Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights

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Abstract

This article examines the likely positive obligations of the European Union ('EU') following its approaching accession to the *European Convention on Human Rights*. By focusing on the Dublin Regulation and recent asylum seeker returns to Greece as breaches of the prohibition on inhuman and degrading treatment, the article demonstrates that in dysfunctional areas of EU regulation, quite concrete changes will be necessary in order to meet the standards required thus far by the approach of the European Court of Human Rights and general principles of international law. This seems all the more probable given the prescriptive nature of the relationship between the EU and member states in the area of immigration. Ultimately, the article argues that current EU law fails to meet the requisite human rights obligations to protect and prevent, investigate, deter and prosecute. In the absence of reforms including a proposed suspension of transfers mechanism, the article concludes that the EU is likely to be condemned by the European Court of Human Rights for failing to meet its obligations under art 3 of the *European Convention on Human Rights*.

I Introduction

The potential for states to hide behind the 'organisational veil' of international institutions has become ever more significant, with increasing international mandates, scope and influence. Lifting the veil, however, goes beyond implications for member states and raises issues of responsibility for the organisation itself. Though still in their relative infancy, 'budding doctrine[s]'[1] on the responsibility of organisations are emerging to fill existing gaps in international law. Against this background, the obligations of the EU (having acquired independent legal personality) present a new and unique opportunity for human rights protection in Europe.

The *Treaty of Lisbon*,[2] renders the *Charter of Fundamental Rights*[3] legally binding and stipulates that the EU shall accede to the *European Convention on Human Rights* ('ECHR').[4]

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1 Catherine Brölman, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart, 2007) 262.

2 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/01 (entered into force 1 December 2009) art 6(2) ('*Treaty of Lisbon*').

3 *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1 ('*Charter of Fundamental Rights*').

4 *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

The development marks a pivotal moment in the evolution of the regional legal system, lifting the veil that has thus far deflected any Strasbourg scrutiny of acts of the EU itself. Although not expanding the competences of the EU in any way, the change is expected to offer individuals greater legal certainty and increased uniformity in the implementation of EU law. In increasing the effectiveness of rights now enshrined by the *Charter of Fundamental Rights*, ECHR and general principles, such an approach should lead to stronger human rights protection within the European system.

Given the existing partial reliance by the European Court of Justice ('ECJ') upon the ECHR, and the EU's commitment to the *Charter of Fundamental Rights*, there has been some scepticism about the the practical impact of EU accession to the ECHR. This article argues, however, that, in what the author ventures to call 'dysfunctional' areas of EU regulation, concrete policy improvements will be required. In support of this view, the article focuses on recent asylum conditions in Greece as inhuman and degrading treatment, and the return of asylum seekers to such conditions by other member states (under current EU law) as violations of art 3 of the ECHR. While the recent case of *NS and ME*[5] has now settled conclusively that EU law neither requires nor *permits* return of asylum seekers to Greece, the article questions whether or not the current state of EU law adequately fulfils the positive obligations to protect and prevent, investigate violations, and deter and prosecute.

The impact of the ECHR on member states returning asylum seekers to countries such as Greece has already attracted significant research and this article does not rehash the question of member state responsibility. There has been ongoing debate concerning asylum conditions in Greece as a violation of art 3, with the landmark Grand Chamber decision of *MSS v Belgium and Greece*[6] handed down in January 2011 concluding that Dublin returns to such conditions amount to a breach not only by Greece, but also by the relevant returning state.[7] The ECJ decision of *NS and ME*[8] in December 2011 has affirmed this finding at EU law level. The implications of this situation for the EU as an institution subject to the ECHR, however, have not been explored. The focus of this article is the likely interpretation by Strasbourg of the EU's obligations under the ECHR, examining the specific issue of Dublin returns to Greece rather than asylum conditions there.

The article argues that the EU may well be required to undertake concrete preventative and protective measures to improve the Dublin system in a way that is unlikely to be considered overburdening or unreasonable by the Strasbourg Court given the nature of EU-member state relationship. Put simply, the EU has the competence to make relatively straightforward legislative and policy changes that would certainly have a significant impact in reducing violations committed within the context of Dublin returns. Similarly, the article argues that additional investigative and deterrent measures should be pursued by the European Commission in order to meet the standard of human rights protection expected by the European Court of Human Rights ('ECtHR').

Ultimately, the article will seek to demonstrate that the practice of Dublin returns to Greece in the recent past is attributable under the ECHR not only to the relevant member state, but also to the EU itself. In failing adequately to meet its positive obligations, the EU

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5 *NS v Secretary of State for the Home Department and ME v Minister for Justice, Equality and Law Reform* (Court of Justice of the European Union, Joined Cases C411/10 and C493/10, 21 December 2011) (*NS and ME*).

6 (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) ('*MSS*').

7 Ibid 77 [367].

8 *NS and ME* (Court of Justice of the European Union, Joined Cases C-411/10 and C-493/10, 21 December 2011).

would therefore presumably be condemned by the Strasbourg Court were the same circumstances to arise again following its accession to the ECHR. In order to avoid such violations, the EU must therefore enact the proposed suspension of returns mechanism as soon as possible. As this article concludes, the relevant changes to the existing Dublin system are no longer merely a moral imperative but indeed a concrete and legal one.

II Background: the European Asylum System

The dramatic liberalisation of border controls within the EU in the early 1990s brought with it new challenges in the field of asylum — most notably a need for harmonisation.[9] The *Schengen*[10] and *Dublin Conventions*[11] sought from the mid-1990s onwards to limit the lodgement of an asylum claim to only one application within the EU, but did not at that time address harmonisation of the respective review processes.[12]

Following the *Treaty of Amsterdam*,[13] which transferred competence in the fields of immigration and asylum to the EU, numerous directives, regulations and decisions have now been passed in creating what has become known as the 'Common European Asylum System' ('CEAS').[14] Under the *Treaty of Amsterdam*, measures in the field of asylum and immigration were to be established progressively within five years.[15] The then *Dublin Convention* has since been succeeded by the Dublin Regulation ('*Dublin II*').[16] The stated motivations for the *Dublin II* system include effective and accessible refugee status determination procedures, the improvement of efficiency through the determination of responsible member states as quickly as possible, and the desire to close loopholes and prevent systemic abuses.[17]

Dublin II sets out the hierarchy for determining which European member state is responsible for examination of an asylum claim. Aside from exceptions, such as in cases of unaccompanied minors and family reunification, the state in which the asylum claim is to be examined shall generally be the state through which the individual entered the EU and filed an application.[18] The member state initially determined as responsible for examination

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9 Ulrike Brandl, 'Distribution of Asylum Seekers in Europe? Dublin II Regulation Determining the Responsibility for Examining an Asylum Application' in Costança Dias Urbano de Sousa and Philippe de Bruycker (eds), *The Emergence of a Common European Asylum Policy* (Éditions Bruylant, 2004) 33.

10 *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders*, opened for signature 19 June 1990, OJ L 239 (entered into force 1 September 1993).

11 *Convention determining the State responsible for examining applications for asylum lodged in one of the Member states of the European Communities*, opened for signature 15 June 1990, OJ C 254/1 (entered into force 1 September 1997) ('*Dublin Convention*').

12 James D Fry, 'European Asylum Law: Race-To-The-Bottom Harmonization?' (2005) 15 *Journal of Transnational Law and Policy* 97, 99.

13 *Treaty of Amsterdam Amending the Treaty on European Union and the Treaty Establishing the European Communities and Related Acts*, signed 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999) art 73i ('*Treaty of Amsterdam*').

14 Fry, above n 12, 100.

15 Ibid 101.

16 *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member state responsible for examining an asylum application lodged in one of the Member states by a third-country national*, opened for signature 18 February 2003, OJ L 50/1 (entered into force 17 March 2003) ('*Dublin II*').

17 Panayiotis Papadimitriou and Ioannis Papageorgiou, 'The New "Dubliners": The Implementation of European Council Regulation 343/2003 (Dublin II) by the Greek Authorities' (2005) 18 *Journal of Refugee Studies* 299, 303.

