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The Post-Colonial Refugee, Dublin II, and the End of Non-Refoulement

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Abstract
Refugee law has been variously conceptualised. Sometimes, as a humanitarian enterprise. Sometimes, as an extension of foreign policy relations based on national self-interests. But can it be better rationalised as a post-colonial enterprise? Does its treatment of Arabs, Afghans and others from the Middle East and North Africa – who are the major consumers of modern refugee law today – tell us something about refugee law? Does it serve to essentialise refugees as the 'Others' of the West? If so, can we conceive of a post-colonial refugee? Is modern refugee law an exercise in 'post-colonialism', which can be defined as a cultural critique that is opposed to imperialism and Eurocentrism? This essay explores this question through an analysis of the Dublin II Regulation system. This system limits the number of asylum-seekers entering the countries of the European Union. Recent cases confirm that even powerful evidence of individual risk is of no avail and serves as no bar to an asylum-seeker being removed from one European country to another, from where he or she risks being refouled to his/her own country, where he/she may be subjected to inhuman and degrading treatment. This essay tells that story.

Keywords
post-colonialism; post-colonial refugee; human rights; non-refoulement; Dublin II Regulation; Charter of Fundamental Rights; Council Directive 2004/83/EC; *M.S.S.* v. *Belgium and Greece*; *N.S.* v. *Secretary of State for the Home Department*

1. Introduction

Is modern refugee law today best conceptualised through the lens of 'post-colonialism'? If so, what does 'post-colonial refugee law' look like? Various attempts have been made in the past to visualise international refugee law as a humanitarian enterprise or an extension of foreign policy relations based on

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national self-interests,[1] but rarely in terms of post-colonialism.[2] Do we in fact know who is the 'post-colonial refugee'? Could she be, for example, an Afghan refugee, escaping the travails of a 'war or terror' in what is a neo-colonial enterprise from the West? I have previously explored the question of how refugee law today is being used as a tool of counter-insurgency in the 'war on terror'.[3] But what about refugee law as a post-colonial enterprise in its effects on Arabs, Afghans and others in the Middle East and North Africa? Post-colonialism can mean different things. One of the earliest uses of the term was by the Marxist political economist Hamza Alavi.[4] In history, 'post-colonialism' refers to the period following formal decolonisation. In literary studies, it does not mean 'post-independence' or 'after-colonialism' as this "would be to falsely ascribe an end to the colonial process".[5] The term is clearly complex and contested. I wish here, however, to introduce a slightly new inflection of the term, namely, as an exercise in post-colonialism, with respect to the treatment of refugees. By this I mean not just that the question of refugees seeking asylum and the way that they are dealt with has to be understood in the context of European imperialism of the 19th and 20th centuries, but I also mean that as an *exercise* it is about containing the historical consequences of the effects of colonialism in postcolonial societies whose failed or semi-failed states, and internal instabilities, might in part at least be a consequence of European imperialism and its aftermath. All too often refugee scholars have assessed the effectiveness of refugee policies, but what they have not done is to interrogate the law as constitutive of exclusion and violence, which was a hallmark of European colonialism. This essay aims to address that shortcoming. In this article, I set out to consider refugee law as an exercise in 'post-colonialism' through an analysis of the Dublin II Regulation system, which is designed to limit the number of asylum-seekers seeking effective sanctuary in the European

[1] *See* S. H. Legomsky, *Immigration and Refugee Law & Policy*, 4th edition (Foundation Press, 2005) pp. 915–937.

[2] Exceptions, which are notably South-Asian and non-European, include R. Sammadar, 'Forced Migration: State of the Field', 4:1 *South Asian Journal of Peacebuilding* (Summer 2012) available at <www.wiscomp.org/pp-v3-n2/formatted/SAMADDAR.pdf >. *See also* R. Kapur, 'The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion', 8:2 *Theoretical Inquiries in Law* (May 2007) pp. 537–570, ISSN (Online) 1565-3404, DOI: 10.2202/1565-3404.1160, available at <www.degruyter.com/view/j/til.2007.8.issue-2/til.2007.8.2.1160/til.2007.8.2.1160.xml>.

[3] See S. S. Juss, 'Refugee Law & the Protection of children fleeing Conflict & Violence in Afghanistan', *JCSL* (2013).

[4] H. Alavi, 'The State in Post-Colonial Societies', in I/74 *New left Review* (1972). See also K. Gough and H. Sharma (eds.), *Imperialism and Revolution in South Asia* (London, 1973).

[5] *See* B. Ashcroft *et al.* (eds.), *The Post-Colonial Studies Reader* (1995) at p. 117 where it is explained: "'Postcolonial' as we define it does not mean 'post-independence', or 'after colonialism', for this would be to falsely ascribe an end to the colonial process. Post-colonialism, rather, begins from the very first moment of colonial contact. It is the discourse of oppositionality which colonialism brings into being. In this sense, post-colonial writing has a very long history."

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Union (EU). The articles starts first with a brief description of the ethos of the Dublin II Regulation system; then a brief word about 'post-colonialism'; and finally an analysis of the case of *EM*(*Eritrea*) which is presently braced to go to the UK Supreme Court, following a trail of important European cases, namely, *KRS, MSS*, and *NS*, all of which confirm that the Dublin Regulation system, designed to shield Europe from refugee arrivals, is a deeply problematic and dysfunctional regime in its current form.

2. The Dublin II Regulation System

In a recent account, Nadine E-Nany has explained how European states have chosen to respond "with the introduction of the 'safe country' concept in the administration of their asylum regimes" which they use as "a procedural measure designed to reduce the amount of asylum claims to be determined". The way that the procedure works is that, "[i]f an individual lodging an asylum application in a destination state is found to have originated from, or passed through, a so-called 'safe country', her claim may be left undetermined and she becomes liable to return to that 'safe country'". It is quite intriguing to see how a country is presumed 'safe' because this is based on nothing more than a banal "consideration of a number of factors, including its human rights record and its political situation".[6] Yet, these are indeterminate, uncertain and precarious criteria. They could mean observation of human rights standards, but they could also mean no more than a stable political system. As Nadine El-Nany acknowledges, "presumptions of safety are open to allegations of being unjustified and thus the concept poses a risk to the integrity of the principle of *non-refoulement*".[7]

The Dublin II Regulation gives legal force within the European Union to what began as a treaty providing for asylum claims to be processed and acted on by the first member state in which the asylum-seeker arrives, and for asylum-seekers and refugees to be returned to that state if they then seek asylum or take refuge elsewhere in the EU. The assumption underlying this system is that every member state will comply with its international obligations under what were initially the 1951 Refugee Convention and the European Convention on Human Rights but now include the Qualification Directive and the EU Charter.[8] Thus, it was established by the Grand Chamber of the European Court of Human Rights in *MSS*[9] that

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[6] N. El-Nany, 'The "New Europe" and the "European Refugee": The Subversion of the European Union's Refugee Law by its Migration Policy', in S. S. Juss (ed.), *The Ashgate Research Companion on Migration Law, Theory, and Policy* (Ashgate, 2013) pp. 3–24, at p. 14.

[7] *Ibid.*

[8] *EM* (*Eritrea*) *& Ors* v. *Secretary of State for the Home Department* [2012] EWCA Civ 1336 (17 October 2012), at para. 3, available at <www.bailii.org/ew/cases/EWCA/Civ/2012/1336.html>.

[9] *MSS* v. *Belgium and Greece* [2011] ECHR 108.

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Belgium had breached Article 3 of the Convention by returning asylum-seekers to Greece because that country was in systemic default of its international obligations.[10] Why do we continue to treat the 'Other' so differently? What is it about the 'Other' that is so different? Is it their place of origin? Is it that the 'Other' seeks to access entry into a territory of European nations the borders of which are so rigidly controlled?

