UACES 42nd Annual Conference

Passau, 3-5 September 2012

www.uaces.org

Paper for the UACES 42nd Annual Conference 'Exchanging Ideas on Europe 2012 Old Borders - New Frontiers'
3-5 September 2012, Passau, Germany

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Co-authors:

Dr Francesca Ippolito
Lecturer in International Law and EU Law
Faculty of Politics
University of Cagliari, IT
Email: francescaippolito@unica.it

Dr Samantha Velluti
Reader in EU Law
Lincoln School of Law, UK
Email: svelluti@lincoln.ac.uk

Title: 'The Common European Asylum System: Reform through the European Courts?'

Abstract

On the basis of a comparative analysis of a series of key asylum cases, the paper seeks to critically examine the jurisprudence of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) vis-à-vis the European Convention of Human Rights (ECHR) and the EUCFR (including the meaning, purpose and scope of the so-called "horizontal clauses") in order to determine the level and standard of asylum-seekers' fundamental rights protection in Europe.
Through the "lens" of asylum and examining the legality of and compatibility with the ECHR of such instruments such as the Dublin II regulation, [1] the Qualification, [2]

[1] Council Regulation 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 State by a third country national, OJ L 50/1, 25 February. 2003.

[2] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30 September 2004 (as amended by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries

Asylum Procedures[3] and the Reception Conditions Directives, [4] the paper intends to unravel the complex and evolving constitutional relationship between the EU and the overall system of the ECHR from the perspective of effective legal and judicial protection of fundamental rights.

The paper concentrates largely on the ECHR and the EUCFR, which provide the basis for the jurisprudential analysis of asylum cases carried out in subsequent sections. The paper then puts forward some tentative conclusions on what the implications may be for the further development of the Common European Asylum System (CEAS).

Asylum and fundamental rights in Europe

In the context of the CoE, the ECtHR has provided extensive protection to those individuals whose situation falls outside the scope of the 1951 Geneva Convention.

Despite the fact that there is no right to political asylum to be found in either the European Convention or its Protocols, the ECtHR has repeatedly stated that in exercising their right to expel such aliens, Contracting States must take into consideration Article 3 of the Convention which provides a prohibition against torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct, however undesirable or dangerous. [5] In particular, cases concerning expulsion of an alien may give rise to an issue under this provision where there are substantial grounds for believing that the individual in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the recipient country. In such circumstances, the ECtHR clearly says that Article 3 implies an

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of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20.12.2011).

[3] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13, 12, 2005.

[4] Council Directive 2003/9/EC of 27 January 2003 laying down the minimum standards for the reception of asylum-seekers, OJ L 31/18, 6 February 2003.

[5] See *e.g. Cruz Varas and Others v Sweden* [1991] 14 EHRR 1; *Vilvarajah and Others v the United Kingdom* [1991] 14 *EHRR* 248; *Chahal v the United Kingdom* [1996] 23 EHRR 413; *Saadi v Italy* [2009] 49 *EHRR* 30.

obligation on the Contracting State not to expel the individual to that country [6] thus applying the *non-refoulement* clause contained in Article 33 of the Geneva Convention as well as, at the same time, providing broader scope of protection than the latter. The message the ECtHR is giving is that Article 3 ECHR provides a more stringent prohibition of *refoulement* than that of the Geneva Convention. Moreover, the European Convention requires that decisions be in accordance with the law, both national, international and European, which for EU Member States also includes EU law. In particular, Article 53 ECHR provides that 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.'

However, the ECtHR has also equally stated that it does not have the power to give a ruling on whether a Contracting State has acted in conformity with its obligations under other international human rights treaties. The European Court will only do so indirectly, that is, only in circumstances where it has to establish whether there has been a breach of the rights guaranteed under the Convention. [7] In *N.A. v. the United Kingdom*, [8] the ECtHR has stated that according to Article 19 ECHR its role is that of ensuring the observance of the Contracting Parties obligations under the ECHR and not to apply directly the level of protection granted by other international human rights instruments.

In the section examining the case law of the Strasbourg Court, we will be examining in detail this approach of the ECtHR in the context of EU asylum with particular regard to the Qualification Directive [9] and the Dublin II Regulation. [10]

With the entry into force of the TL in 2009, the EUCFR acquired the same legal status of the EU Treaties with the effect that the EUCFR has become legally binding for all the EU institutions, bodies and agencies and for the Member States' actions within the scope of EU law. Article 6 (1) TEU provides that: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of

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[6] See *e.g. Salah Sheekh v Netherlands* [2007] 45 *EHRR* 50.

[7] See e.*g.* see *KRS v United Kingdom* Application No 32733/08, Decision 2 December 2008.

[8] *NA v United Kingdom* Application No 25904/07, Judgment of 17 July 2008.

[9] See, supra n 8.

[10] See, supra n 9.

the European Union …, which shall have the same legal value as the Treaties.' In this way, Member States have unequivocally shown a willingness to place the respect of fundamental rights at the heart of the EU system.

