure imperii*), which in part led the Court to avoid examining the accuracy of the legal positions in question. The Court's failure properly to apply the sources of law prescribed under Article 38 of its Statute leaves the bindingness of the judgment on Italy open to doubt. Whether Italian authorities comply is for them to choose, but whether they are obligated to do so is questionable.

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European Court of Justice—fundamental rights—prohibition of inhuman or degrading treatment—Common European Asylum System—concept of "safe countries"—transfer of asylum seekers to the responsible member state

N.S. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT. Joined Cases C-411/10 & C-493/10. *At* http://curia.europa.eu.
Court of Justice of the European Union (Grand Chamber), December 21, 2011.

In its judgment in joined cases *N.S. v. Secretary of State* and *M.E. v. Refugee Applications Commissioner*,[1] the Grand Chamber of the Court of Justice of the European Union (ECJ)[2] held that member states of the European Union (EU or Union), including their national courts,

[21] *See* Memorandum by the Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, para. 46, UN Doc. A/CN.4/596, at 31–32 (Mar. 31, 2008).

[1] Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't (Eur. Ct. Justice Dec. 21, 2011). Decisions of the Court and opinions of the advocates general are available online at http://curia.europa.eu.

[2] Under the CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION Art. 19(1), 2010 O.J. (C 83) 13 [hereinafter TEU], the institution of the EU Court of Justice encompasses the Court of Justice, the General

may not transfer an asylum seeker back to the member state where he or she first entered the European Union when there are substantial grounds for believing that individual would face a real risk of being subjected to inhuman or degrading treatment contrary to Article 4 of the EU Charter of Fundamental Rights (Charter).[3] In so doing, the Grand Chamber adopted a broad view of the responsibilities of EU member states under the Common European Asylum System (CEAS).[4] By emphasizing human rights concerns over the mutual confidence and presumption of compliance underlying the CEAS, which are intended to ensure the efficient processing of asylum applications, the ECJ set a new standard that will upset the system of resolution of asylum claims within the Union. More broadly, if embraced by other states internationally or taken as evidence of evolving state practice, the judgment may unsettle established practices as regards the transfer of asylum seekers on the basis of the "safe third country" notion in other refugee-processing systems.[5]

The Dublin II Regulation[6] sets out the criteria for determining which member state is responsible (at least in principle) for examining an asylum application lodged in the European Union. The normal rule under the regulation gives primary responsibility to the state of first arrival. Where a third-country national has left that state and applied for asylum in another member state, the regulation provides for transferring the asylum seeker to the state of first arrival (the "Member State responsible"). However, where conditions in that first state raise doubts about the legitimacy of its procedures and/or whether the applicant will be accorded proper treatment if returned, a decision to return the applicant may be challenged. That was the situation in the cases under consideration, arising from the "refugee-processing crisis" in Greece.

N.S. v. Secretary of State concerned an Afghan national who arrived in Greece, where he was arrested in 2008. N. S. did not make an asylum application; he was released four days later and ordered to leave Greece within thirty days. According to his account, when he tried to leave he was again arrested and expelled to Turkey, where he was detained in appalling conditions for two months. He subsequently escaped and traveled to the United Kingdom, where he did lodge an asylum application. Pursuant to Article 17 of the Dublin II Regulation, the UK authorities informed Greece of the applicant's whereabouts and asked it to take charge as the "responsible State." In the absence of a response, the UK authorities, again relying on the Dublin II Regulation, ordered the applicant removed to Greece. N. S. challenged that decision before the UK courts, alleging that sending him back to Greece risked infringing his fundamental rights.

Court, and specialized courts (at present, the EU Civil Service Tribunal). For clarity, this report refers to the Court of Justice as the European Court of Justice (ECJ) in the sense of the highest court of this institution. EU treaties and related documents are available at http://www.eur-lex.europa.eu.