18 *Dublin II* [2003] OJ L 50/1 art 13.

of the asylum claim must 'take back' any applicant who has gone on to enter the territory of another member state without permission.[19]

It is noteworthy that member states retain a wide scope for discretion with regard to whether or not to return asylum applicants to the country responsible under *Dublin II*. Commonly referred to as the 'sovereignty clause', art 3(2) provides that each member state *may* choose to examine an application for which it is not responsible under the *Dublin II* criteria.[20] This provision, however, is permissive rather than obligatory (at least in its phrasing). Potential difficulties with *Dublin II* were widely foreseen by academics and commentators. As Papadimitriou and Papageorgiou note, 'from the start, it was obvious that countries on the periphery of the EU would, in the end, have to bear the burden of examining a disproportionate number of asylum applications.'[21] Further, it has been widely understood for several years that the principal motivation of many asylum seekers in moving from countries of the EU periphery to Western Europe is based on differences in reception conditions.[22] More recent directives have not altered these facts.

Subsequent to *Dublin II* are the *Reception Directive*,[23] the *Qualification Directive*[24] and the *Procedures Directive*.[25] The *Reception Directive* addresses concrete issues including freedom of movement, employment and material conditions for asylum seekers, aiming to 'ensure full respect for human dignity'. Described as 'the most important instrument in the new legal order in European asylum because it goes to the heart' of the *Refugee Convention*,[26] the *Qualification Directive* clarifies and defines the conditions through which an individual acquires refugee or complementary protection status within the EU.

Of more central importance to concrete asylum conditions (such as in Greece), however, is the *Procedures Directive*, concerned with minimum standards for the processing of asylum claims. member states retain the prerogative to introduce or maintain procedures more favourable than those stipulated under the *Procedures Directive*,[27] but are under no obligation to do so. The *Procedures Directive* has attracted significant academic, NGO and UN criticism, with the then United Nations High Commissioner for Refugees ('UNHCR'), Ruud Luubers, warning that 'several provisions … would fall short of accepted international standards … [and] … could lead to an erosion of the global asylum system'.[28] An investigative report released in 2010 by the UNHCR on the application of the *Procedures Directive* in 10 European member states notes that extensive scope for derogations,

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19 Ibid art 16.

20 Ibid art 3(2).

21 Papadimitriou and Papageorgiou, above n 17, 303.

22 Aspasia Papadopoulou, 'Smuggling Into Europe: Transit Migrants in Greece' (2004) 17 *Journal of Refugee Studies* 167, 180.

23 *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member states* [2003] OJ L 31/18 ('*Reception Directive*').

24 *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals of Stateless Persons as Refugees or as Persons who Otherwise Need International Protectin and the Content of the Protection Granted, Official Journal of the European Union* [2004] OJ L 304/12.

25 *Council Directive 2005/85/EC on Minimum Standards of Procedures in Member states for Granting and Withdrawing Refugee Status* [2005] OJ L 326/13.

26 Hélène Lambert, 'The EU Asylum Qualification Directive, Its Impact of the Jurisprudence of the United Kingdom and International Law' (2006) 55 *International and Comparative Law Quarterly* 161, 161.

27 *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member states for Granting and Withdrawing Refugee Status* [2005] OJ L 326/13, art 5.

28 Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and Dismantling of International Protection' (2005) 7 *European Journal of Migration and Law* 35, 53.

exceptions and divergent legislative interpretation has indeed led to the 'protection gaps' which were flagged as a risk at the time of the *Procedures Directive*'s adoption.[29]

Of greatest relevance for the current crisis in Greece is the assumption, established by the so-called 'Spanish Protocol', that asylum claims from European member states are generally inadmissible.[30] The right of member states to return asylum seekers under *Dublin II*, however, remains subject to the ECHR, and specifically the prohibition on torture.

III Positive Obligations within the EU Human Rights Framework

State obligations under public international law require the respect, protection and fulfilment of those rights to which they have committed themselves in international treaties (or by which they are bound under *jus cogens*). The widely accepted meaning of these three obligations is summarised by the Office of the High Commissioner for Human Rights as follows:

> The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.[31]

This approach has been both affirmed and applied by the ECtHR. The concept of positive obligations is now deeply embedded in the Court's reading of the ECHR.[32] The basis of such obligations rests upon the principle that rights must be practical and effective, the applicability of ECHR rights to all persons within a member state's jurisdiction, and the duty of states to provide effective domestic remedies in the case of alleged breaches.[33] The ECtHR has held that positive obligations include both a basic duty to create an adequate national legal framework, and more specific implementation duties and preventative measures to deter breaches by non-state agents.

The ECtHR's jurisprudence on positive obligations has emerged particularly from violations of the right to life, and the subsequent duty to carry out an effective investigation.[34] In the significant judgment of *Osman v United Kingdom*,[35] the Court further clarified a positive duty actively to *protect* potential victims of crime and *prevent* violations. While on the facts of the case the Court found that there had been no violation of art 2, it held that in particular circumstances positive operations measures to protect citizens at risk may be required,[36] and that a violation would occur where the authorities:

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29 UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (March 2010) 91.

30 Nadine El-Enany, 'The Safe Country Concept in European Union Asylum Law: In Safe Hands?' (2006) 2 *Cambridge Student Law Review* 1, 4.

31 United Nations Office of the High Commissioner for Human Rights, *International Human Rights Law* (March 2011) UNHCR <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>.

32 Jean-Paul Costa, 'The European Court of Human Rights: Consistency of Its Case Law and Positive Obligations' (2008) 26 *Netherlands Quarterly of Human Rights* 449, 454.

33 Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004) 5.

34 See, eg, *McCann v United Kingdom* (1995) 324 Eur Court HR; *Nachova v Bulgaria* [2005] VII Eur Court HR 1.

35 [1998] VIII Eur Court HR 101 ('*Osman*').

36 Ibid 25 [115].

> knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual … from the criminal acts of a third party and that they failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk.[37]

The Court noted expressly that this standard was not tantamount to gross negligence or wilful disregard on the part of the relevant authorities.[38] Simultaneously, however, it clarified that such positive obligations should not impose 'an impossible or disproportionate burden' upon member states.[39] Conforti notes that, in addition to foreseeability, the Court has sometimes used the test of causality in ascertaining what the respondent state 'knew or ought to have known.'[40] In *LCB v United Kingdom*,[41] for example, it held that, since a causal link had not been sufficiently established, it could not find that the UK authorities could or should have taken action in respect of the applicant.[42]

The ECtHR has repeatedly found a breach of positive obligations in the absence of appropriate and effective domestic legislation to deter violations.[43] Conforti argues that a breach of obligations is indeed easier to ascertain where it is the result of a lack of or inadequacy of legislation, rather than the result of negligence of the authorities in protecting against the wrongful action.[44] In addition, where criminal legislation exists, it must be accompanied by effective prosecutions.[45] Aside from criminal behaviours of non-state actors, member states are similarly obliged to regulate private industry.[46] This imposition by the Court of a positive duty to censure and deter ECHR violations of a civil nature arguably allows a closer analogy to be drawn to the relationship between the EU and its member states (see below).

IV *MSS v Belgium and Greece*

This article will restrict its analysis to asylum conditions in Greece at the time of the *MSS*[47] decision, handed down in January 2011. While the factual situation on the ground continues to evolve, the state of affairs at the time of the landmark judgment provides the most pertinent (and indeed sole) example of Dublin returns that are established by the ECtHR as breaching the ECHR, both on the part of Greece and the returning member state, Belgium.

The Court held, as in previous cases, that conditions in asylum detention in Greece (including over-crowding, lack of ventilation and lack of access to bathroom facilities)

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37 Ibid 25 [116].
38 Ibid.
39 Ibid 25 [115].
40 Benedetto Conforti, 'Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart, 2004) 129, 132.
41 [1998] III Eur Court HR 108.
42 Conforti, above n 40, 133.
43 Philip Leach, 'Positive Obligations from Strasbourg: Where Do the Boundaries Lie?' (2006) 15 *Interights Bulletin* 123, 124.
44 Conforti, above n 40, 134.
45 *Siliadin v France* [2005] VII Eur Court HR 1, 29 [112].
46 *Fadeyeva v Russia* [2005] IV Eur Court HR [92].
47 European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011.

amounted to inhuman and degrading treatment within the meaning of art 3.[48] The practice of refoulement from Greece to third countries, in violation of the *jus cogens* principle of international law, was also assessed by the Court as being contrary to art 3.[49]