The rueful observations of Mr. Justice Holman, in *Al-Ali*,[11] a case that is presently before the UK Courts, brings into sharp relief the importance of these questions. In rejecting the claim of a Kuwaiti Bidoon who had been wrongly refouled by the Dutch authorities back to Kuwait, His Lordship in *Al-Ali* remarked: "I have the utmost compassion for you personally, because I do understand that the way asylum seekers seem to be moved from country to country must sometimes *seem to lack dignity*, but that is what these European states have decided is the way in which these claims will be dealt with …."[12] But who is this asylum-seeker? She is not a European. What if she were a European? She would not be subject to the Dublin Regulation. She would not be moved around from country to country. So, why do we treat non-Europeans in this way? Could it be that coming mostly from ex-colonial territories, governed formerly by the very European powers to which access is now sought, that she is a 'post-colonial refugee'? Is 'post-colonial refugee' an idea whose time has come? The Dublin system is an unedifying spectacle. Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, highlights how the Dublin Regulation shortcomings have placed "a heavy burden on national courts, including supreme courts and above all else the European Court of Human Rights" with the result that "[d]uring 2009–2010 the Strasbourg Court received no less than 700 cases concerning asylum seekers for their transfers to be suspended".[13] What this tells us, I would contend, is that the post-colonial refugee provides postcolonial studies with a specificity which proves that it is far from having reached the end of its cycle in the Anglophone academe.

This is because the Dublin system on refugees is still anchored in the mind-set of colonial Europe. It assumes that every area in Europe – from Sicily in the south to Scandinavia in the north – is a safe territory for a refugee to access protection once he or she gets there. It is trite that, "all refugees have in common these characteristics: they are uprooted, they are homeless, and they lack national protection and status".[14] This is why refugees seek to find sanctuary in a safe country.

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10) *EM (Eritrea) & Ors* v. *Secretary of State for the Home Department*, *supra* note 8, para. 4.
11) *Al-Ali* v. *SSHD* [2012] EWHC 3638 (Admin) decided on 4 December 2012. This case is presently on appeal to the Court of Appeal in the UK.
12) *Ibid.*, at para. 126.
13) T. Hammarberg, 'The "Dublin Regulation" undermines refugee rights', *Press Release*, 22 September 2010, available at <https://wcd.coe.int/ViewDoc.jsp?id=1671357&Site=DC >.
14) *International Encyclopedia of the Social Sciences* (1968).

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The fact is that by definition refugees have to move and their condition is one of territorial alienage.[15] The very definition of the refugee inheres in this condition because, "t]he refugee is an involuntary migrant, a victim of politics, war, or natural catastrophe. Every refugee is naturally a migrant, but not every migrant is a refugee."[16] But this is not to say that one country in Europe is as safe for the refugee as another. Yet, Council Directive 2004/83/EC of 29 April 2004,[17] which is generally referred to as the Qualification Directive, posits an explicit limitation on claims of putative refugees – when they arrive as 'third country nationals' often from the erstwhile colonised territories of Europe – from countries outside of the European Union.

In the UK the Qualification Directive has been implemented through the Protection (Qualification) Regulation 2006.[18] A claim for asylum from another EU member state will invariably be treated as unfounded. This is because of a presumption that all European Union member states are equally safe locations of origin and safe locations for asylum for all refugees from everywhere. EU member states do not produce refugees. They do not treat those who claim refugee status within their territorial borders in an inhumane and degrading manner contrary to the standards of both the European Convention of Human Rights 1950 ('ECHR') of the Refugee Convention 1951. The 'safe country' notion is a peculiarly unhelpful one. As the United Nations High Commissioner on Refugees (UNHCR) has explained, "[s]imply put, the term 'safe country' has been applied, in the refugee context, to countries which are determined either as being non-refugee-producing countries or as being countries in which refugees can enjoy asylum without any danger".[19] They do not necessarily guarantee any particular safety for a third country national who arrives there in search of safety and sanctuary. This is manifestly clear from the examples given below.

Yet, what is invidious is that the *a priori* determination of a country as safe creates an automatic presumption, which is not easily rebuttable, of an absence of a well-founded fear of persecution or ill-treatment, with respect to any person who

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15) *See* 'Rethinking the Refugee Concept', in F. Nicholson and D. Twomey (eds.), *Refugee Rights and Realities, Evolving International Concepts and Regimes* (Cambridge University Press, 1999).
16) *Ibid.* This is because "[a] migrant is one who leaves his residence (usually for economic reasons) in order to settle elsewhere, either in his own or in another country. A refugee movement results when the tensions leading to migration are so acute that what at first seemed to be a voluntary movement becomes virtually compulsory."
17) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>.
18) The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, available at <www.legislation.gov.uk/uksi/2006/2525/contents/made>.
19) UN High Commissioner for Refugees, *Background Note on the Safe Country Concept and Refugee Status*, 26 July 1991, EC/SCP/68, at para. 3, available at <www.unhcr.org/refworld/docid/3ae68ccec.html> (accessed 1 April 2013).

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comes from such a country. In effect, the safe country concept melts away the notion of a refugee. Yet, all that is required for a European country to secure the status of a safe country is a record of good governance. What is good governance is often little more than the European Union being able to identify certain positive norms in a particular country. Given that all European Union states are a party to the Refugee Convention and given that all have invariably ratified the major human rights treaties, all have little difficulty in being treated as 'safe countries' for the purpose of refugee and asylum law. This too is the product of a particular European mind-set, fashioned during the heyday of Empire, and still all too prevalent in the West. No other non-European state could get away with such an automatic seal of approval. Yet, despite evidence to the contrary that many European states are most certainly not safe for refugees, the myth making persists. The intellectual exercise of so doing performs a valuable function in the European Union, however, for it serves to essentialise refugees as the 'Others' in the very mind of the West. It is for this reason that in this essay I wish to discuss European immigration policy in the context of post-colonial theory and to suggest that the notion of a 'post-colonial refugee' is deeply ingrained in modern European refugee law. I want to ask: Is modern refugee law best understood as an artefact of neo-colonialism? Many refugees after all come these days from Afghanistan where a neo-colonialism war has been waged.

If there is a real risk of a breach to what extent should a court conduct an investigation? It is the uncertainty over a question such as this which makes the 'safe country' notion such a slippery and unreliable one.

3. The 'Safe Country' Notion in EU Asylum Law

Much has been written about the shortcomings of the Dublin II system. It has been said that the 'safe country' notion posits a misconceived assumption of common standards of refugee protection that is all too frequently missing. Not all the countries of Europe are safe for all purposes and for all people. The 'safe country' notion is a legal fiction. Yet, I want to go further. I want to suggest it is employed as nothing more than a legal *mantra* and that there is now overwhelming evidence of this. The latest cases show "even powerful evidence of individual risk is of no avail" to a person fighting referral from one safe European country to another unsafe one, and that on the whole judicial tribunals are precluded from the consideration of both the individual risk, and of refoulement, to a transfer of an asylum-seeker from one country to another. This is contrary to the prohibition against non-refoulement. I will attempt to make good this thesis below. I would make the following preliminary observations at the outset.

First, international cooperation has long been recognised as a necessary prerequisite for the satisfactory solution to the plight of refugees. This is clear from

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the Preamble to the 1951 Refugee Convention.[20] Yet, its actual implementation remains one of the most controversial issues in refugee protection. The difficulties in implementation arise from managing 'burden-sharing' in a fair and sensitive way. The Dublin II system attempts to do this. This was explained by Mr Justice Cranston in *Saeedi*, in terms that "[t]he Dublin Regulation (EC) No 343/2003 is the cornerstone of the Common European Asylum System [CEAS]. It establishes a system of determining responsibility, according to specific criteria, for examining an asylum claim lodged in a Member State or in Iceland, Norway or Switzerland, which all participate in the Dublin system." As he explained, "[t]he Regulation aims at ensuring that each claim is examined by one Member State as 'on the one hand, to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum application and, on the other, to prevent abuse of asylum procedure in the form of multiple applications for asylum submitted by the same person in several Member States with the sole aim of extending his/her stay in the Member States'"[21]

Second, it remains the case nevertheless that the most sophisticated mechanism developed by states to embody this principle is currently contained in the so-called Dublin II Regulation. However, from its inception this system has been subject to scrutiny by domestic as well as international courts. Nadine El-Nany[22] has recently offered a powerful critique of Dublin II. She has explained how the central, binding EU instrument for the implementation of the 'safe country' concept is the Dublin Regulation,[23] incorporating the Dublin Convention,[24] agreed at Schengen, into EU legislation, and it is the pivotal binding EU instrument. The Dublin Convention states that responsibility lies with the first Member State with which the asylum applicant establishes contact. This may be by the issue of a transit visa, the legal presence of a close family member, or in the absence of these, the first physical contact with the territory.[25] State parties are required to readmit

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[20] The Refugee Convention 1951 states in its Preamble: "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international- scope and nature cannot therefore be achieved without international co-operation", available at <www.unhcr.org/4ca34be29.pdf>.