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

[4] On the ongoing CEAS project, see European Commission, Asylum—Building a Common Area of Protection and Solidarity (June 30, 2011), *at* http://ec.europa.eu/home-affairs/policies/asylum/asylum_intro_en.htm.

[5] *See* United Nations High Commissioner for Refugees [UNHCR], *Asylum Processes (Fair and Efficient Asylum Procedures)*, paras. 12–18, UN Doc. EC/GC/01/12 (May 31, 2001), *available at* http://www.unhcr.org/refworld/docid/3b36f2fca.html (on safe-third-country concept); GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 403–07 (2007) (on safe-third-country concept in non-EU systems).

[6] Council Regulation 343/2003, 2003 O.J. (L 50) 1 (EC).

Similarly, *M.E. v. Refugee Applications Commissioner* concerned five asylum applicants, originally from Afghanistan, Iran, and Algeria, who also entered the European Union through Greece, where each was arrested for illegal entry without applying for asylum. After leaving Greece, they traveled to Ireland, where they claimed asylum. Only two disclosed their previous presence in Greece, but the Eurodac system[7] alerted the Irish authorities to the earlier presence in Greece of all five and their failure to claim asylum there. All five resisted returning to Greece, arguing that the procedures and conditions for asylum seekers there were inadequate. Before the Irish High Court, they claimed that under the Dublin regulation, Ireland was therefore responsible for examining and deciding their asylum claims.

Taking notice of the overloading of the Greek asylum system and its effects on the treatment of asylum seekers and the examination of their claims, the Court of Appeal of England and Wales (UK) and the High Court (Ireland) separately sought a preliminary ruling from the ECJ on whether, before transferring applicants to the member state responsible under the Dublin II Regulation for examining their asylum application, other member states are obligated first to determine whether that state actually observes fundamental rights. They also asked whether, if that state does not observe fundamental rights, those other states are bound to assume responsibility for examining the application themselves.

The importance of these questions was underscored by Greece's having allegedly been the point of entry for almost 90 percent of the illegal immigrants entering the European Union in 2010, resulting in a disproportionate burden on that state and its inability to cope with the situation. The Court of Appeal of England and Wales pointed out that asylum procedures in Greece suffer from serious shortcomings, the proportion of asylum applications granted is minimal, judicial remedies are inadequate and difficult to access, and conditions for the reception of asylum seekers are deficient (para. 44).

After holding that the decision of a member state whether to examine an asylum application that is not its responsibility under the Dublin II Regulation implements EU law for the purposes of Article 6 of the Treaty on European Union (TEU) and/or Charter Article 51 (paras. 64–69),[8] the ECJ stressed that the CEAS is based on the precepts of the UN Convention on the Status of Refugees, in particular the guarantee that no one will be sent back to a place where he or she will face a well-founded fear of persecution.[9] The Dublin II Regulation

[7] The EU database for the comparison of fingerprints of asylum applicants and illegal immigrants, established pursuant to Council Regulation 2725/2000, 2000 O.J. (L 316) 1 (EC). *See also* Council Regulation 407/2002, 2002 O.J. (L 62) 1 (EC) (on implementing the Eurodac regulation).

[8] Under TEU Article 6(1), the "Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union . . . , which shall have the same legal value as the Treaties." Under Article 51(1) of the Charter, its provisions are addressed to the member states "only when they are implementing Union law." The latter phrase must be interpreted as meaning "that the provisions of the Charter apply to the Member States where they act within the scope of EU law." Opinion of Advocate General [AG] Bot, paras. 116–20 (Apr. 5, 2011), Case C-108/10, Scattolon v. Ministero dell'Istruzione, dell'Università e della Ricerca (Eur. Ct. Justice Sept. 6, 2011); *accord* Case C-27/11, Vinkov v. Nachalnik Administrativno-nakazatelna deynost, para. 58 (Eur. Ct. Justice June 7, 2012); Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, para. 30 (Eur. Ct. Justice Dec. 22, 2010); *see also* Opinion of AG Sharpston, para. 69 (May 22, 2008), Case C-427/06, Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, 2008 ECR I-7245 (noting that member state measures can be reviewed on the basis of their compliance with general principles of EU law only if they fall within the scope of EU law and providing guidance on when that is the case).