With regard to Belgium, the ECtHR held that facts regarding asylum conditions in Greece were well known and widely ascertainable prior to the applicant's transfer back to Greece.[50] Distinguishing this case from previous instances, where there had been an absence of proof to the contrary that the receiving state would meet its obligations regarding minimum standards for reception and processing of asylum seekers, the Court held that the presumption was rebutted by the significant volume of material on problematic asylum procedures and conditions in Greece, from such sources as the Council of Europe, UNHCR, Human Rights Watch, Amnesty International and local Greek NGOs.[51] The Court further observed that the existence of domestic laws and accession to international treaties were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices 'manifestly contrary to the principles of the Convention'.[52] The Court held that the Belgian authorities knowingly exposed the applicant to conditions that amounted to degrading treatment, and as such had violated art 3.[53]

Unlike cases such as *Fadeyeva v Russia*,[54] in which the Court has examined the balance between the rights of the individual and the balance of the community as a whole,[55] the absolute nature of the prohibition on torture has meant that the standard of protection required of member states by the Court has been higher. As van Dijk notes, 'the required effectiveness is then the only applicable (and decisive) criterion'.[56] Nevertheless, it is important to note that positive obligations continue to be restricted to conduct rather than result.[57] In addition to the cases focused specifically on art 3, it can be inferred that an obligation to conduct an effective investigation, as well as to prohibit and prosecute violations, can be derived from the Court's jurisprudence on the art 2 right to life.[58]

The ECtHR has consistently held that, in order to constitute a breach of art 3 of the ECHR, treatment must attain a minimum level of severity, dependent on all circumstances of the case, including 'the duration of treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim'.[59]

The landmark decision of *Soering v United Kingdom*[60] established the test of whether there is 'real risk' that the applicant would be exposed to torture, inhuman and degrading

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48 Ibid [250].
49 Ibid [315].
50 Ibid [366].
51 Ibid [347]–[348].
52 Ibid [353].
53 Ibid [367].
54 [2005] IV Eur Court HR.
55 *MSS* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) [94].
56 Pieter Van Dijk, '"Positive Obligations" Implied in the European Convention on Human Rights: Are the States Still the "Masters" of the Convention?' in Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Essays in Honour of Peter Baehr* (Kluwer, 1998) 17, 27.
57 Claire De Than, 'Positive Obligations under the European Convention on Human Rights: Towards the Human Rights of Victims and Vulnerable Witnesses?' (2003) 67 *Journal of Criminal Law* 165, 168.
58 Van Dijk, above n 56, 26.
59 *Ireland v United Kingdom* (1978) Eur Court HR (ser A) [162].
60 (1989) 161 Eur Court HR (ser A) [88].

treatment.[61] In the case of *A v United Kingdom*,[62] the ECtHR held that the British authorities had violated art 3 in failing to prevent the beating of a nine-year-old child by his mother's partner. The Court noted that children and other vulnerable individuals are particularly entitled to protection in the form of effective deterrence by the authorities.[63] The defence of 'reasonable chastisement' under the criminal law was found by the Court not to provide adequate protection against treatment or punishment contrary to art 3.[64] In *Z v United Kingdom*,[65] the Grand Chamber of the Court has also reaffirmed the principle that states must take 'reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.[66]

Finally, in the most recent case of *Opuz v Turkey*,[67] the Court has imposed an arguably even higher standard of due diligence with its reference to *all* reasonable measures.[68] While the Turkish authorities had not remained completely passive with regard to the domestic violence with which the case was concerned, the Court found that the legislative framework should have permitted criminal prosecution even following the victim's withdrawal of complaints,[69] and that the due diligence standard could not have been met, since the applicant's husband had perpetrated his attacks 'without hindrance and with impunity to the detriment of the rights recognised by the Convention'.[70] Simultaneously, however, the Court emphasised that it was not its role to 'replace the national authorities' or to choose 'from the wide range of measures that could be taken to secure compliance with their positive obligations'.[71] The exact means of compliance therefore remains within the state's margin of appreciation.[72] The Court's reliance on due diligence as a general principle of international law will be discussed further below.

In summary, the jurisprudence of the ECtHR confirms several interrelated positive obligations with regard to the prohibition on torture, inhuman and degrading treatment. First, it is clear that individuals may not be deported or returned to any country where they may face conditions that would amount to a violation of art 3.[73] With regard to acts occurring on the territory of a member state itself, the relevant authorities are obliged not only to refrain from committing violations, but also to investigate[74] and provide an ability to prosecute[75] such actions where they are committed by non-state actors. The most recent case of *Opuz* suggests that the standard to be applied with regard to the adequacy of national deterrent laws is quite high. Where violations continue to occur without hindrance and with impunity, legislation will be presumed to be insufficient.[76]

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61 Ibid [92].
62 [1998] VI Eur Court HR No 90.
63 Ibid [22].
64 Ibid [23]–[24].
65 [2001] V Eur Court HR.
66 Ibid [73].
67 European Court of Human Rights, Grand Chamber, Application No 33401/02, 9 June 2009 ('*Opuz*').
68 Ibid [162].
69 Ibid [168].
70 Ibid [169].
71 Ibid [165].
72 Leach, above n 43, 124.
73 *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A) [88].
74 *McCann v United Kingdom* (1995) 324 Eur Court HR (ser A) [161].
75 *Opuz* (European Court of Human Rights, Grand Chamber, Application No 33401/02, 9 June 2009) [168].
76 Ibid [169].

V The Approach of the European Court of Justice

The ECJ has taken a more restrictive review of the legal duties of member states. As Butler and De Schutter argue, 'the ECJ does ensure that the EU legislator respects human rights, but it does little to *protect* human rights'.[77] Thus, human rights obligations of the part of the EU have been acknowledged by the Court only in the negative sense.[78]

This approach is most clearly demonstrated in the decision of *European Parliament v Council of the European Union*,[79] in which the Court considered the *Family Reunification Directive*,[80] which did not expressly prevent states from adopting measures contrary to the right to family unification under the ECHR, by permitting derogations. The ECJ accepted that 'a provision of a Community act could not respect fundamental rights if it required, or expressly or impliedly authorised the member states to adopt or retain national legislation not respecting those rights'.[81] Simultaneously, however, the Court held that since the *Family Reunification Directiv* left member states a margin of appreciation sufficiently wide to enable them to apply it in a manner consistent with fundamental rights, it remained valid.

The position of accepting legislation which relies on the member states' appropriate application of general principles within their respective margins of appreciation is also consistent with the *Lindqvist* case.[82] Any finding by the ECJ that the current sovereignty clause within the Dublin Regulation is in and of itself inconsistent with recognised human rights would therefore require a significant departure from the existing case law. As such, there is a marked divergence in both the approaches and effects of the ECtHR and ECJ respectively. This lack of uniformity will be examined more closely with regard to the specific issue of returns to Greece below.

VI Status and Modes of Governance of the European Union

With the *Treaty of Lisbon*, the EU has expressly acquired independent legal personality.[83] This has simplified the EU's status insofar as it is now indisputably an actor in international law.[84] Various observers have speculated about the effect this may have on the EU's human rights obligations. As Butler and de Schutter argue:

> the more the Union comes to share the attributes of a sovereign State, the more it shall have to enter into the kinds of agreements through which, like its member states themselves, it will commit itself to the promotion and protection of human rights in all matters falling under its jurisdiction.[85]

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77 Israel de Jesús Butler and Olivier de Schutter, 'Binding the EU to International Human Rights Law' (2008) 27 *Yearbook of European Law* 277, 296.

78 Ibid 294.

79 Court of Justice of the European Communities, C540/03, 27 June 2006.

80 *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*, opened for signature 22 September 2003, OJ L 251/3 (entered into force 3 October 2003).

81 Court of Justice of the European Communities, C540/03, 27 June 2006, [23].

82 Butler and de Schutter, above n 77, 295–6.

83 *Treaty of Lisbon* art 46A.

84 Kateryna Koehler, 'European Foreign Policy after Lisbon: Strengthening the EU as an International Actor' (2010) 4 *Caucasian Review of International Affairs* 57, 63.

85 Butler and de Schutter, above n 77, 279.

Under art 6 of the *Treaty of Lisbon*, providing for accession of the EU to the ECHR, the ECHR will soon apply directly to the EU as well as its member states.[86] In the interim, the EU is bound by the *Charter of Fundamental Rights*, and will continue to be following its accession to the ECHR. Given their common foundation in fundamental European values and constitutional traditions, it is not surprising that the two texts are broadly similar. In particular, the Charter contains the same prohibition on torture[87] which is most relevant to the *Dublin II* system under discussion here. Unlike the Convention, the *Charter of Fundamental Rights* also enshrines the right to asylum (art 18) in accordance with both the *Convention Relating to the Status of Refugees*[88] and the 1967 Protocol, though this inclusion makes little difference to debates about relevant material conditions.