[21] *Saeedi, R (on the application of) v. Secretary of State for the Home Department & Ors* [2010] EWHC 705 (Admin) (31 March 2010), at para. 59, available at <www.bailii.org/ew/cases/EWHC/Admin/2010/705.html>.

[22] El-Nany, *supra* note 6, p. 14.

[23] Commission Regulation (EC) No 1560/2003 of 2 September 2003, laying detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222.

[24] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities 15 June 1990 [1997] OJ C254/1.

[25] Articles 4–8, Dublin Convention and Articles 28–38, Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux

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individuals transferred on the basis of the Dublin regime, whilst respecting the principle of mutual recognition with regard to the application of its rules. But as Lavenex has concluded, European cooperation is founded on "the assumption of common standards of refugee protection"[26] and Costello has referred to "the most worrying" element of the application of the 'safe country of origin' concept being the ensuing decline in procedural safeguards.[27] As the cases discussed below in this essay show, claims originating from countries designated as 'safe' are treated as 'manifestly unfounded' or inadmissible.[28] The only consensus among all actors involved seems to be its unsatisfactory performance and its continuous need for reform.

Thus, Crisp and Van Hear intimate that the concept is susceptible to political manipulation, such that there are "lists" of "safe countries of origin" whereby states may be "tempted to include their closest allies and most important trading partners".[29] One example in this respect is the EU Spanish Protocol.[30] This excludes Union citizens from claiming asylum in other member states "[g]iven [their] level of protection of fundamental rights and freedoms".[31] But as van Selm has noted, "for some individuals there can be a protection need even from a State which appears generally not to violate human rights … [as] evidenced by the large number of claims made to the [Court of Human Rights] on an annual basis by EU citizens".[32] The mere existence of human rights violations in European countries is a factor working against the presumption of safety attributed to member states.[33] Witness the plight of the Roma in Hungary, who have been subjected to shockingly violent attacks, since the rise of the far right anti-Roma Jobbik party. Indeed, as Amnesty International has reported, it is now clear that the state authorities are implicated as they frequently do not report these crimes as hate crimes.[34] Despite

Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders 14 June 1985 [1985] OJ L 176. *See* S. Lavenex, '"Passing the Buck": European Union Refugee Policies towards Central and Eastern Europe', 11:2 *JIL* (1998) p. 130.

26) *Ibid*.

27) C. Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection? DOI:10.1163/1571816054396842 ', 7:1 *European Journal of Migration Law* (2005) p. 35.

28) *Ibid.*

29) J. Crisp and N. Van Hear, 'Refugee Protection and Immigration Control: Addressing the Asylum Dilemma', 17:3 *RSQ* (1998) pp. 1–27.

30) Protocol on asylum for nationals of Member States of the European Union (attached to the EC Treaty by the Amsterdam Treaty).

31) *Ibid.*

32) J. Van Selm, 'Access to Procedures: "Safe Third countries", "Safe Countries of Origin" and "Time Limits"', paper commissioned by UNHCR and the Carnegie Endowment for International Peace, 2001, p. 37, at pp. 38–39.

33) *Ibid.*, at p. 39.

34) Amnesty International, 'Violent Attacks Against Roma in Hungary: Time to Investigate Racial Motivation', Amnesty International, 2010, p. 7, available at <www.amnesty.org/en/

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this powerful commentary by others, I would suggest, however, that the latest legal developments leave no doubt that the Dublin II system is no longer operating on the basis of a presumption of safety. It is now openly being stated that even powerful evidence of individual risk is of no avail so that there is no bar to an asylum-seeker being removed to a European country from where he or she risks being refouled, and which otherwise fails to provide protection from inhuman and degrading treatment.

Thirdly, there is recognition of the failure of the 'safe country' notion in that the EU is currently negotiating a recast Dublin II Regulation that needs to provide an appropriate response to member states obligations of protection in the context of international cooperation, as interpreted by the European Court of Human Rights in the *M.S.S.* v. *Belgium and Greece* case (judgment of 21 January 2011) and by the Court of Justice of the European Union in the *N.S.* v. *Secretary of State for the Home Department* case (C-411/10, judgment of 21 December 2011), which are discussed below.

Fourth, problems have arisen in relation to refoulement of refugees from Italy, Greece and Hungary. The treatment of Dublin returnees in Hungary gives rise to serious concerns (the non-refoulement principle is not duly observed, returnees are immediately issued an expulsion order and routinely detained without considering their individual circumstances, *etc.*). The Hungarian Helsinki Committee has prepared a short information note in order to raise awareness about the seriousness of the situation and to urge national Dublin units and courts to carefully examine the conditions returnees would face in Hungary before actually deciding on the return.[35] The current situation leads to an improper application of the Dublin Regulation and to the serious violation of asylum-seekers' human rights.

Fifth, it is of course right that in an ideal world, people would be able to access protection in any country of their choosing. But the reality, as enshrined in Dublin II, is far removed from this. What is needed therefore is a common European asylum system, which (i) does not define adequate protection by reference to those countries that have managed no more than reach minimum standards, but (ii) ensures that adequate protection is defined in terms of where people can access fair, humane and effective asylum systems, and (iii) are able to do so in whichever European country in which they choose to access protection. Until such time, however, what the Courts should do is ensure that the relatively few that do manage to get to a country in Europe where they can secure

library/asset/EUR27/001/2010/en/7ee79730-e23f-4f20-834a-deb8deb23464/eur270012010en.pdf> (accessed 3 January 2011).

35) *See Access to Protection Jeopardized: Information note on the treatment of Dublin returnees in Hungary*, December 2011, available at <www.unhcr.org/refworld/publisher,HHC,,,4f3e10ab2,0.html>.

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safety and security are given an impartial and fair hearing on the merits of their claim, so that those who need protection are allowed to stay and not subject to refoulement.

It is worth reminding ourselves, as the factual scenarios of the cases discussed below well attest, that those fleeing to the borders of Europe from war-torn and strife-ridden countries of Afghanistan and Iraq, and the regions of the Middle East and Africa, are often fleeing conditions of real persecution and ill-treatment. One may pause to recount that in my 2006 book I wrote that when it comes to the world's refugees "[n]ever in recent time has there been a situation in the democratic world that has more urgently needed brave moral leadership" and that "[i]n many cases from where refugees are fleeing resources have been pillaged and plundered for decades and the people are now being turned away" but that "[t]hey are fleeing from oppression and the oppression is poverty". Yet, even as "the hysteria over refugees reaches new heights" the fact remains that "[t]rained journalists rarely ask refugees what they are fleeing from" and "[t]he Press has consistently failed to report the very conditions and events that create refugees".[36] The fact is everyone has the right to claim asylum, wherever that may be, and this principle which was first enshrined in the United Nations Convention Relating to the Status of Refugees 1951,[37] created to guarantee people in Europe those rights after the atrocities of World War II, and extended thereafter by the 1967 Protocol to people in other countries around the world, has been replicated in one international instrument after another since then. Until conflict and persecution no longer exist, those rights must be upheld.

The case *Nasseri*[38] concerned an Afghan national who crossed into Greece in December 2004 and claimed asylum, but when that application was rejected on 1 April 2005, he entered the UK on 5 September 2005 concealed under a lorry. When detected he again claimed asylum.[39] Greece agreed to take him back, following a request from the UK government for his asylum claim to be determined there. The applicant resisted on grounds that there was a real risk that, if sent to Greece, he would be returned to Afghanistan to face inhuman or degrading treatment, contrary to Article 3 ECHR.[40] Lord Hoffmann highlighted that the duty to investigate possible claims of human rights infringements is part and parcel of the protection of a person's rights and that the Court will conduct an investigation which amounts to "a rigorous scrutiny of the claim" such that "unless a Member

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36) S. S. Juss, *International Migration & Global Justice* (Ashgate Press, London, 2006) preface at p. ix.
37) United Nations Convention Relating to the Status of Refugees 1951, available at <www.unhcr.org/3b66c2aa10.html>.
38) *Nasseri* [2009] UKHL 23 (6 May 2009), available at <www.bailii.org/uk/cases/UKHL/2009/23.html>.
39) *Ibid.*, at para. 2.
40) *Ibid.*, at para. 4.