As mentioned by Guild until the adoption of the EUCFR we were accustomed to understanding the protection of fundamental human rights as belonging to two separate universes: on the one hand, that of national constitutional settlements and, on the other hand, that of international, including regional, human rights instruments. [11] With the entry into force of the Lisbon Treaty, the entitlement to rights no longer depends on either national constitutional settlements or on international human rights treaties (with all the difficulties attendant on accessing those rights). [12]

The EUCFR provides that in so far as it contains fundamental rights that correspond to those provided by the ECHR, the meaning and scope of the EU Charter's rights shall be the same as those of the ECHR rights (Article 52(3) EUCFR). Hence, the meaning and scope of those fundamental rights that are already guaranteed by the ECHR must necessarily comprise the ECtHR jurisprudence. However, Article 52(3) EUCFR does not prevent Union law from providing more extensive protection and consequently the ECHR constitutes a "floor" rather than a "ceiling" for EU human rights law.

This horizontal clause of the EUCFR [13] clearly has significant implications not only for the law and policy development of the CEAS but also, and most importantly, for the relationship between the ECJ and the ECtHR. Significantly, as pointed out forcefully by the Commission, the Charter not only applies to the internal policies of the EU but also to their external ones.[14]

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[11] Guild, 'Fundamental Rights and EU Citizenship', Global Jean Monnet/European Community Studies Association World Conference on *The European Union after the Treaty of Lisbon*, 25-26 May 2010 July 2010.

[12] *Idem.*

[13] For detailed analysis see, Weiss, 'Human Rights in the EU: rethinking the role of the European Convention on Human Rights after Lisbon', (2011) 7(1) *European Constitutional Law Review* 64-95.

[14] European Commission, Communication on *A Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573, Brussels, 19 October 2010; European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2010 Report on the Application of the EU Charter of Fundamental Rights*, COM(2011) 160 final, Brussels, 30 March 2011.

Article 52(3) was introduced in the EUCFR to avoid the risk of a reduction in the level and standard of protection already guaranteed by the ECHR and divergent interpretations by the ECJ and the ECtHR. However, this provision does not clarify which rights are equivalent to those in the ECHR, which is not set out in the Charter but in an explanatory memorandum commissioned by the Presidium of the Convention that drafted the Charter. As the Charter has been made formally legally enforceable, the list of corresponding ECHR/EUCFR may acquire a more authoritative status in the jurisprudence of the ECJ.

In addition, Article 52(3) EUCFR does not mention the relationship of the EUCFR with the jurisprudence of the ECtHR and thus it leaves the problem of the two-court system unresolved. As explained further below, the Strasbourg Court has already exercised some level of indirect control over the EU legal system through decisions concerning certain Member States, which are parties to the Convention subject to its jurisdiction. [15]

Finally, Article 53 EUCFR [16] (the general non-regression clause equivalent to Article 53 ECHR) has also been subject to criticism as it does not consider the substantive and procedural specificities and needs of the EU legal order. Some commentators have argued that it may undermine the supremacy of EU law by opening the door to possible Member States´ justifications to set aside EU norms whenever they are deemed to be in conflict with a higher standard of human rights protection under national constitutional orders. [17] Unlike other international human rights instruments which aim at complementing national systems of protection, the EUCFR is part of a

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[15] See *e.g. Cantoni v. France* [1996] Reports 1996-V; *Matthews v. The United Kingdom* [1999] 28 EHRR 361.

[16] Article 53 provides that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

[17] Carozza, 'The EU Charter of Fundamental Rights and the Member States, in Peers and Ward' (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Oxford: Hart Publishing: 2004), 35 at 45; Widmann, 'Article 53: Undermining the Impact of the Charter of Fundamental Rights', (2002) 8 *Columbia Journal of European Law* 342; Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? (2001) 38 *Common Market Law Review* 1171.

context, the Union context, which is constructed in conceptual terms as an autonomous legal order 'with an integrating vocation that tends to displace, by means of the principle of supremacy, the disparities between the Member States.'[18] However, the possibility of the EUCFR undermining the principle of supremacy seems highly unlikely despite the existing tension in para 3 of Article 53 EUCFR between preserving the autonomy of the EU legal order and Member States' fundamental constitutional provisions. According to Guild, the EUCFR is 'neither a national constitution nor an international human rights treaty. Instead it belongs to the EU legal order and depends for its interpretation and enforcement on the mechanisms of EU law [as per Article 51(1) EUCFR, authors' addition]. In this regard it imposes obligations on state authorities that are not amenable to modification by those authorities. Its definitive interpretation is the preserve of the ECJ, to which any national court can turn for assistance in interpretation. But that interpretation when provided is binding on both national administrations across the Member States and national courts.' [19]

It is noteworthy that already prior to the TL, at a time when the EUCFR was still a persuasive legal instrument for statutory interpretation, Advocate General (AG) Maduro in his Opinion in the Elgafaji case, [20] stated that the EUCFR had a dual function: 'In the first place, it may create the presumption of the existence of a right which will then require confirmation of its existence either in the constitutional traditions common to the Member States or in the provisions of the ECHR. In the second place, where a right is identified as a fundamental right protected by the Community legal order, the Charter provides a particularly useful instrument for determining the content, scope and meaning to be given to that right.'