Importantly, art 52 of the *Charter of Fundamental Rights* provides that where rights correspond to those already existing under the ECHR, they will share the same scope.[89] The prohibition on torture, inhuman and degrading treatment clearly falls within this category.[90] At the same time, however, art 51(2) asserts that no new task or competence will be created by the Charter.[91] The two clauses could potentially be contradictory with regard to the imposition of positive obligations upon the EU. As Kedzia argues, the obligation to take positive action, if imposed upon the EU, may require actual extension of its powers.[92] Indeed, the potential conflict between these two clauses has been flagged by the Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary of the Council of Europe.[93] The EU Network of Independent Experts on Fundamental Rights has addressed this question, concluding that the EU will be obliged to fulfil 'only such positive duties which lie within the sphere of its competences but not those which go beyond it powers.'[94] As elaborated below, it is arguable that the obligation more actively to prevent Dublin returns in case of ECHR art 3 violations falls within the former category.

Any analysis of the likely positive obligations stemming from EU-member state interactions must first consider that same relationship carefully. The debate as to the forms and modes of governance within the EU is both lively and ongoing.[95] As the EU moves away from more hierarchical modes to include new, more flexible forms of governance,[96] it has become clear that European integration as a process is, and will remain, 'strikingly different from those of national governments.'[97] The EU-member state relationship differs significantly from state-citizen interactions, or even the relationship between the national and regional governments in a federalist system, in that it encompasses both 'bottom-up' and 'top-down' components. The former refers to the inputs made by member states

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86 *Treaty of Lisbon* art 6.
87 *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/01, art 4.
88 Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).
89 Ibid art 52(3).
90 Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010) 233.
91 *Treaty of Lisbon* art 51(2).
92 Zdzislaw Kedzia, 'The Relationship between the European Convention on Human Rights and the Charter of Fundamental Rights after the European Union's Accession to the Convention' in Jan Barcz(ed), *Fundamental Rights Protection in the European Union* (C H Beck, 2009) 224, 238.
93 Ibid.
94 Ibid.
95 Paul Craig and Graínne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 5th ed, 2011) 159.
96 Ibid.
97 James A Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?' (1996) 34 *Journal of Common Market Studies* 29, 39.

themselves in both policy and legislative processes, while the latter designates the actions required by member states in order to comply with EU requirements and decisional outcomes.[98]

Nevertheless, while the EU has assumed a more discursive, non-binding manner in some fields,[99] these new modes of governance stand in contrast to what Craig and de Búrca describe as hierarchical governance, exemplified originally by the 'Classic Community Method' and encompassing a top-down form of governing by central institutions leading to binding, uniform rules.[100] This form of 'prescriptive Europeanisation'[101] is coercive, leaving little or no room for domestic level discretion.[102]

Contrary to a more general departure from traditional, hierarchical forms of law-making,[103] the field of immigration law and policy has conversely been characterised since the late 1990s by increasing communitarianism and greater European regulation.[104] Indeed, Faist and Ette regard changes since the *Treaty of Amsterdam* as providing for 'serious supranationalisation'[105] in this area. *Dublin II*, as a regulation, belongs to the most binding forms of EU obligation. The suite of regulations and directives concerning asylum cumulatively form 'an entire framework' of policies in this area.[106] Costello notes correctly that the nature of the EU act being applied does not necessarily determine whether or not member states exercise discretion in a given area.[107] Nevertheless, the quite prescriptive relationship between the EU and member states has implications for causation issues likely to be considered by the Strasbourg Court (discussed further below). Before turning to that issue, however, it is useful at this point to consider the evolving relationship between the ECJ and ECtHR, particularly in light of EU accession to the ECHR.

Recently opened discussions between the ECJ and ECtHR are aimed at pre-emptively considering key issues and complex legal questions arising from the EU's accession to the ECHR. Negotiations have been based upon the principle of giving the EU, as far as possible, the same status as other contracting parties.[108] Crucially, however, in addition to not extending the EU's competences, the agreement on accession 'shall make provision for preserving the specific characteristics of the EU and EU law.'[109] Relevant characteristics include the exclusive prerogative of the ECJ to declare an act of the EU invalid,[110] and the

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98 Eleanor Zeff and Ellen B Pirro, *The European Union and the Member states* (Lynne Rienner, 2nd ed, 2006) 9.

99 Thomas Faist and Andreas Ette, *The Europeanization of National Policies and Politics of Immigration: Between Autonomy and the European Union* (Palgrave Macmillan, 2007) 19.

100 Craig and de Búrca, above n 95, 160.

101 Faist and Ette, above n 99, 19.

102 Ibid.

103 Craig and de Búrca, above n 95, 160–1.

104 Faist and Ette, above n 99, 7.

105 Ibid 6.

106 Petra Bendel, 'Everything Under Control? The European Union's Policies and Politics of Immigration' in Faist and Ette, above n 99, 42.

107 Cathryn Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 *Human Rights Law Review* 87, 108.

108 Jean-Paul Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *Common Market Law Review* 1, 3.

109 Protocol Relating to Article 6(2) of the *Treaty of the European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms* [2007] OJ C 306/155, art 1.

110 European Court of Justice, Discussion Document of the Court of Justice of the European Union on Certain Aspects of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (May 2010) 4 <curia.europa.eu/jcms/jcms/P_64268/%3E%20>.

fact that the distribution of responsibilities between the EU and its member states may only be determined by the ECJ.[111] The practical result is that in cases where it is unclear whether the act or omission complained of falls within EU or member state competence, the Strasbourg Court would necessarily be called upon to interpret EU law in order to attribute the alleged violation to the appropriate party. It is undisputed that such a judicial determination lies beyond the ECtHR's jurisdiction.[112]

VII The Strasbourg Approach to Responsibility of International Organisations

In addition to the status of the EU within the internal European legal framework, it is clear that the Court must also weigh up the issue of responsibility of international organisations under general international law. Dekker notes:

> The general international legal system governing the activities of international organisations is still in a kind of embryonic phase, at least in comparison with the existing body of rules of international law for states.[113]

The conditions under which organisational responsibility will be imposed can be expected to be analogous (at least to a significant extent) with the established law of state responsibility.[114] As Shaw states most succinctly, 'the basis of international responsibility is the breach of an international obligation, and such obligations will depend upon the situation.'[115]

The *Draft Articles for the Responsibility of International Organisations* ('DARIO') were adopted by the International Law Commission in 2011, and have already been considered and applied by the ECtHR in the recent *Behrami*[116] judgment. Article 4 sets out two elements of an internationally wrongful act of an international organisation.

> There is an internationally wrongful act of an international organisation when conduct consisting of an action or omission:
>
> (a) is attributable to that organisation under international law; and
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> (b) constitutes a breach of international obligation of that organisation.[117]

The question of attribution, including whether Dublin returns on the part of member states have occurred with *authorisation* of the EU, is fundamental. Article 7 of DARIO

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111 Jacqué, above n 108, 18.

112 In anticipation of such complexities, the co-respondent mechanism has been proposed, allowing either the Union or a Member state to join proceedings as a co-respondent before the Strasbourg Court. Even if the proposed mechanism proceeds as presently expected, examination of a case in which the Union is a co-respondent would nevertheless be best simplified by the preliminary reference procedure. See further Jacqué, above n 108.

113 Ige F Dekker, 'Making Sense of Accountability in International Institutional Law: An Analysis of the Final Report of the ILA Committee on Accountability of International Organisations from a conceptual legal perspective,' (2006) XXXVI *Netherlands Yearbook of International Law* 83, 84.

114 Malcolm N Shaw, *International Law* (Cambridge University Press, 2008) 1311.

115 Ibid.

116 *Behrami v France* and *Saramati v France* (European Court of Human Rights, Grand Chamber, Joined Cases, Application Nos 71412/01 and 78166/01, 2 May 2007) [21]–[25] and [50].

117 Draft Articles on the Responsibility of International Organisations, [2011] II(2) *Yearbook of the International Law Commission* [87] art 4.

provides that international organisations will be considered responsible for acts of member states 'if the organisation exercises *effective control* over that conduct.'[118] The significance of control exercised by the EU in the field of immigration and asylum will be considered further below.