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State has done so, it runs the risk of being held in breach".[41] Despite that there is, however, no guidance at the moment as to when or if the duty arises. There is no guidance on the nature of the duty, where the state risks being in potential breach of fundamental EU law rights, about how rigorous it should be in the steps that it takes. This is the main question that will be discussed in this essay.

4. Why 'Post-colonialism'? And Why Now?

'Post-colonialism' studies have grown from the experience of the interactions between European nations and the societies they colonised. On the advent of the First World War, European rule controlled over 85 per cent of the globe – a truly remarkable fact given the sway of great civilisations elsewhere. This was the apogee of the historical era of empires that extended well back to 1492 and extended over half a millennia. The overwhelming range, extent and duration of the European empire since then has led in our own times to a rising interest in post-colonial literature and criticism, and not least because of its just as sudden and rapid dissolution since the Second World War. Yet, the study of law has largely escaped the critique of post-colonialism. This too is remarkable. For post-colonial theory and critique has much to offer law. The formation of law especially as it applies to other people and societies has been all the more impoverished for the absence of this emergent new critical tradition which arose out of a historical event. The postcolonial period for the most part is now taken to describe the second half of the 20th century, as the period that followed the high water-mark of modern European colonialism. As a cultural critique it is opposed to imperialism and Eurocentrism. The value of the postcolonial critique lies in its inquiry into, and exposure of, the various power relations between those who colonised and those who were colonised. After all, the experience of colonisation was not just a one-way process. It not only colonised, but also in turn influenced the colonisers, forcing them to intellectually essentialise the 'Others' in the mind of the West. This paved the way to certain types of power relations that persist to this day. The study of law has yet to fully explore this phenomenon based on the notion of the 'Other'.

Post-colonialism is not in that sense an exercise in pure theory. It is a form of critical thinking. It is constantly evolving. It, moreover, develops through collective self-criticism. Its foundational text is Edward Said's seminal, and now celebrated, *Orientalism*, produced a generation ago.[42] This work rejected a banal tradition of simple anti-colonialism. Instead, it highlighted the violence of

41) *Ibid.*, at para. 15. Lord Hoffman relied on *Chahal* v. *United Kingdom* [1996] 23 EHRR 413, at para. 96 and on *Vilvarajah* v. *United Kingdom* [1991] 14 EHRR 248, at para. 108.
42) E. Said, *Orientalism* (Pantheon Books, 1978).

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colonialism in its various forms. The violence of conquest, plunder, material human exploitation, was as much a violence of the vice of the mind, as it was a physical violence of the subjection of the West's 'Others'. This kind of intellectual mind violence was the bedrock of its so-called 'civilizing mission', which in the end was just a form of racial oppression. In essence, it was an epistemic violence. It classified, discriminated, and differentiated, these 'Others' dividing them into hierarchies of people, while purporting to understand them in rational scientific ways. For Said, the epistemic base of imperialism lay in the distinctive colonial mind-set. Symbolic representations, of people, their culture, and their history, were produced by this mind-set. The era of the colonialisation of the West's 'Others' was characterised by these colonial representations. Refugee law can benefit from this critical form. Refugees face a violence of the vice of the mind in the way they are treated by the Dublin countries of the West. They are classified, discriminated and differentiated. For, they are the West's 'Others'.

Post-colonial critiques philosophy was used to highlight how domination worked. Michel Foucalt's philosophical theories had engaged with 'power', what it is, how it works, and how it defines and captures knowledge, so as to become the basis of social control. To that extent, Said's insights into post-colonialism provided us with a discursive formation in the Foucauldian sense. Such philosophical insights in the early 20th century enabled us to understand how we are being dominated. They did so by deconstructing the colonial discourse and entering into the colonial mind-set which was such a distinctive feature of a particular historical and cultural era of the West. As such, Said's work chimed perfectly with intellectual climate of the Anglo-American universities at the time, where the English and social science departments were embarking on post-structuralist and post-modernist theories and where Foucault and Derrida were becoming increasingly influential. Said's critique, and that of other post-colonial thinkers who followed in his wake, turned the cultural tide by providing a censure of the system of thought that underlay colonialism. It became possible to essentialise 'coloniality' as an invariant power configuration. That turning of the cultural tide, I would contend, has not yet taken place in international refugee law. The Dublin system provides that opportunity. It is time now to censure the system of thought that underlies it.

5. Asylum, Protection and Non-Refoulement

The relevant principles of refugee law that apply to 'Dublin Regulation' refugees are enshrined in a number of different sources of law. Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees is well known as containing the principle of non-refoulment of a refugee "to the frontiers of territories where his

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life or freedom would be threatened".[43] Article 78 of the Consolidated version of the Treaty on the Functioning of the European Union, requires the EU to develop a 'common policy on asylum' but one which requires "compliance with the principle of non-refoulement".[44] Articles 18 of the Charter of Fundamental Rights of the European Union (2000/C364/01), preserves of non-refoulment of a refugee "the right to asylum".[45] Article 19 states that "no one may be removed, expelled or extradited" to face "torture or other inhuman or degrading treatment or punishment". [46] Moreover, preambles (2), (4) and (15) to the Dublin II regulation are also significant. Recital (2) states that the "Common European Asylum System [is] based on the full and inclusive application of the Geneva Convention".[47] Recital (4) emphasises that the "method [used] should be based on objective, fair criteria both for the Member States and for the persons concerned".[48] Recital (15) draws attention to "the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the

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43) "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *See* Convention relating to the Status of Refugees, 189 UNTS 150, entered into force 22 April 1954, available at <www1.umn.edu/humanrts/instree/v1crs.htm>.

44) "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties." *See* Consolidated version of the Treaty on the Functioning of the European Union / Title V: Area of Freedom, Security and Justice, available at <http://en.wikisource.org/wiki/Consolidated_version_of_the_Treaty_on_the_Functioning_of_the_European_Union/Title_V:_Area_of_Freedom,_Security_and_Justice>.

45) "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')." *See* Article 18 of the Charter of Fundamental Rights of the European Union, <http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01000101.htm>.

46) "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." *See* Article 19 of the Charter of Fundamental Rights of the European Union, *ibid.*

47) Recital (2) recalls that the European Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, to ensure that nobody was sent back to persecution "i.e. maintaining the principle of non-refoulement ... Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals".

48) Recital (4) reads: "Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications."

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European Union".[49] Yet, as we shall see below, all these platitudes are routinely being flouted by member states as they contend with the arrival of asylum seekers from the major trouble spots of the world, namely, Afghanistan, the Middle East, and North Africa.

Nevertheless, it is worth acknowledging that the importance of all these provisions lies in the fact that they all guarantee the right of refugees not to be refouled. As is well-known, 'non-refoulement' is regarded by many now as a *jus cogens* of international law, a peremptory principle, and a fundamental law, such that it is 'compelling law'. It cannot be negotiated away. The Grand Chamber of the European Court of Human Rights in *MSS* v. *Belgium and Greece*[50] (application no. 30696/09) emphasised the ambit of the principle of non-refoulement in its judgment of 21 January 2011. The Court went so far to cite a note by the UNHCR declaring that:

> … The duty not to refoule is also recognised as applying to refugees irrespective of their formal recognition, *thus obviously including asylum seekers whose status has not yet been determined*. It encompasses *any measure attributable to a State* which could have the effect of returning an asylum seeker or refugee to the frontiers of territories *where his or her life or freedom would be threatened*, or where he or she would risk persecution. This *includes rejection at the frontier, interception and indirect refoulement*, whether of an individual seeking asylum or in situations of mass influx.[51]

The Advocate General in the decision of the Grand Chamber of the Court of Justice of the European Union (CJEU) in *NS* v. *Secretary of State for the Home Department* (*Principles of Community law*)[52] noted that "[o]ne of the greatest challenges in creating the Common European Asylum System is establishing a fair, but also effective distribution of the burden, associated with immigration, on the asylum systems of the European Union ('EU') Member States".[53] The judgment of the CJEU affirms, nevertheless, the fundamental principle that "[t]he Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted".[54] Indeed, the Court went onto say that "[c]onsideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that

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49) Recital 15 reads: "The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18."
50) *MSS* v. *Belgium and Greece*, *supra* note 9.
51) *Ibid.*, at para. 56, emphasis added.
52) *NS* v. *Secretary of State for the Home Department* (*Principles of Community law*) [2011] EUECJ C-493/10, 22 September 2011, available at <www.bailii.org/eu/cases/EUECJ/2011/C49310_O.html>.
53) *Ibid.*, at para. 1.
54) *Ibid.*, at para. 75.