[9] Convention Relating to the Status of Refugees, Art. 33(1), July 28, 1951, 189 UNTS 150 [hereinafter Refugee Convention]. Charter Article 18 and the CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION Art. 78, 2010 O.J. (C 83) 47 [hereinafter TFEU], provide that the rules of the

was intended to speed up the handling of asylum claims in the interests of both asylum seekers and the participating member states (paras. 75–79). Given that goal, the Court said, minor infringements of the norms governing the right to asylum are insufficient to prevent the transfer of an asylum seeker to the primarily responsible member state, since such a rule would frustrate the objective of quickly designating that member state. By contrast, when there are substantial grounds for believing that the asylum procedure and reception conditions for asylum applicants in the responsible member state are systemically flawed, the transfer would be incompatible with Charter Article 4 (paras. 84–86).

A rebuttable presumption may be made, the Court said, that the member state denoted as responsible under the regulation does observe the fundamental rights required by EU law, but no conclusive presumption can be made regarding fulfillment of those rights (such as through a list of "safe countries") (paras. 99–105).[10] Member states may not transfer an asylum seeker to the responsible member state where they "cannot be unaware" that systemic deficiencies in that country's asylum procedure provide 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 Charter Article 4 (para. 106). Moreover, the Court said, member states have sufficient instruments at their disposal to assess compliance with fundamental rights, and therefore the real risks to which an asylum seeker would be exposed if he were transferred to the responsible member state (para. 91). Furthermore, subject to the right itself to examine the application, the member state that should transfer the applicant to the member state responsible under the Dublin II Regulation but finds it impossible to do so must consider the other criteria in the regulation so as to establish whether one of those criteria enables another member state to be identified as responsible for conducting the examination. In that regard, it must not worsen a situation of infringement of the applicant's fundamental rights by taking an unreasonable length of time to determine the reponsible member state. If necessary, it must examine the application itself (paras. 96, 107–08). Finally, the ECJ stated that its answers to the questions referred to it did not need to be qualified to take account of Protocol No. 30 to the TEU on the application of the Charter to Poland and the United Kingdom,[11] which merely explains the scope of Charter Article 51 with regard to those countries and is not intended to exempt them from the obligation to comply with the Charter or to prevent their courts from ensuring compliance with its provisions (paras. 119–22).

* * * *

Advocate General (AG) Sharpston noted in her opinion in *Bolbol* that the "humanitarian challenge of how to care for persons who have lost home and livelihood as a result of conflict has been with us since men first learnt to make weapons and use them against their neighbours."[12] Addressing this challenge effectively, in the context of European integration, has

Convention and 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267, are to be respected. *See* Case C-31/09, Bolbol v. Bevándorlási és Állampolgársági Hivatal, 2010 ECR I-5537, para. 38.

[10] Moreover, as pointed out in the present case in the Opinion of AG Trstenjak, para. 134 (Sept. 22, 2011), Joined Cases C-411/10 & C-493/10 [hereinafter AG Opinion], that presumption must be interpreted by taking into account the principle of effectiveness, that it must not be made excessively difficult or impossible in practice to exercise the rights conferred by EU law.

[11] Protocol No. 30 to the TEU, 2010 O.J. (C 83) 313.