The central focus of this article, however, relates primarily to the EU's human rights accountability. Aside from direct responsibilities, international institutional law has also recognised the notion of accountability in relation to international organisations, particularly the EU.[119] The concept of accountability is broader than the principles of responsibility and liability for internationally wrongful acts.[120] The ILA Committee on Accountability of International Organisations for a Conceptual Legal Perspective has examined the concept against general international law.[121] It determines four different fours of accountability of international organisations: legal, political administrative and financial.[122] Like the DARIO framework, the ILA committee stipulates control as the basis of attribution for acts of member states to international organisations.[123] In cases where an international organisation assumes and administers a regulatory and behavioural framework, key principles including good governance, procedural regularity and due diligence should be given particular attention.[124]

While purely speculative now, it is certainly arguable that the Strasbourg Court is likely to attribute responsibility to the EU with regard to breaches caused by legal, political, administrative and financial actions of which the EU assumes control. EU control of the Dublin system at the legislative level is now undisputed. This may lead to a finding of co-responsibility were the circumstances in *MSS* to appear before the Court post-EU accession to the Convention. Further, given the general principles of international law discussed above and the Court's attitude to due diligence in particular, it appears likely that the EU may be condemned for failing to meet the 'respect, protect, fulfil' obligations consistently upheld by the ECtHR.

VIII The EU Reaction to Dublin Violations

In the case of state failures to implement provisions of EU law within a specified time-frame, the European Commission ('Commission') has a non-compellable power under the *Treaty on the Functioning of the European Union* to intervene.[125] Infringement proceedings can be broken down into four distinct stages:

> 1. *The pre-contentious stage* — Negotiations give the member state an opportunity to explain its position and reach a voluntary resolution;

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118 Ibid art 7 (emphasis added).
119 Dekker, above n 113, 86.
120 Shaw, above n 114, 1317.
121 International Law Association, *Accountability of International Organisations: Final Report* (2004) <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.
122 Ibid 5.
123 Dekker, above n 113, 99.
124 Shaw, above n 114, 1318.
125 *Consolidated Version of the Treaty on the Functioning of the European Union* [2008] OJ C 115/1 art 258.

> 2. *Formal notification* — The Commission sends a letter to the member state informing them of the alleged infringement, and generally requesting a response within two months;
>
> 3. *The reasoned opinion* — Where the matter remains unresolved, the Commission may issue a document setting out the basis of the infringement, and noting the period within which the member state must act in order to avoid the final stage;
>
> 4. *Referral* — Where all other avenues have been unsuccessful, the Commission may refer the matter to the European Court of Justice.[126]

The Commission has no investigative service, and complaints are brought on the basis of information from diverse sources, including other European institutions, NGOs and private citizens.[127] Breaches which may be subject to enforcement proceedings by the Commission include inadequate implementation of community law, and breaches of a positive obligation to ensure the effectiveness of community law.[128]

Investigative stage documents as well as the reasoned opinion remain confidential, and neither the Community Courts nor the Ombudsman has been prepared to require disclosure.[129] Further, the ECJ has repeatedly held that it will examine proceedings on an objective basis only; it does not look into the Commission's motives for bringing any action.[130] These circumstances make it particularly difficult to assess the Commission's actions from a due diligence point of view, as will be discussed further below.

Following this initial infringement proceeding, the ECJ may also impose pecuniary penalties in the case of a member state failing to comply with a previous judgment.[131] The Court may also order interim measures as necessary.[132]

The Commission has undertaken active measures with a view to ensuring the fulfilment of fundamental rights obligations within the Greek asylum system. In 2007, it requested the ECJ to consider the situation,[133] resulting in the Court's declaration that Greece had failed to adopt the necessary measures in order to give effect to the *Reception Directive*.[134] The Greek authorities subsequently transposed the *Reception Directive* into Greek Law. The Commission again notified Greece of its intention to bring proceedings before the ECJ in November 2009.

In addition to arguably more 'punitive' measures, the Commission has provided positive support to Greece. Aside from regular Commission funding, it has provided substantial emergency funding under the European Refugee Fund.[135] The deployment of EU asylum support teams through the European Asylum Support Office is intended to

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126 Craig and de Búrca, above n 95, 432.
127 Ibid 429.
128 Ibid 443–7.
129 Ibid 441.
130 Ibid 434.
131 Ibid 452.
132 Ibid 457.
133 *Tabesh v Greece* (European Court of Human Rights, First Section, Application No 8256/07, 26 November 2009) [84].
134 *Commission of the European Communities v Hellenic Republic* (Court of Justice of the European Communities, C72/06, 19 April 2007).
135 European Commissioner for Home Affairs, *Statement Following the Judgment of the European Court of Human Rights on the Transfer of Asylum Seekers Under the EU Dublin Regulation* (21 January 2011) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/35&type=HTML>.

assist in the concrete implementation of the Greek Action Plan to reform its present system.[136] Prior to this, Rapid Border Intervention Teams were also deployed to Greece in late 2010.[137]

In contrast to these steps, the European Commission has not directly addressed the issue of Dublin transfers to Greece during this same period. The Commission in fact proposed the creation of a community mechanism, allowing the suspension of transfers to member states who are over-burdened, during 2008.[138] The proposal followed the Commission's Evaluation Report on the Dublin System in 2007, as well as contributions from various stakeholders and consultations that identified 'a number of deficiencies related mainly to the efficiency of the system … and the level of protection afforded to applicants for international protection which are subject to the Dublin procedure.'[139] Significantly, the report found that, while concerns remained both on the practical application and effectiveness of the system, its objectives had, to a large extent, been achieved.[140]

The issues of efficiency and integrity of the system are undoubtedly given a key focus within the report, with related protection concerns receiving far less attention. The evaluation noted, for example, that divergent interpretations of the sovereignty clause had been applied by member states,[141] but did not expressly outline the Commission's view of a correct interpretation. In reviewing effective access to asylum procedures as laid out by the *Qualification Directive*, the report noted that 'one member state does not carry out, under certain circumstances … an [asylum determimation] assessment when taking back asylum seekers from other member states.'[142] The implications of such a practice with regard to the protection of individuals concerned, however, were not further discussed.

In contrast to the evaluation report, the Commission's green paper on the future of the CEAS emphasised the central human rights motivations of the Dublin framework. At the outset, the discussion paper affirms:

> the ultimate objective pursued at EU level is … to establish a level playing field, a system which guarantees to persons genuinely in need or protection access to a high level of protection under equivalent conditions in all member states while at the same time dealing fairly and efficiently with those found not to be in need of protection.[143]

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136 European Commissioner for Home Affairs, Statement on the Deployment of Asylum Support Teams to Greece (1 April 2011) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/214>.

137 European Commissioner for Home Affairs, above n 135.

138 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum: An Integrated Approach to Protection across the EU* (17 June 2008) 9.

139 European 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* (Recast) (3 December 2008) 2 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820 :FIN:EN:PDF>.

140 European Commission, *Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System* (6 June 2007) 13.

141 Ibid 6.

142 Ibid.

143 European Commission, *Green Paper on the Future of the Common European Asylum System* (6 June 2007) 2.

It is similarly recognised at the outset that the then current state of EU legislation contained 'gaps'.[144] These included a negation of the desired harmonisation of reception conditions given the wide margin of appreciation left to national authorities,[145] serious inadequacies regarding responses to vulnerable people,[146] and the need for a more balanced distribution between the member states.[147] In aiming to address the needs of those asylum seekers with particular vulnerabilities, the paper suggests a more prescriptive and detailed supranational approach.[148] While not commenting specifically on the individual rights implications of Dublin returns, the report acknowledges that 'the Dublin system may *de facto* result in additional burdens of member states that have limited … capacities'.[149]

Against the background of these two key documents, the Commission's subsequent proposed Dublin 'recast,' as it is commonly known, aims expressly at enhancing the system's efficiency *and* strengthening the international needs of applicants simultaneously.[150] The proposed new suspension of transfers procedure addresses cases 'of particular pressure on certain member states with limited reception and absorption capabilities'[151] and cases where concern exists that applicants may not benefit from adequate standards of protection under such a transfer, particularly in terms of reception conditions and access to the asylum procedure.[152] Proposed new cl 22 reads as follows:

> (22) This mechanism of suspension of transfers should be applied also when the Commission considers that the level of protection for applicants for international protection in a given member state is not in conformity with Community legislation on asylum, in particular in terms of reception conditions and access to the asylum procedure, in view of ensuring that all applicants for international protection benefit from an adequate level of protection all member states.[153]

UNHCR welcomed these proposed amendments,[154] while recommending that the proposal be strengthened to include additional requirements ensuring that the state to which transfers are suspended is compelled to remedy the situation within a reasonable timeframe, failing which an automatic enforcement mechanism (removing the discretion of the Commission and any potential politicisation) should come into effect.[155]

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144 Ibid 3.
145 Ibid 4–5.
146 Ibid 7.
147 Ibid 11.
148 Ibid 7.
149 Ibid 10.
150 European Commission, above n 139, 2.
151 European Commission, above n 143, 10.
152 Ibid.
153 Ibid 19.
154 United Nations High Commissioner for Refugees, UNHCR Comments on the European Commission's Proposal for a Recast of the 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 ('Dublin II') (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a Recast of the Regulation of the European Parliament and of the Council Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of [The Dublin II Regulation] (COM(2008) 825, 3 December 2008) (March 2009) 2.
155 Ibid 12.