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all participating states, whether member states or third states, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol and on the ECHR, and that member states can have confidence in each other in that regard".[55]

How is this 'confidence' to be achieved? How is it to be maintained? The answer lies in Article 3 of the Dublin II Regulation, which is integral to the CEAS, and what it provides is that:

> 1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.
> 2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. …

There is a tension between the seemingly mandatory language of Article 3(1) and discretionary derogation under Article 3(2). Can one really assume that the treatment of asylum seekers in all member states complies with the requirements of the Charter, the Geneva Convention and the ECHR? Or, does one just recite it as a *mantra* and step back? Plainly, not. There is a 'presumption' in Article 3(1) but it is not a 'conclusive presumption' which European Union law in any event precludes the application of. It is plain that for the system to be applied fairly and in good faith, member states may not transfer an asylum-seeker to the member state responsible within the meaning of the Dublin II Regulation where there are real and enduring deficiencies of asylum procedure. We may now turn to consider whether this thesis can be tested.

6. Three European Cases

Three landmark cases of recent years are noteworthy. *KRS* v. *United Kingdom*[56] of 2008 and *MSS* of 2011 are from the European Court of Human Rights ('ECtHR') and therefore not binding on the domestic courts in the UK. The third case, *NS* of 2012, is from the Court of Justice of European Union and is binding on the UK courts. Attempts have been made to apply them in an uncouth and inelegant way by British judges with limited success. *EM* (*Eritrea*) was decided by the Court of Appeal in October 2012 and permission has been granted for an appeal now before the UK Supreme Court. *Al-Ali* was decided in December 2012 and permission to

55) *Ibid.*, at para. 78.
56) *KRS* v. *United Kingdom* [2008] ECHR 1781.

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appeal has been granted by the Court of Appeal to hear this. These cases are considered below.

6.1. *KRS* v. *United Kingdom* (*ECtHR*)[57]

The first case of *KRS* v. *United Kingdom*[58] from 2008 concerned an Iranian asylum-seeker. He had first entered Greece. He then came to the UK and sought asylum, whereupon the Home Secretary proposed his return to Greece. The ECtHR noted seriously adverse reports on Greece's treatment of asylum-seekers and returnees, principally from the United Nations High Commissioner for Refugees, supported by reports from Amnesty International and from three non-governmental organisations including Greek Helsinki Monitor. Remarkably, however, it concluded that Greece's international commitment to the European asylum system and her presumed compliance with it afforded a complete answer. The UNHCR's position paper of 15 April 2008 had advised member states to suspend returns to Greece under Dublin II and to use their power under Article 3(2) to deal with these applications domestically. The ECtHR, while noting this, took the view that this had not displaced "the presumption … that Greece will abide by its obligations" under the material Directives. This was especially so given that Greece had no policy of refoulement to Iran and no block on access to its own courts.[59] Yet, the UNHCR had opposed this course of action. The ECtHR did not resile from the findings of the UNHCR report, "whose independence, reliability and objectivity are, in its view, beyond doubt".[60] The UNHCR in April 2009 pointed out that "the court in KRS had seemingly overlooked its other criticisms of Greece," and this "further intervention proved decisive,"[61] as is clear from the judgment of the second case decided by the ECtHR.

6.2. *MSS* v. *Belgium and Greece* (*ECtHR*)[62]

The year 2011 brought the second case of *MSS* v. *Belgium and Greece*.[63] This case concerned the return of an Afghan asylum-seeker, this time from Belgium to Greece, who claimed that he had fled Afghanistan after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul. In this, the Grand Chamber noted the

57) *Ibid.*
58) *Ibid.*
59) *EM* (*Eritrea*) *& Ors* v. *Secretary of State for the Home Department*, *supra* note 8, at para. 34.
60) *KRS* v. *United Kingdom*, *supra* note 55, at p. 17
61) *EM* (*Eritrea*) *& Ors* v. *Secretary of State for the Home Department*, *supra* note 8, at para. 36.
62) *MSS* v. *Belgium and Greece*, *supra* note 9.
63) *Ibid.*

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UNHCR's letter sent to Belgium in April 2009. Whereas, the Greek government set out to defend its record by placing reliance on the facilities provided by it for accommodation and finding work, the Court was not persuaded. First, the Court attached "considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection".[64] Second, it considered "whether a situation of extreme material poverty can raise an issue under Article 3 ".[65] Third, this was "an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity".[66] Fourth, the applicant, "spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live".[67] Fifth, what was most noteworthy was that, in the Court's view, "the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as that of the applicant".[68] Sixth, in fact, the Court was uncompromising in its view that "the Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece" and not least because "[t]he Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers".[69] Seventh, moreover, "the situation the applicant complains of has lasted since his transfer to Greece in June 2009".[70] Eighth, with this it was hardly difficult for the conclusion to be reached that "the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs".[71]

The Grand Chamber in 2011 was prepared,[72] notwithstanding *KRS* from 2008, to take the view that it was still possible at the date that case was decided to assume that Greece was complying with its obligations in the respects identified by the Fourth Section. But it decided that it was no longer the case. This is because in *KRS* from 2008 the Court considered that in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community directives laying down minimum standards for asylum procedures

64) *Ibid.*, at para. 251.
65) *Ibid.*, at para. 252.
66) *Ibid.*, at para. 253.
67) *Ibid.*, at para. 254.
68) *Ibid.*, at para. 255.
69) *Ibid.*, at para. 258.
70) *Ibid.*, at para. 262.
71) *Ibid.*, at para. 263.
72) *Ibid.*, at para. 353.

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and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with Article 3 of the Convention.[73] However, since then numerous reports and materials have been added to the information available to the Court when it adopted its *KRS* decision in 2008. These reports and materials, based on field surveys, "all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis."[74]

The Court also appears to have had before it evidence of structural deficiencies in the Dublin system. As it observed,

> [a]dded to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights.[75]

Therefore, "the general situation was known to the Belgian authorities" such that "the applicant should not be expected to bear the entire burden of proof. On the contrary, … the Aliens Office [in Belgium] systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception."[76] The result was that "at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him."[77]

6.3. NS v. *Secretary of State for the Home Department* (*Principles of Community Law*) (*CJEU*)[78]

The third case – which unlike the two from the ECtHR of *KRS* in 2008 and *MSS* in 2011 which are of persuasive authority – is that of the CJEU in *NS*, which was binding on the Court in *EM* in 2012. This case was concerned with the reception conditions for, and treatment of, asylum seekers within Greece when Afghan asylum seekers challenged their return to Greece. *NS* concerned applications by

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73) *Ibid.*, at para. 343.
74) *Ibid.*, at para. 347.
75) *Ibid.*, at para. 350.
76) *Ibid.*, at para. 352.
77) *Ibid.*, at para. 358.
78) *NS* v. *Secretary of State for the Home Department* (*Principles of Community Law*), *supra* note 52.