[12] Opinion of AG Sharpston, para. 1 (Mar. 4, 2010), Case C-31/09, *supra* note 9.

been the objective of the CEAS. Furthermore, as AG Trstenjak observed in her opinion in *N.S.*, the aim of the CEAS is to establish a fair, but effective distribution of the burden imposed by asylum seekers on the asylum systems of the member states.[13]

At the same time, protecting the fundamental rights of asylum seekers is paramount. As the European Court of Human Rights (Human Rights Court) held in *M.S.S. v. Belgium and Greece*, "the confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations,"[14] in particular under the Refugee Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[15] "States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions."[16]

The present judgment involves these often-conflicting aspirations. By adopting and endorsing the Human Rights Court's analysis, the judgment exposes the fundamental problems for the European Union in both respects and casts doubt on the viability of the CEAS. Indeed, by holding that member states may not transfer an asylum seeker to the responsible member state under the CEAS when they cannot be unaware that systemic deficiencies in its asylum procedure and reception conditions of asylum seekers amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment, the ECJ has profoundly unsettled the principle of mutual confidence that underlies the CEAS and, by extension, the entire edifice of European integration.[17]

The ECJ placed considerable reliance on *M.S.S.*, which concerned an Afghan national who had illegally entered the Union from Turkey via Greece and had then been detained in Greece. On his release, he left without applying for asylum, which he eventually sought in Belgium. Because the Belgian authorities concluded that Greece was responsible for examining his asylum application in accordance with Article 3(1) in conjunction with Article 10(1) of the Dublin II Regulation, Belgium transferred M. S. S. back to Greece. Before his transfer, however, he lodged an application with the Human Rights Court. In its judgment, that Court found that the conditions of detention and living conditions of the Afghan asylum seeker in Greece violated ECHR Article 3 (prohibiting torture or inhuman treatment). Referring to the deficiencies in the examination of M. S. S.'s application, the risk of direct or indirect *refoulement*[18] to his home country without any serious consideration of the merits of the application, and the absence of an effective remedy, the Human Rights Court also established a violation by Greece of Article 13 (providing for access to such a remedy) in conjunction with Article 3 of the ECHR.[19] In an exceptional move, the Court found Belgium in breach of

[13] AG Opinion, *supra* note 10, para. 1.

[14] M.S.S. v. Belgium, App. No. 30696/09, para. 216 (Eur. Ct. H.R. Jan. 21, 2011). Decisions of the Court are available online at http://www.echr.coe.int.

[15] Nov. 4, 1950, ETS No. 5, 213 UNTS 222.

[16] *M.S.S.*, para. 216.

[17] That principle is an aspect of sincere cooperation, now laid down in TEU Article 4(3).

[18] Article 33(1) of the Refugee Convention, *supra* note 9, prohibits states from expelling or returning a refugee "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This is reflected in Art. 19(2) of the Charter, *supra* note 3.

[19] *M.S.S.*, para. 321.

Article 3 for sending the Afghan asylum seeker back to Greece, that is, not a third state but another party to the ECHR, since it had thereby exposed him to the risks linked to deficiencies in the Greek asylum system and to detention and living conditions violative of Article 3. Belgium was also found to have violated Article 13 in conjunction with Article 3 of the ECHR.[20] The Court had already held in *T.I. v. United Kingdom*[21] that the indirect removal of an asylum seeker to another contracting state did not affect the United Kingdom's responsibility to ensure that the applicant was not, as a result of its decision to expel, exposed to treatment contrary to ECHR Article 3; nor could the United Kingdom automatically rely on the arrangements made in the Dublin Convention (which was later replaced by the Dublin II Regulation).[22]

That said, the holding in *M.S.S.* effectively reversed the Human Rights Court's position in *K.R.S. v. United Kingdom*. That case concerned the complaint of an Iranian asylum seeker regarding his return to Greece pursuant to the Dublin II Regulation. Even though significant problems in the situation of asylum seekers in Greece and the risk of *refoulement* had been pointed out by the United Nations High Commissioner for Refugees (UNHCR), the Court was confident that, as an EU member state, Greece would respect all relevant rules, including those pursuant to the ECHR. The Human Rights Court declared the application inadmissible, finding that were any claim to arise under the Convention, it should be pursued first with the Greek domestic authorities and thereafter in an application to the Court.[23] That confidence in Greek compliance with the rules might have been a bit misplaced since the ECJ had held in 2007[24] that Greece had failed to implement Council Directive 2003/9/EC on minimum standards for the reception of asylum seekers.[25]