Amnesty International (EU office) made broadly similar comments and recommendations,[156] while also advocating provisions for suspension of transfers in cases where identification mechanisms are inadequate under the *Qualification Directive*.[157] Regardless of the strong support of the proposal from the UN and NGO community, however, at present no such mechanism exists, despite the growing trend among national courts and tribunals to suspend recent transfers to Greece.[158]

Ultimately, the proposal to 'recast' and modify *Dublin II* implies by its mere existence as well as its content that both the EU and the wider community were aware by 2008 that the system posed significant fundamental rights challenges, and stood to be strengthened and improved in order to meet a best practice human rights standard. The key question, for the purpose of this article, however, is not whether the existing measures are merely *imperfect*, but rather whether they constitute a breach of positive obligations likely to be imposed by the Strasbourg Court. As such, the article will now turn to the crucial issue of what could (or indeed *should*) have been done differently.

IX Future Positive Obligations of the European Union

As discussed above, the ECtHR judgments concerning positive obligations until now have not relied exclusively on the notion of control in order to establish states' responsibilities. Rather, the emphasis has been very much on states' commitment to the 'practical and effective protection' of the rights and freedoms set out in the ECHR.[159] The issues are often not only whether states were in a position to alter a given set of circumstances, but rather whether they should have been. The EU, in acceding to the ECHR, will assume the same duty under art 1 to ensure the respect and safeguarding of enshrined rights in a practical and concrete way. The ECtHR can only be expected to apply consistent reasoning and hold therefore that merely refraining from violations is insufficient.

Simultaneously, however, the ECtHR has required a causal link between acts or omissions by the state and the alleged violation. In several landmark cases, causation has been so clearly established as hardly to warrant consideration.[160] In *LCB v United Kingdom*,[161] however, the Court held that although the applicant's daughter may indeed have contracted leukaemia as a result of a failure to take preventative measures, the state's knowledge at the time meant that it could not have been expected to foresee or safeguard against this possibility.[162] More recent cases such as *Osman*[163] have turned to a large degree upon the issue of foreseeability; that is, what respondent states 'knew or ought to have

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156 Amnesty International (EU Office), *Amnesty International's Comments on the Commission Proposals for a Directive laying down Minimum Standards for the Reception of Asylum Seekers (Recast)* (COM(2008) 815 final) and on the Commission Proposal for a Regulation 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) (COM(2008) 820 final) (April 2009) 26–7 <http://www.amnesty.eu/static/documents/2009/AICommentsDublinReceptCond_0409.pdf>.

157 Ibid 27.

158 Ibid 24.

159 See, eg, *Osman* [1998] VIII Eur Court HR [116]; *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A) [87]; *Opuz* (European Court of Human Rights, Grand Chamber, Application No 33401/02, 9 June 2009) [165].

160 See, eg, *Osman* [1998] VIII Eur Court HR; *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A).

161 [1998] III Eur Court HR.

162 Ibid [36]–[41].

163 [1998] VIII Eur Court HR [115].

known.'[164] In light of these existing principles, it is likely that the Court's estimation of positive EU obligations under the ECHR will turn upon two key concerns: the extent to which the EU's action or omission *contributed* to the breach (causation), and the degree to which the EU should have *anticipated* such consequences (foreseeability).

A *The Obligation 'to Protect and Prevent'*

In looking at the high degree of regulation exercised by the EU over member states in the area of asylum, it may be assumed that an express suspension of Dublin returns in the case of potential ECHR violations would at least significantly reduce the probability of those same acts taking place. In contrast with discursive modes of governance, offering suggestions and guidance for national policy makers,[165] the binding nature of the Dublin Regulation could effectively remove existing state discretion for such returns where they are likely to have an adverse impact on rights protected by the ECHR. A more sceptical observer here may raise the issue of non-compliance, and indeed, in order to avoid such a measure existing as a mere legal fiction, the procedure would have to be actually integrated into member states' practice.[166]

As the case of *NS and ME*[167] has raised, there is a strong body of legal jurisprudence which holds that states are under an obligation not to undertake any action which would lead to the violation of enshrined human rights, meaning that states are *already* prevented from Dublin returns where conditions such as those in Greece are present. This interpretation follows from the basic principles of EU law confirmed by the ECJ:

- member states must comply with EU law in a manner giving respect to fundamental rights;
- Provisions of EU law must respect fundamental rights, and cannot do so where they require or authorise member states to adopt a course that fails to respect such rights;
- An EU legal instrument must not confer discretion on member states to adopt a course which would fail to respect such rights;
- Any discretion afforded to member states under EU law must be exercised in a manner that respects EU law; and

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164 Ibid [116].

165 Faist and Ette, above n 99, 19.

166 Christian Filzwieser, 'The Dublin Regulation vs the European Convention of Human Rights: A Non-Issue or a Precarious Legal Balancing Act?' (2006) *Forced Migration Repository* 11–12 <http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5364>.

167 (Court of Justice of the European Union, Joined Cases C411/10 and C493/10, 21 December 2011).

- member states are obliged to implement EU law in a manner that complies with general principles of EU law, including the fundamental rights protected by the ECHR.[168]

Both the United Kingdom and the Republic of Ireland have referred cases to the ECJ regarding the legality of current transfers to Greece.[169] The ECJ judgment *NS and ME*[170] has now settled any debate that the binding nature of the *Charter of Fundamental Rights*, and the provision that rights contained within it meet the same standard as those imposed by the ECHR means that states are indeed obliged to take positive steps to avoid violations of art 4 of the *Charter of Fundamental Rights*,[171] prohibiting torture, inhuman and degrading treatment. While the Court held that allowing 'the slightest infringement' to prevent the transfer of an asylum seeker to the member state primarily responsible would not be compatible with the aims of *Dublin II*,[172] it held that member states may not transfer an asylum seeker to the original member state responsible:

> 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 that provision.[173]

The ECJ provided no express definition of the key component of 'systematic deficiencies', nor did it elucidate the circumstances in which a member state 'cannot be unaware' of such circumstances. The Court's reference to the ECtHR judgment in *MSS,*[174] however, suggests that an ECHR finding of an art 3 violation may satisfy the relevant test. The ECJ also recognised the 'repeated and unanimous' reports of international NGOs[175] as enabling member states to evaluate the risk of non-compliance with fundamental rights.[176]

While the appellant had posed the question of whether the scope of the protection under both general principles of EU law and specific arts 1, 18 and 47 of the *Charter of Fundamental Rights* are wider than the protection conferred by art 3 of the ECHR,[177] the Court did not address this point. It therefore remains unclear whether a violation of fundamental rights other than the prohibition of torture, inhuman and degrading treatment would engage a member state duty of protection (non-transfer).

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168 John Stanley, 'Presumption of Compliance, or Obligation to Consider Facts? Recent Case Law on Transfers of Asylum Seekers to Greece under the Dublin Regulation (Council Regulation (EC) No 343/2003)' (2010) 3 *Juridikum: Zeitschrift für Kritik, Recht, Gesellschaft* 261, 262.

169 See *Saeedi, R (on the application of) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin) (31 March 2010);*Mirza v Refugee Applications Commissioner and the Minister for Equality, Justice and Law Reform* [2009] IEHC (21 October 2009) <http://www.unhcr.org/refworld/docid/4bfd08022.html>.

170 (Court of Justice of the European Union, Joined Cases C411/10 and C493/10, 21 December 2011).

171 Article 4 of the *Charter of Fundamental Rights*, prohibiting torture, inhuman or degrading treatment, has the same scope and meaning as the ECHR prohibition (art 3) as per n 79, above.