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two asylum-seekers, one against the United Kingdom and one against Ireland. The one against the UK was the claimant in the main proceedings. On his journey from Afghanistan to the United Kingdom, he had travelled through, among other countries, Greece, where he was arrested and fingerprinted on 24 September 2008. He did not claim asylum in Greece. Following detention in that member state, he was ordered to leave Greece within 30 days and was subsequently expelled to Turkey. Having escaped from detention in Turkey, he made his way to the United Kingdom, where he arrived on 12 January 2009 and applied for asylum on that same date.[79] Both claimants asked for a preliminary ruling on a series of questions. These questions concerned the interrelation between the seemingly mandatory language of Article 3(1) and discretionary derogation under Article 3(2). The issues raised can be summed up as follows: "[I]n deciding whether to exercise the power under art. 3(2) of the Dublin II Regulation to examine a claim which is the responsibility of another state, is a member state required to presume conclusively that the other state's arrangements are compliant with its international obligations, or is it obliged to examine whether transfer would bring a risk of violation either of Charter rights or of the EU's minimum standards?" The Court concluded that a presumption of compliance existed but was rebuttable.[80]

Yet, the bar that the Court set for a rebuttal was exceptionally high, because as it explained "[r]ebuttal, however, required proof that the receiving state was aware that there were in the state of first arrival 'systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers … [which] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment …'".[81] In the Court's view the discretionary power under Article 3(2) of the Regulation "[f]orms part of the mechanisms for determining the member state responsible for an asylum application".[82] It does not necessarily follow, however, that the Court was then correct in holding that that it must be assumed that the treatment of asylum seekers in all member states complies with the requirements of the Charter, the Geneva Convention and the ECHR.[83] The reason why the Court so held is perhaps explicable in its final ruling that "European Union law precludes the application of a conclusive presumption that the member state which article 3(1) of regulation number 343/2003 indicates as responsible observes the fundamental rights of the European Union".[84] So, the effect of this premise was that:

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[79] *Ibid.*, at para. 45.
[80] Parker J, in paras. 14–15 of his judgment in *EM*, offers a valuable explanation of the macro-policy underlying this approach.
[81] *NS* v. *Secretary of State for the Home Department* (*Principles of Community Law*), *supra* note 52, at para. 106.
[82] *Ibid.*, at para. 68.
[83] *Ibid.*, at para. 80.
[84] *Ibid.*, at para. 2 of their final ruling.

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> … Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of [the Dublin II regulation] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision [*viz* Article 4 of the Charter of Fundamental Rights of the European Union].

This conclusion arose from an analysis of *MSS.*[85] The CJEU concluded that the extent of Greece's default established in that case amounted to "a systemic deficiency", and then declared:

> 90. In finding that the risks to which the applicant was exposed were proved, *the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations* bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347–350).

7. *EM* (*Eritrea*) in the UK and the Emergent Difficulties[86]

In late 2012, the case of *EM* (*Eritrea*) *& Others*[87] before the UK Court of Appeal considered the cases of four Eritreans all of which raised one central question: is it arguable that to return any of the claimants to Italy either as an asylum-seeker pursuant to Council Regulation 343/2003 (better known as the Dublin II Regulation) or as a person already granted asylum there would entail a real risk of inhuman or degrading treatment in violation of Article 3 of the ECHR?[88] Sir Stephen Sedley sought to make sense of the existing European jurisprudence. Unlike the previous cases, this one did not concern Greece. It concerned Italy. Sir Stephen Sedley observed that two things could now be said of this jurisprudence,

> which for the present *has placed Greece outside the Dublin II system*. One is that the assessment of risk on return is seen by the Strasbourg court as depending on a combination of personal experience and systemic shortcomings which in total may suffice to rebut the presumption of compliance. The other is that in this exercise the UNHCR's judgment remains pre-eminent and possibly decisive.[89]

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85) *MSS* v. *Belgium and Greece*, *supra* note 9.
86) *EM* (*Eritrea*) *& Ors* v. *Secretary of State for the Home Department*, *supra* note 8.
87) *Ibid.*
88) Sir Stephen Sedley, *ibid.*, at para. 1.
89) *Ibid.*, at para. 39.

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What would the position be in relation to Italy? The answer to that question cannot be determined without a hard look at the cases.

With respect to the cases of all four Eritreans, the UK Home Secretary argued that there is a presumption of law and of fact that Italy's treatment of asylum-seekers and refugees is compliant with its international obligations; that the presumption is rebuttable; but that, in the absence in the present cases of a legally sufficient rebuttal, evidence of a real risk to the claimants of inhuman or degrading treatment in Italy cannot prevent their return. In rejecting the applications of the asylum-seekers before the UK Court of Appeal, the words of Sir Stephen Sedley, ruefully confirmed how high the threshold had been set in *NS*. His Lordship explained that "[t]he Court took care (paragraphs 81–2) to distinguish a true systemic deficiency from 'operational problems', even if these created 'a substantial risk that asylum seekers may … be treated in a manner incompatible with their fundamental rights'".[90] The suggestion that 'operational problems' in countries like Italy and Greece, which lead to clear violations of fundamental human rights, is acceptable so long as it is not tantamount to a systemic deficiency is in most cases a distinction without a difference. 'Operations' are part of a 'system' that is being made. The line between the two is so fine here that it is hardly worth drawing once it is acknowledged that violations of fundamental human rights are routinely taking place in some countries of the European Union in the treatment of asylum-seekers from the Middle East and North Africa.

This is also clear from a closer analysis of the judgment of Sir Stephen Sedley in ***EM*** because His Lordship went on to lament,

> It appears to us that what the CJEU has consciously done in NS is elevate the finding of the ECtHR that there was in effect, in Greece, a systemic deficiency in the system of refugee protection into a sine qua non of intervention. What in MSS was held to be *a sufficient condition of intervention* has been made by NS into *a necessary one*. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II.[91]

These remarks show how completely ineffective and illusory protection under Regulation 3(2) really is. *NS* has actually raised the bar even higher than what it was in *MSS.* It is now 'necessary' to show evidence of a 'systemic deficiency' which invariably can almost never be done when one is dealing with ostensibly democratic signatory countries to the major human rights treaties in the European Union. In the end, Sir Stephen Sedley could only say that "[w]e have no choice but to approach the present claims on the same footing. Although questions were raised in the course of argument as to whether the return to Italy of a claimant

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90) *Ibid.*, at para. 46.
91) *Ibid.*, at para. 47.

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already granted refugee status there would fall under Dublin II, the reasoning of the CJEU in NS plainly calls for a uniform approach to the present cases."[92] Yet, given that state bodies are bound by the jurisprudence of the European Convention of Human Rights, it is questionable whether the Courts do not have a choice.

The 2012 case of *EM (Eritrea) & Others*[93] concerned four claimants. Each of them show how facile the distinction between 'operational problems' and 'systematic deficiency' is in cases of this kind. Each argued that given that it was established by the Grand Chamber of the European Court of Human Rights in *MSS*[94] that because Greece was in systemic default of its international obligations, Belgium had breached Article 3 of the Convention by returning asylum-seekers there, the same can now be shown to be true of Italy, setting the United Kingdom in the same position as Belgium in *MSS*.[95] The facts of all four cases are relevant to the construction of the 'post-colonial refugee' and his/her determined effort to scale the walls of the citadel that is Europe. *EH* was an Iranian national, who having arrived in the UK via Italy, now resisted return on grounds that he will be subjected in Italy to inhuman and degrading conditions. The Court found that "[t]here is a great deal of evidence that EH is now severely disturbed and suffering from PTSD and depression, both of which require treatment".[96] *EM* was an Eritrean national, who was prevented from making an asylum claim in Italy by a corrupt official who demanded EUR 120 for processing of his application, with the result that being destitute, he travelled clandestinely to the United Kingdom, making a claim for asylum.[97] *AE*, however, was not a direct state persecution case. Her case helps demonstrate another facet of the 'post-colonial refugee'. She fled Eritrea because of ill-treatment from her husband and the inability of the Eritrean authorities to protect her. She was screened on arrival in Italy, placed in a hotel, interviewed and, after some three months, recognised as a refugee and granted a five-year residence permit. However, it was the subsequent violation of her fundamental rights in terms of lack of food, accommodation, destitution, and being repeatedly raped by a number of men who threatened her with reprisal if she

[92] *Ibid.*, at para. 48.
[93] *Ibid.*
[94] *MSS* v. *Belgium and Greece*, *supra* note 9.
[95] *EM (Eritrea) & Ors* v. *Secretary of State for the Home Department*, *supra* note 8, at para. 4.
[96] EH had initially arrived in Italy where he was fingerprinted, and thereafter left the country and made his way to the United Kingdom, where he applied for asylum on the ground that he had been tortured as a political detainee in Iran. When the Italian authorities were contacted and accepted responsibility for his claim under Dublin II whereupon the UK Home Secretary certified his claim as "clearly unfounded". *See ibid.*, at para. 15.
[97] He had left his country for fear of persecution as an Orthodox Pentecostal Christian, made his landfall on Lampedusa, where he was fingerprinted. When later these were found to correspond with fingerprints on record in Italy, the Italian authorities were asked to accept responsibility for his claim. When they failed to respond, they were deemed to have accepted responsibility, and so removal directions were set for his return to Italy, which he challenged. *See ibid.*, at paras. 16–17.