No one can doubt that Greece has faced, and continues to face, an enormous burden from asylum seekers. In a 2008 proposal to amend the Dublin II Regulation, the Commission had attempted to forestall the potential tensions between human rights obligations and effective burden sharing among member states by allowing for a temporary suspension of transfers when a member state encounters an urgent situation that places an exceptionally heavy burden on its reception capacities, asylum system, or infrastructure, or when the circumstances in a member state may lead to giving applicants for international protection less than what is required by EU legislation.[26] In its 2009 report on the proposal, the European Parliament substantively agreed with that mechanism but proposed adding a paragraph 9a to the new Article 31, "providing the legal basis for a legislative instrument in order to provide effective support to those Member States which are faced with specific and disproportionate pressures on their national

[20] *M.S.S.*, paras. 359–60, 396.

[21] T.I. v. United Kingdom, 2000-III Eur. Ct. H.R. 435.

[22] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. (C 254) 1.

[23] K.R.S. v. United Kingdom, App. No. 32733/08 (Eur. Ct. H.R. Dec. 2, 2008).

[24] Case C-72/06, Comm'n v. Greece, 2007 ECR I-57.

[25] Council Directive 2003/9/EC, 2003 O.J. (L 31) 18; *see* Gina Clayton, *Asylum Seekers in Europe:* M.S.S. v Belgium and Greece, 11 HUM. RTS. L. REV. 758, 761 (2011).

[26] Commission Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person, Art. 31, COM (2008) 820 final/2 (Jan. 19, 2008).

systems due, in particular, to their geographical or demographic situation."[27] (As of this writing the proposal has not yet been adopted.) Nevertheless, several member states did decide to suspend transfers of asylum seekers to Greece.[28]

The "ricochet" effects of this aspect of the judgment on other EU law instruments are potentially far-reaching. For example, two references for a preliminary ruling pending before the ECJ[29] essentially ask whether the exclusion of automatic reliance on mutual trust in other member states' compliance with human rights standards is transposable to the European arrest warrant.[30] If the answer is positive, one of the core assumptions underlying the effective operation of the warrant would fall by the wayside.

The key question from the perspective of the member states is what sort of indications are warranted before a member state must inquire into the situation awaiting asylum seekers in another member state. As mentioned, the ECJ refers in that respect to "substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions" in the responsible member state, resulting in inhuman or degrading treatment (para. 86). This aspect of the reasoning was doubtless inspired by the Human Rights Court's case law since *Soering v. United Kingdom*.[31] Fundamentally, however, the core of the member states' obligation originated in an established principle of international law, recalled by the International Court of Justice (ICJ) in the *Corfu Channel* case.[32] In that case, the ICJ concluded that the laying of the mines that exploded when two British destroyers struck them, causing damage and serious loss of life, could not have been accomplished without the knowledge of the Albanian government. The ICJ was therefore satisfied that, having such knowledge, Albania nevertheless did nothing to prevent the disaster, which engaged its international responsibility.[33]

In the present cases, the member states presumably knew about the systemic deficiencies in the asylum procedure and reception conditions of asylum seekers in another member state.[34] In *M.S.S.*, the Human Rights Court listed several elements that Belgium should have taken

[27] Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (recast), EURL. PARL. DOC. A6-0284/2009, at 24 (Apr. 29, 2009).

[28] Article 3(2) of the Dublin II Regulation, *supra* note 6, permits such suspensions under certain circumstances. The states that suspended transfers included Belgium, Denmark, Finland, Germany, the Netherlands, and the United Kingdom, and EU nonmenber participants in the Dublin system Iceland, Norway, and Switzerland. *See* Updated UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in Particular in the Context of Intended Transfers to Greece, para. 2 & nn.5, 6 (Jan. 31, 2011), *at* http://www.unhcr.org/refworld/pdfid/4d7610d92.pdf.