172 *NS and ME* (Court of Justice of the European Union, Joined Cases C411/10 and C493/10, 21 December 2011) [84].

173 Ibid [106].

174 Ibid [89].

175 Ibid [90].

176 Ibid [91].

177 Ibid [50].

Despite the instant issue in both cases now having been determined by the ECJ, such referrals demonstrate that the question of whether *Dublin II* compels member states to utilise art 3(2) in particular circumstances has been unclear, at least from the member state perspective. This lack of certainty is further emphasised by the divergent national policies regarding recent returns to Greece.

Similarly to the respective Irish and British authorities referred to above, several other EU member states (at least until the recent ECtHR *MSS*[178] decision) have not suspended Dublin transfers to Greece. In Belgium, Finland and the Netherlands, for example, these policies have been grounded largely upon the presumption that Greece will continue to abide by its relevant regional and international obligations.[179] In Belgium the presumption is, in principle, rebuttable, although the onus is on the asylum seeker to provide proof of a real risk that they will be subject to violations of art 3 if returned.[180] The Finnish Migration Board, although assessing the possible application of the sovereignty clause on a case-by-case basis, has also resumed returns to Greece, and was vindicated by the Finnish Supreme Administrative Court decision in early 2009 permitting the transfer of an Iraqi asylum seeker.[181] Leading case law of the Dutch Council of State has similarly held that applicants have failed to provide tangible indications that Greece will violate its non-refoulement obligations or art 3 of the ECHR.[182] As such, while the examples cited above have considered the risk of ECHR violations in reaching their determinations, they have held de facto that such breaches were not occurring. To the author's knowledge, in none of the above member states has the judicial reasoning specifically considered a possible obligation under *Dublin II* art 2(3) to exercise the sovereignty clause in cases of probable ECHR breaches.

Finally, though courts of EU member states including Austria, France, Hungary, Italy and Romania have each ruled against Dublin returns to Greece in recent years,[183] the majority of these have not interpreted *Dublin II* itself as containing any obligation to exercise the sovereignty clause in specific circumstances. Rather, the respective judiciaries of Austria, France and Hungary have each held that conditions in Greece would expose the applicants in each case to violations of art 3 of the ECHR.[184] By contrast, in Italy the Council of State held expressly that the harm feared by the applicants should lead to an assessment of the claim under art 3(2) of the sovereignty clause.[185] The Romanian national court similarly cancelled transfers to Greece on these grounds.[186]

Though these member state examples are far from exhaustive, they reveal not only a significant disparity between the factual estimations of respective courts regarding Greece, but also a lack of coherence regarding the interpretation of *Dublin II* itself. Those decisions holding that conditions in Greece did not amount to ECHR violations now stand in clear

178 European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011.
179 United Nations High Commissioner for Refugees, *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* (16 June 2010) 7–10.
180 Ibid 8.
181 Ibid 8–9.
182 Ibid 10.
183 Ibid 4.
184 Ibid 4–6.
185 Ibid 6.
186 Ibid.

conflict with the finding of the ECtHR regarding approximately the same time period.[187] In light of this, the argument that a correct interpretation of *Dublin II* already sufficiently protects individuals against fundamental rights violations may be theoretically sound, but fails to consider the de facto realities of member state practice. Indeed, as the European Union Agency for Fundamental Rights noted in its 2010 Annual Report, 'the extraordinary pressure on the Greek asylum system revealed the weaknesses of EU law when applied in this type of "stress situation"'.[188]

In considering how the Strasbourg Court is likely to evaluate these circumstances, the most recent Chamber judgment, *Opuz*,[189] may perhaps be instructive. The finding that the Turkish authorities could not have discharged their positive obligations given the continuance of violations 'without hindrance and with impunity'[190] suggests that the Court may also interpret continued returns to Greece during the recent past as evidence of the failure of the EU to prevent and protect. Tempering such a results-based approach, however, is the additional criterion of foreseeability, and the Court's desire not to propose 'an impossible or disproportionate burden.'[191] Once again, following the decision in *MSS*,[192] the foreseeability of violations and the time at which conditions in Greece became widely known is no longer in question.

However, while it is clear that member states must do 'all that could be reasonably expected of them'[193] in order to prevent an imminent and foreseeable harm, the Court has consistently been at pains not to overburden states in this regard.[194] The Court has made it clear that it does not see it as falling within the scope of its role to choose the exact measures a state should employ in order to fulfil such obligations, and that the means of compliance remain with the margin of appreciation.[195] Although the EU had indeed implemented various measures aimed at improving conditions in Greece itself (see above), it undertook no active steps to prevent returns under *Dublin II*, leaving these decisions to the discretion of individual member states.

The proposed suspension of returns mechanism already discussed would arguably fulfil this positive protection obligation. By imposing a binding assessment of conditions in a particular member state, the EU would immediately remove any possibility of an incorrect (or convenient) factual interpretation such as those cited above. Further, it would clarify with finality that member states not only have the discretion, but rather are *obliged* to exercise the sovereignty clause in such circumstances.

In the case where such a suspension had been imposed and a member state nevertheless undertook Dublin returns in contravention of the ban, the principles of reasonableness as well as causation would presumably shift responsibility from the EU to the individual state concerned. Any disproportionate burden physically to prevent Dublin returns would be avoided. The establishment of an express suspension mechanism would

187 *MSS* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).
188 European Union Agency for Fundamental Rights, *Fundamental Rights: Challenges and Achievements in 2010* (Publications Office of the European Union, June 2011) 33.
189 European Court of Human Rights, Grand Chamber, Application No 33401/02, 9 June 2009.
190 Conforti, above n 40, 132.
191 *Osman* [1998] VIII Eur Court HR [116].
192 European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011.
193 Zeff and Pirro, above n 98, 9.
194 Ibid.
195 *Opuz* (European Court of Human Rights, Grand Chamber, Application No 33401/02, 9 June 2009) [165].

allow the EU to initiate proceedings, thus fulfilling the relevant 'deter and prosecute' obligation discussed further below.

B *The Obligation to Investigate*

The development of a positive obligation to investigate has been somewhat less clear throughout the Court's jurisprudence than the duty to protect and prevent. As Mowbray notes, while 'the duty of investigation under art 2 is supported by the most coherent body of Strasbourg case law … the application of the art 3 duty … has been more problematic.'[196]

In the first relevant case of *Assenov v Bulgaria*,[197] the Court held that art 3, read in conjunction with the state's general duty under art 1 to 'secure to everyone within their jurisdiction the rights and freedoms in [the] Convention', required by implication that there should be an effective official investigation.[198] This decision was endorsed by a united Chamber of the full-time Court in *Sevtap Veznedaroglu v Turkey*.[199]

The most recent Grand Chamber decision of *Ilhan v Turkey*,[200] however, has reformulated the legal reasoning on this issue. It held that the duty to carry out an effective investigation fell within the art 13 right to an effective remedy.[201] Mowbray argues that the art 3 duty may be restricted to cases where the court is unable to reach a finding in respect of the applicants' substantive complaints due to a lack of conclusive evidence.[202] It remains to be seen, however, how the Court will settle this issue conclusively.[203]

Where member states have breached the prohibition against torture, inhuman and degrading treatment through the facilitation of Dublin returns to a second member state, affected individuals must clearly have access under the Convention to an effective recourse against the violation. This is in fact already provided by the national courts of respective member states, or alternatively the ECHR, and to some degree the ECJ. It seems unlikely that the Strasbourg Court would require anything additional from the EU under art 13.

If, however, the procedural requirements of art 3 are to be those that ensure an effective and practical application of the rights enshrined by the ECHR, reliance on the ECHR and ECJ may prove insufficient. In order to deter and punish violations of this nature (see below), it is likely to fall to the Commission, as in other present cases, to initiate infringement proceedings against the relevant states, a task which necessarily requires thorough examination of the factual circumstances. As noted, the Commission presently has no investigative service at its disposal.[204] The question is then whether its present dependence upon external sources allows the Commission to discharge this function adequately.

The Grand Chamber of the Court in *Z v United Kingdom*[205] held that:

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196 Alastair Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51 *International and Comparative Law Quarterly* 437, 448.

197 [1998] VIII Eur Court HR No 96.

198 Ibid [102].

199 European Court of Human Rights, Second Section, Application No 32357/96, 11 April 2000; see also Mowbray, above n 196, 444.

200 [2000] VII Eur Court HR.