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reported them that led her to flee to the UK. There she claimed asylum, where the decision was made to remove her to Italy.[98] An even more interesting case was that of *MA*, another Eritrean woman. She actually acquired refugee status in Italy on grounds of persecution as a Pentecostal Christian. Later, her agent brought her three children to Italy to join her. Yet, despite being recognised as refugees, her family had to live on the streets, sleeping under bridges, lighting fires for warmth, and relying on charitable handouts for food, so that after three months she had to bring her children clandestinely to the UK.[99] The Court confirmed that her "account of the effects of her experiences is now supported by what appears to be cogent medical evidence",[100] even though she had "displayed considerable deviousness, lacerating her fingertips to prevent identification on arrival here and using a different name in Italy".[101]

The distinction between 'operational problems' and 'systemic deficiencies' was strongly contested by the claimants. Although the Home Secretary "put a substantial body of evidence before the court describing Italy's system for the processing, reception, accommodation and support of asylum-seekers and refugees",[102] the claimants argued that "it is not what happens in reality to a very considerable number both of asylum-seekers and of recognised refugees. In short, they say, Italy's system for the reception and settlement of asylum-seekers and refugees is in large part dysfunctional", and that anyone arriving or returned there "faces a

98) The accommodation that she was given with others, both men and women, was in crowded and insanitary premises which had to be vacated during the day. She was also given food vouchers which ran out. This left her dependent on charitable handouts. Then, after three months even this accommodation was withdrawn. Faced with a spell of living in cramped accommodation, shared with men, she left Italy and made her way to the United Kingdom. Some months later she was returned by the UK authorities back to Italy. In Milan, she found herself destitute. She lived in a squat where she was repeatedly raped by a number of men who threatened her with reprisal if she reported them. Having no money, she relied on charity for food. Eventually, she borrowed EUR 100 from a fellow Eritrean and made her way back to the UK, where she was detained on arrival, and a decision made to remove her again to Italy. She claimed this would violate her human rights. The Home Secretary certified her claim as "clearly unfounded". Notwithstanding the existence "of psychiatric evidence that AE was badly traumatised and suicidal at the prospect for return to Italy", the Home Secretary still rejected an application to use her discretionary power to transfer AE's refugee status to the United Kingdom and confirmed the decision to remove her to Italy. *See ibid.*, at paras. 18–21, especially para. 21.

99) The facts of this applicant are even more poignant. In the course of embarking in a lorry at Calais in the dark, she lost her eldest child, whose whereabouts are still not known, while the other two subsequently became settled in secondary and tertiary education in the UK and were both doing well. The Italian authorities did not respond to the UK request for assumption of responsibility, so they were deemed under Dublin II to have accepted responsibility for the entire family. Sir Stephen Sedley recounted how "[n]either child has any desire to be returned to Italy, with its associations of misery and hardship, and the mother is reportedly suicidal at the prospect of enforced return". *See ibid.*, at para. 28.

100) *Ibid.*, at para. 27.

101) *Ibid.*, at para. 27.

102) *Ibid.*, at para. 29.

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very real risk of destitution".[103] The legal position for the Court, however, was more complicated than simply having to find whether or not there was a triable issue on these controverting facts as alleged. This is because "it is the Home Secretary's case that none of this arises unless and until it can be shown that Italy is in systemic rather than sporadic breach of its international obligations".[104]

In *EM* the Court of Appeal was faced with a formidable argument on behalf of all four Eritrean applicants. It was argued that the "presumption of state compliance" can be rebutted by adequate "evidence of personal risk", predicated typically but not necessarily on that "person's own experience". Evidence such as a UNHCR report is simply part of a body of evidence which may legitimately go beyond what the High Commissioner reports. Given the apparent prevalence of the inhuman and degrading conditions described by the four applicants here, it is perfectly reasonable to infer that the Italian system, like the Greek, is not merely functioning erratically but is truly dysfunctional.[105] Sir Stephen Sedley strained to disagree. His Lordship held that there was in the objective evidence "a great deal of support to the accounts given by three of the claimants of their own experiences of seeking asylum in Italy". However, the question under the law as it now stood was not whether each of the four claimants faces a real risk of inhuman or degrading treatment if returned to Italy. If this was the question "their claims would plainly be arguable and unable to be certified. But we are unable to accept that this is now the law" because

> [t]he decision of the CJEU in *NS v United Kingdom* has set a threshold in Dublin II and cognate return cases which exists nowhere else in refugee law. It requires the claimant to establish that there are in the country of first arrival "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers … [which] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment …"[106]

As Sir Stephen Sedley explained, "the sole ground on which a second state is required to exercise its power under article 3(2) Regulation 343/2003 … is that the source of risk to the applicant is a systemic deficiency, known to the former, in the latter's asylum or reception procedures. Short of this, even powerful evidence of individual risk is of no avail." One is bound to say that this is most troubling. The suggestion that 'even powerful evidence' of fundamental human rights violations cannot prevent removal is a denial a refugee law and violation of the *jus cogens* of non-refoulement. It is nothing short of a travesty. This is because, as His Lordship went onto explain, "[t]he totality of the evidence about Italy" is such that it is

103) *Ibid.*, at para. 31.
104) *Ibid.*, at para. 32.
105) *Ibid.*, at para. 49.
106) *Ibid.*, at para. 61.

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"extremely troubling". The reason why the applicants could not succeed in their claims in this case, however, was that "[w]hile undoubtedly at a number of points it either overtly alleges or powerfully suggests systemic failure, it is neither unanimously nor compellingly directed to such a conclusion". This was despite the fact that "what amounts to a systemic deficiency must to a considerable degree be a matter of judgment, perhaps even of vocabulary" because on the whole "the evidence does not demonstrate that Italy's system for the reception of asylum seekers and refugees, despite its many shortcomings and casualties, is itself dysfunctional or deficient".[107]

8. Conclusion

Postcolonial theory has afforded us with valuable insights into the uses and abuses of power. Indeed, Joseph Stiglitz, a Nobel Prize Winner and former chief economist of the World Bank, has drawn an explicit parallel between International Monetary Fund policies and colonialism.[108] So, certain forms of colonialism are alive and kicking. They exist in refugee law when the Dublin countries decide to keep refugees out. This is all too frequently not recognised when international refugee law is presented by the West as a human rights endeavour. The central axioms of post-colonialism, such as 'elitism' and 'Eurocentrism', are now so much in vogue in popular culture as to have become mainstream. In the social sciences, at any rate, they have gained universal acceptance. Yet, they were once seen as key militant hypothesis and openly regarded as subversive. Post-colonial theory now finds itself in environmental studies, religious studies, visual studies, media studies, linguistics, among others. New synergies in interdisciplinary studies have been developed. The one exception to this intellectual development has been the study of law. This is curious to say the least. Given that post-colonial criticism prioritises and privileges approaches 'from below' to confront issues such as ethnic relations, gender, global poverty and third world migrations, it is surprising indeed that little has been done to locate the 'post-colonial refugee' in such critiques. This is why it is time now to apply the concept of the 'post-colonial refugee' to the Dublin II Regulation.

What the Dublin II Regulation system is in this context is a supremely important example of post-colonialism at work in modern refugee law. This is because what is avowedly unique about EU asylum law is its pretence (not to say conceit) in presuming that all European Union states have effective asylum procedures.

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107) *Ibid.*, at para. 63.
108) J. Stiglitz, *Globalisation and its Discontents* (W.W. Norton, New York and London, 2002). *See also* the book review at <www.politicalaffairs.net/book-review-globalization-and-its-discontents/>.

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Although, technically this presumption is rebuttable in individual cases, it is clear that in reality it often is not. The reason is simple. If the presumption could be rebutted it would drive a coach-and-horses through the responsibility-sharing artefact of the Dublin system. European burden-sharing would disintegrate. If that happens, then EU asylum law would disintegrate. It ceases to be something unique and special – something that is the signal achievement of Europeans, which only they managed to achieve. The Advocate-General in the CJEU in *NS* was entirely aware and deeply conscious of this threat to the Dublin system of asylum-determination. He therefore installed 'systemic deficiency' as a benchmark to be satisfied every time and in each case, even though it made nonsense of the doctrine of non-refoulement in asylum law. Sir Stephen Sedley in the Court of Appeal in EM (Eritrea) had to say in these circumstances that "the sole ground on which a second state is required to exercise its power under article 3(2) Regulation 343/2003 … is that the source of risk to the applicant is a systemic deficiency, known to the former, in the latter's asylum or reception procedures".[109] Yet, the assertion is not free from difficulty.