[29] Case C-396/11, Criminal Proceedings Against Radu (Eur. Ct. Justice, referral filed July 27, 2011); Case C-399/11, Criminal Proceedings Against Melloni (Eur. Ct. Justice, referral filed July 28, 2011).

[30] *See* Council Framework Decision 2002/584/JHA on the European Arrest Warrant, 2002 O.J. (L 190) 1.

[31] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); *see* Hirsi Jamaa v. Italy, App. No. 27765/09, para. 114 (Eur. Ct. H.R. Feb. 23, 2012) (citing Soering, *supra*, paras. 90–91); *see also* Al Husin v. Bosnia, App. No. 3727/08, paras. 49–50 (Eur. Ct. H.R. Feb. 7, 2012).

[32] Corfu Channel, 1949 ICJ REP. 4 (Apr. 9).

[33] *Id.* at 22–23.

[34] See similarly on *M.S.S. v. Belgium*, App. No. 30696/09 (Eur. Ct. H.R. Jan. 21, 2011), Guy S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-refoulement*, 23 INT'L J. REFUGEE L. 443, 453–54 (2011).

into account when considering whether the Greek authorities were respecting their international obligations: the numerous additional reports and materials available since *K.R.S.*, the letter sent by the UNHCR in April 2009 to the Belgian minister in charge of immigration, and the reform phase manifest in the European asylum system since December 2008.[35] Thus, when read in the light of *Corfu Channel* and *M.S.S.*, the ECJ's judgment leaves various temporal and substantive issues open, which calls for further case law.[36]

Though the arguably wide-ranging systemic impact of the judgment's main holdings may make the issue look somewhat peripheral, what the ECJ held on the status of the UK "opt-out" from the Charter is consequential for the United Kingdom and the entire EU legal order. Essentially, the Court held that Protocol No. 30 does not call into question the applicability of the Charter in the United Kingdom or Poland. While that conclusion may surprise the British prime minister who negotiated the protocol,[37] the same position had already been defended in academic commentary and was confirmed by the secretary of state before the Court of Appeal of England and Wales.[38]

The ECJ was probably not far off in holding that the judgment concerns 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" (para. 83). Perhaps that raison d'être could be succinctly described as the aspiration to check the possible—and in the past proven—destructive force of the member states' external policies (including policies toward third-country nationals) by subjecting them to rule-of-law constraints.[39] The Union can arguably make progress in its own rule-of-law standards—and thus further its raison d'être—only if at the same time it strives for more rigorous application of the rule of law at the international level.[40] But in encouraging the reinforcement of international rule-of-law constraints, the Union may be forced by more rigorous international rule-of-law standards to reinforce the rule of law within its own legal order. By adopting and endorsing the analysis of the Human Rights Court, hence choosing sincere cooperation toward the common goal of protection of human rights for asylum seekers over "blind" mutual

[35] *M.S.S.*, paras. 345–50. *But see id.*, Partly Dissenting Opinion of Judge Bratza, para. 1 (contesting the majority's conclusion that the situation in Greece and the risks to asylum seekers there at the time justified finding that Belgium had violated Article 3, especially in light of *K.R.S.*, *supra* note 23).

[36] *E.g.*, Case C-4/11, Fed. Rep. Germany v. Puid (Eur. Ct. Justice, referral filed Jan. 5, 2011); Case C-245/11, K v. Bundesasylamt (Eur. Ct. Justice, referral filed May 23, 2011); *see* Violeta Moreno-Lax, *Dismantling the Dublin System:* M.S.S. v. Belgium and Greece, 14 EUR. J. MIGRATION & L. 1, 18 (2012) (noting differences among member states on standards regarding safety of returns).

[37] Prime Minister Tony Blair: "It is absolutely clear that we have an opt-out from both the charter and judicial and home affairs." 462 PARL. DEB., H.C., Hansard, June 25, 2007, col. 37, *at* http://www.parliament.uk.