201 Ibid [92].

202 Mowbray, above n 196, 445.

203 Ibid 448.

204 Craig and de Búrca, above n 95, 429.

205 *Z v United Kingdom* [2001] V Eur Court HR.

> Where alleged failure by the authorities to protect persons from the acts of *others* is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention.[206]

In principle, the Commission's existing infringement procedures should be sufficient in the investigative sense in so far as they allow responsibility for breaches to be adequately identified. The non-compellable nature of these powers,[207] however, may no longer remain as such. As already discussed, the Court has held that states have a duty to take reasonable measures to prevent foreseeable risks of torture or inhuman and degrading treatment by both state and non-state actors.[208] The *Osman* decision has elaborated upon 'foreseeable risks' as those of which the authorities 'knew or ought to have had knowledge.'[209] While not requiring investigations of every potential or remote threat, in the case of clear violations of the ECHR, the Court would appear likely to use a test of foreseeability in determining whether investigations and deterrent measures should have been carried out.

In the present case, the well-recognised incidence of Dublin returns to Greece by some countries, as well as the relevant conditions in Greece itself, should arguably have triggered an examination of return practices and possible infringement proceedings by the Commission. As discussed above, the Commission had commenced multiple proceedings against Greece with regard to its asylum procedures and conditions during the relevant timeframe. In contrast, there is no indication of any actions commenced against member states *returning* individuals to Greece. This omission raises an interesting question of 'why?', particularly given the abovementioned and often-used argument that member states are already bound by *Dublin II* not to facilitate returns in violation of the Convention. Within the relevant timeframe, it seems unthinkable that the occurrence of Dublin returns to Greece had completely escaped the Commission's attention, particularly given the wealth of external sources reporting upon and criticising these practices. Did the Commission perhaps believe these return violations were not established enough to warrant infringement proceedings? Even more confusingly for the current legal picture, is it possible the Commission did not believe itself competent to commence proceedings against member states such as Belgium, now found by the ECHR[210] to have violated art 3 in addition to Greece? If indeed *Dublin II* already prohibits returns to circumstances of inhumane and degrading treatment, then this second question is particularly curious.

Given the confidential nature of internal Commission proceedings,[211] it is not possible to know the motivation or lack thereof of any infringement proceeding, or indeed whether some had commenced at the early, pre-contentious stage. What is noteworthy, however, is that the ECtHR would appear, on its current case law, to reject the notion that the Commission has absolute and non-compellable discretion with regard to which violations

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206 Ibid [109].
207 *Consolidated Version of the Treaty on the Functioning of the European Union* [2008] OJ C 115/01 art 258.
208 Stephanie Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65 *Cambridge Law Journal* 438, 441.
209 [1998] VIII Eur Court HR [116].
210 *MSS* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) [34].
211 Craig and de Búrca, above n 95, 441.

it investigates and acts upon. Where violations are foreseeable and should have been known to the Commission, such investigations may now become obligatory.

C *The Obligation to Deter and Prosecute*

Closely linked to the duty to investigate is the positive obligation to deter and prosecute. As noted above, the Strasbourg Court has repeatedly emphasised the requirement of effective and deterrent legislation to prevent violations, even by non-state actors.[212] Aside from enacting and enforcing legal measures to deter violations, member states have also been obliged to take 'reasonable steps' to prevent ill-treatment of which they 'knew or ought to have had knowledge',[213] including in some cases physical intervention. In the case of the EU-member state relationship, it seems clear that physical intervention to prevent Dublin returns would be deemed unreasonable, due both to the residual sovereignty of individual member states and to the practical logistics of such a measure.

As discussed above, however, a suspension of transfers mechanism would appear not to create a disproportionate burden for the EU, and would presumably deter member states from such violations, though perhaps not halt them completely. It is clear from the Court's jurisprudence that legislation must be accompanied by relevant prosecutions.[214] The Commission would presumably be obliged not only to investigate potential breaches but further to instigate infringement proceedings as appropriate.

Finally, these interrelated duties to protect, prevent, investigate, deter and prosecute are all subject to the condition of foreseeability being fulfilled. As Conforti summarises, 'a conclusion that can be drawn from the Strasbourg case-law is that no violation is found in cases where there is lack of a causal link between the behaviour of the State and the event'.[215] The degree to which the EU would be required to fulfil these positive obligations must depend necessarily upon what it 'knew or ought to have known'.[216] In the instant case of returns to Greece, as discussed above, it seems clear that this requirement is satisfied. The sheer volume of material from UN agencies, NGOs and advocacy groups leads to the conclusion that the EU was either aware of relevant conditions and member state practices, or else should have been. In the case of a future suspension mechanism being wilfully ignored by member states, however, this assessment of responsibilities is likely to change. Indeed, it would seem impossible for the Court to require anything further from the EU in such circumstances without imposing a 'disproportionate burden'[217] and indeed necessitating an expansion of EU competences, clearly at odds with both the *Treaty of Lisbon* and *Charter of Fundamental Rights*.[218]

X Conclusion

The expected interaction between the two European courts following EU accession to the ECHR can be seen as creating a kind of double safeguarding of fundamental rights. Based

212 Ibid 415.
213 Mowbray, above n 33, 45.
214 Kedzia, above n 92, 238.
215 Conforti, above n 40, 131.
216 *Osman* [1998] VIII Eur Court HR [116].
217 Ibid [115].
218 Kedzia, above n 92, 238.

on the above analysis, what then would the Strasbourg Court have been likely to conclude in the case of *MSS*[219] had the EU at that time already acceded to the ECHR? As argued above, the complete absence of measures by the EU expressly to prohibit such returns almost certainly constitutes a breach of the positive obligation to protect and prevent. Similarly, a failure to deter states from facilitating such returns, and take infringement actions against those who do, would have been likely to be construed as a violation of the obligation to deter and prosecute.

Finally, the positive obligation to investigate potential violations arguably requires the EU to undertake a level of examination sufficient to identify breaches, even if merely relying upon a variety of external sources. It is clear that the Commission fulfilled this obligation with regard to conditions in Greece, given the multiple infringement proceedings initiated. What is not publicly known (or available), however, is whether the Commission was simultaneously examining the practice of Dublin returns to Greece by other member states. Certainly there are no relevant proceedings to suggest as much. Given the ongoing nature of the Belgian practice of Dublin returns to Greece at the time, the violation was arguably foreseeable. In these circumstances, there is a strong argument that the Commission is not only *able*, but indeed *compelled*, to investigate further. It can be assumed that, were the EU already a party to the ECHR at the relevant time, the onus would be upon the Commission to demonstrate a sufficient level of investigation concerning such practices.

Of course, these implications are far wider than for the instant case alone. Consistent with the reasoning above, fields of legislation currently leaving relatively wide discretion to member states may require more comprehensive measures by the EU where such actions are within its existing competences. Environmental regulation, and the emerging Common Foreign and Security Policy, could potentially both evolve as areas within which the EU is similarly bound by positive obligations, and would be suitable for further research.

Ultimately, the central motivation behind EU accession to the ECHR is a dual one of both uniformity and a greater level of overall human rights protection. In order to realise these goals in any practical sense, it seems inevitable that the EU's role and responsibilities now be seen somewhat differently. Insofar as the EU adopts the attributes and powers of a sovereign state, it must assume commensurate obligations. These will necessarily alter the expectations surrounding not merely what the EU *may* do, but rather what it is *required* to do in order to meet the ECHR's standards.

The imposition of positive obligations upon the EU can only be anticipated to create at least as much debate and controversy, if not more, than the continually developing area of positive obligations of EU member states. The notion sits uncomfortably with many who consider it an excessive intrusion upon sovereignty or, more practically, an unworkable requirement where the necessary resources for implementation are simply lacking. As this article has demonstrated, however, the current state of EU law permits a simply intolerable loophole for the regional European system of human rights protection. This view is indeed supported by institutions and agencies ranging from Human Rights Watch[220] to the EU's

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[219] European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011.

[220] Human Rights Watch, *Greece Asylum Crisis Can't Be Fixed Without Reforming Dublin Rules* (28 January 2011) <http://www.hrw.org/en/news/2011/01/28/greece-s-asylum-crisis-can-t-be-fixed-without-reforming-dublin-rules>.

own Agency for Fundamental Rights.[221] In these circumstances, the interpretation of positive obligations following the EU's accession to the ECHR would surely be an imperative and welcome addition to the existing European Human Rights protection framework.

[221] European Union Agency for Fundamental Rights, above n 188, 33.