This is because the observation in the next breath that, "[s]hort of this, even powerful evidence of individual risk is of no avail"[110] cannot be right, because it is arguable that even in strict European law terms, this is contrary to law. The Court of Appeal's narrow interpretation of the *NS* judgment fails adequately to acknowledge the absolute nature of the non-refoulement principle, as provided in Articles 4 and 19 of the Charter of Fundamental Rights of the European Union (2000/C364/01). Article 4 carries the prohibition that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 19(2), as we have seen above provides for protection in the event of removal, expulsion or extradition, and states that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

Second, and in any event, this position is far from true under European human rights law, as administered by the Strasbourg Court, which protects the right to be free from inhuman and degrading treatment under Article 3 of the ECHR in a removal case. The fact is that if in Italy (or in Greece for that matter) there was indeed "powerful evidence of individual risk" to a person who risked being refouled to a place where his life or freedom stood to be infringed, then there is a duty on courts to examine that risk and to prevent the return of a person to Italy. No supra-national or domestic court in Europe can escape from the dictates of human rights law. If the truth be told, the reality is that the Dublin Regulation II system is falling apart. The 'systematic deficiency' that is being talked about here

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109) *EM (Eritrea) & Ors* v. *Secretary of State for the Home Department*, *supra* note 8, at para. 62.
110) *Ibid.*, at para. 62.

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with respect to countries like Greece and Italy is known to all member states. What the courts are engaged in is a form of sophisticated casuistry, designed to prop up a crumbling edifice by giving it a semblance of effectiveness.

Third, this is clear from the fact that even though the *NS* and *EM* judgments endorse the need for 'systemic deficiencies' to be demonstrated in a state system, the CJEU has not as yet clarified precisely what type, nature or degree of breaches of fundamental rights could give rise to a duty not to return or refoule, such that a receiving state would then have to accept responsibility for a claim made before it. While it is true that not *any* breach of the EU *acquis* – as that which has been agreed upon as the accumulated legislation, legal acts, and court decisions comprising what is European Union Law – would suffice, it has not been made clear what would, and there is room here for further interpretation. The same goes for a fundamental right. Not every breach here would suffice, but it has not been made clear what would.

Fourth, and furthermore, there is the whole question of what implications the Charter holds for the application of the Dublin system. This includes Article 18 which, as we saw above, preserves the 'right to asylum' not only under the 1951 Refugee Convention, but also under the treaties of the European Union. The Court in *NS* did not grapple with this question (although this question was put before it in the preliminary reference), but it will need to be examined at some point, and hopefully the UK Supreme Court will deal with this. What is clear is that the problems will not go away. Indeed, they become ever more compelling. Shortly after *EM* (*Eriteria*) was decided in October 2012 by the UK Court of Appeal, the case of *Al-Ali*[111] was determined by the UK High Court on 4 December 2012. What was different in this case, from the cases of *NS* and *EM* (*Eriteria*), was that, unlike in those cases, here the claimant was actually refouled by the Netherlands back to Kuwait in November 2010. It was therefore argued on his behalf that his own individual history and circumstances of demonstrable failure of protection in a Dublin State require exercising the discretion under Article 3(2) of the Regulation, without any need to demonstrate or rely upon any systemic flaw or deficiency.[112] The claimant, who originated from Kuwait, claimed asylum in the Netherlands. Before his asylum claim was adjudicated upon or otherwise determined, a sergeant on behalf of the Commander of the Royal Military Police ordered him to leave the Netherlands within 24 hours. The claimant went into hiding but about three weeks later did travel from the Netherlands back to Kuwait. He claimed then to have been ill-treated there. In April 2011 the claimant arrived in the United Kingdom and made a further claim to asylum there. The Netherlands agreed to take the claimant back pursuant to the Regulation. Applying Article 3(1) of the Regulation the Secretary

111) *Al-Ali* v. *SSHD*, *supra* note 11.
112) *Ibid.*, at para. 2.

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of State for the Home Department wished to remove the claimant there. But the claimant resisted return on grounds that he had already been forced to return to Kuwait from the Netherlands and would be again.

In *Al-Ali*[113] Mr. Justice Holman determined the matter in a way that augurs well for the future and helps demonstrate why the current state of the law, with its blatant disregard of the prohibition against non-refoulement, is no longer sustainable. Faced with the argument from the UK government, (which was based on Sir Stephen Sedley's lament that "even powerful evidence of individual risk is of no avail"), that the Court is precluded from "consideration of individual risk even of refoulement as a bar to transfer under article 3(1)", Mr. Justice Holman observed that "[r]efoulement is, of course, of the utmost gravity."[114] He robustly held that "[i]t is certainly a factual distinction that the present claimant was actually refouled … and by peremptorily requiring the claimant to leave when he had nowhere else to go the Netherlands did effectively refoule him. Since the overarching guarantee, in support of which the CEAS and Dublin II are a mechanism and machinery, is not to be refouled, I am prepared to assume (without so holding) that neither the CJEU nor the Court of Appeal were contemplating a (claimed) history of actual refoulement when they used the language that they did."[115] Mr. Justice Holman went further. His Lordship declared that,"the history of this case necessarily calls for some investigation and explanation" because "unless and until it is investigated and explained, it would not be possible to discern whether the experiences of the claimant were individual, or whether they evidenced systemic deficiency. Was he required to leave because of some error? Or might it have been because, for example, of some systemic bias in the Netherlands against Kuwaiti Bidoons?"[116] With this the Court ruled that the claimant here cannot be transferred under Article 3(1) of Dublin II in the absence of a sufficient explanation of why he was refouled. Unsurprisingly, this case too has been appealed – this time by the government.

So, we are left with the question: how is justice to the 'post-colonial refugee' to be meted out? I suggest the following tentative solution. First, if it is clear that transfer to a Member State responsible within the meaning of the Dublin II regulation will mean that the asylum-seeker will face a real risk. This risk will be either of inhuman or degrading treatment in that other Member State, or a risk of refoulement (whether formal refoulement or constructive refoulement) to the country from which the asylum-seeker originally fled, and where he would face such risk–be that country Afghanistan, Iran, Kuwait, Eritrea or elsewhere.

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113) *Ibid.*
114) *Ibid.*, at para. 60.
115) *Ibid.*, at para. 62.
116) *Ibid.*, at para. 63.

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Second, in relation to the issue of EU law, what is the scope of the protected rights? In particular, is their scope wider than that of the ECHR? These questions bear thinking about because it is likely that the asylum-seeker's transfer to a member state responsible within the meaning of the Dublin II regulation would give rise to a real risk of a breach of his fundamental rights under the Charter of Fundamental Rights and Freedoms such as the right to dignity (Article 1), to asylum (Article 18) and to a fair trial and effective remedy (Article 47). Third, there are two further issues of EU law: (i) from the individual's point of view, is there a duty to consider evidence of potential breaches by a third country of its obligations under EU law before removal? (ii) On the other hand, from the removing state's point of view, is there a '*conclusive*' presumption that the third country does comply with those obligations? In any event, should those matters, be dealt with before or after removal to the third country? The cases discussed in this article surely point to the conclusion that the removing state should be required to take evidence about such prospective breaches into account before it decides whether to exercise the power under Article 3(2) of the Dublin II Regulation to consider the individual's asylum claim in the UK. If indeed, removal would give rise to a real risk of such breach, then the removing state is required so to exercise this power.

Ultimately, what I hope this essay also makes clear is that it is wrong to say that just because the Dublin II Regulation depends for its effectiveness upon member states enforcing minimum standards that they must be presumed to do so. All that the Dublin II Regulation does is assume that member states apply minimum standards, but that, where they do not, the potential removing state under the Dublin II Regulation is required to exercise its power under Article 3(2) by exercising a discretion to ensure that the individual's fundamental EU law rights are protected – this is what the German Administrative Court in Frankfurt has already done in *Transfer of Asylum Applicants to Greece*.[117] That is the way in which justice can be brought closer home to the 'post-colonial' refugee.

[117] *See 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* (UNHCR, Brussels, 16 June 2010) available at <www.unhcr.org/refworld/pdfid/4c18e6f92.pdf>.

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