[38] Catherine Barnard, *The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?*, *in* THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY? 257 (Stefan Griller & Jacques Ziller eds., 2008); NS, R (on the Application of) v. Sec'y of State for the Home Dep't, [2010] EWCA (Civ) 990, [7] (quoting respondent's notice that "the Secretary of State accepts, in principle, that fundamental rights set out in the Charter can be relied on as against the United Kingdom . . . . The purpose of the Charter Protocol is not to prevent the Charter from applying to the United Kingdom, but to explain its effect." (Lord Neuberger, M.R.)).

[39] Geert De Baere, *European Integration and the Rule of Law in Foreign Policy*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW (Julie Dickson & Pavlos Eleftheriadis eds., forthcoming 2012).

[40] Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 ECR I-6351 (reported by Miša Zgonec-Rožej at 103 AJIL 305 (2009)), and Case T-85/09, *Kadi v. Comm'n* (Gen. Ct. Sept. 30, 2010), *appeal docketed*, Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P (Eur. Ct. Justice Dec. 13, 2010), can arguably be understood in that light.

confidence, the ECJ has done just that. Furthermore, the ECJ's condemnation of a conclusive presumption of compliance with fundamental rights (typically a list of "safe countries") aligns the CEAS with international refugee law in that respect[41] and may in turn inspire other asylum systems to reject that presumption.

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European Convention on Human Rights—Article 3—inhuman and degrading punishment—life sentences—gross disproportionality

VINTER v. UNITED KINGDOM. Application Nos. 66069/09, 130/10, & 3896/10. *At* http:// www.echr.coe.int.
European Court of Human Rights, January 17, 2012.

The European Court of Human Rights (Court) recently sustained the imposition of life sentences without possibility of parole against challenges that they constitute inhuman or degrading punishment[1] in violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention or ECHR).[2] In so doing, it gave effect to the "gross disproportionality" test frequently found in domestic law, including that of the United States. It also held, however, that the continued detention of a life prisoner once valid penological grounds no longer exist does violate Article 3 when the prisoner has no recourse for seeking a reduction in the life sentence.

The *Vinter* case concerned three applicants who, having been convicted of murder in separate criminal proceedings in England and Wales, were serving mandatory sentences of life imprisonment. All three applicants had been given *whole-life orders*, meaning that under United Kingdom law they were not eligible for conditional release and could be released only at the discretion of the secretary of state on compassionate grounds. In the past that discretion had rarely been exercised, typically when the prisoner was terminally ill or seriously incapacitated.[3]

The applicants claimed that in the case of life sentences Article 3 requires that conditional release (that is, release other than on compassionate grounds) must always be a possibility. As a result, they argued, the "irreducible" life sentences imposed on them without hope of release

[41] *See* UNHCR, *supra* note 5, paras. 13–16; GOODWIN-GILL & MCADAM, *supra* note 5, at 392; Rainer Hofmann & Tillmann Löhr, *Introduction to Chapter V: Requirements for Refugee Determination Procedures, in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 1081, 1113 (Andreas Zimmermann ed., 2011).

[1] Vinter v. United Kingdom, App. Nos. 66069/09, 130/10, & 3896/10 (Eur. Ct. H.R. Jan. 17, 2012) [hereinafter Judgment]. The Court's judgments and decisions are available online at http://www.echr.coe.int.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Nov. 4, 1950, ETS No. 5, 213 UNTS 222 [hereinafter Convention]. Article 3 provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[3] Section 30(1) of the Crime (Sentences) Act, 1997, c. 43 (Eng.), provides that the secretary of state may at any time release a life prisoner on license (conditionally on good behavior) if he is satisfied that exceptional circumstances justify the prisoner's release on compassionate grounds. Before the Court of Human Rights the British government admitted that since 2000 no prisoner serving a whole-life term had been released on compassionate grounds. Judgment, para. 37.