The EUCFR is not limited in its scope of application to Union citizens but also extends to third-country nationals (TCNs). The significant novelty of the EU Charter's provisions is that only a few provisions are limited to EU citizens, which are mainly to be found in Chapter 5. However, even in this chapter, there are very important rights

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[18] García, 'The General Provisions of the Charter of Fundamental Rights of the European Union', Jean Monnet Working Paper No. 4/02, http://www.jeanmonnetprogram.org/papers/02/020401.pdf at 22-23.

[19] See Guild, supra n 28.

[20] See Opinion of AG Maduro in Case C-465/07 *Elgafaji and Elgafaji* [2009] ECR I-921.

to which any person is entitled to. For example, Article 41 EUCFR contains a right to good administration and it provides that: 'every person has the right to have his or her affairs handed impartially, fairly and within a reasonable time by the institutions and bodies of the Union.' When referring to the institutions and bodies of the Union it also includes national authorities when they are carrying out EU law (as per Article 51 EUCFR). Consequently, asylum seekers can equally rely on Article 41 EUCFR for requesting that his or her claim be dealt with in an impartial and fair manner and within a reasonable period of time. This argument is further buttressed by the fact that asylum law and policy is now clearly within the remit of EU law. [21] By the same token, asylum seekers can also rely on Article 47 EUCFR, which provides for the right to an effective remedy and to a fair trial. It states that: 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article […] Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.' [22]

According to Article 51 EUCFR, its provisions are addressed to the Member States only when they are implementing EU law. The Charter does not extend the field of application of EU law beyond the powers of the Union, and it does not 'establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.' What this means, among other things, is that the issues of direct applicability of the EUCFR has to be settled in accordance with the same principles as EU primary law. In addition, the ECJ is called upon to interpret EU law in the light of the EUCFR, that is, within the limits of the powers conferred on it.

For example, Article 18 EUCFR states that: '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

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[21] *E.g.*, see the Qualification Directive 2004/83 and the Procedures Directive 2005/85.

[22] *E.g.*, C-175/08 *Abdulla v Bundesrepublik Deutschland* [2011] Q.B. 46. In this case the ECJ refers, among other things, to the respect of the rights protected in the EU Charter.

Union (hereinafter referred to as "the Treaties").' Gil-Bazo traces the roots of Article 18 EUCFR back to Article 14 of the 1948 Universal Declaration of Human Rights (UDHR). [23] By examining the Charter's travaux préparatoires and explanations drafted by the Presidium [24] as well as the constitutional traditions of Member States, she argues that the EUCFR seems to have gone beyond Article 14 UDHR and the right to be granted asylum has become a subjective and enforceable right the protection of which all individuals with an international protection need are entitled under the Union's legal order, provided that their protection grounds are established by international law, irrespective of whether they are found in the Refugee Convention or in any other international human rights instrument. [25] Peers argues that the right to asylum should be considered to be a general principle of EU law due to its recognition in many national constitutions. [26]

From the wording of the provision contained in Article 18 EUCFR it is clear to see that the right to asylum does not have autonomous legal content: pursuant to this provision the right to asylum has to be guaranteed within the legal framework of the Geneva Convention and EU law (including the rules of interpretation provided by Article 6(1) TEU, Title VII of the EUCFR and the case law of the ECJ). Consequently, Article 18 EUCFR cannot be interpreted as meaning that it produces direct effect and that it creates individual rights which national courts must protect, as the provision does not ensure a clear and unconditional right. What it means rather is its implementation is made conditional to the adoption of EU secondary legislation and/or measures enacted under national law.

Article 19 EUCFR is the other relevant provision for asylum seekers. According to the EU Charter's Explanations paragraph 1 of this Article has the same meaning and scope as Article 4 of the Protocol No 4 to the ECHR concerning collective expulsion. [27] Its purpose is to guarantee that every decision is based on a specific examination

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[23] Gil Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27(3) *Refugee Survey Quarterly* 33-52.

[24] European Convention, Draft Charter of Fundamental Rights of the European Union, Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels 11 October 2000, CHARTE 4473/00 CONVENT 49.

[25] *Ibid.*, 48 and 50.

[26] Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2011), p. 98.

[27] European Convention, supra n 41.

and that no single measure can be taken to expel all persons having the nationality of a particular State (see also Article 13 of the Covenant on Civil and Political Rights). Paragraph 2 incorporates case-law from the ECHR regarding Article 3 ECHR. [28] In particular, the prohibition of collective expulsion in international law is based on two basic principles, namely the prohibition of discrimination and the prohibition of arbitrariness.

Collective expulsion has been defined by the ECHR as any measure compelling non-nationals, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual member of the group. [29] The background to the expulsion has to be examined if there is doubt about a 'reasonable and objective examination of the particular case of each individual alien of the group.' [30] Hence, every decision to expel a person should be based on a specific examination and no single measure can be taken to expel all persons having the nationality of a particular State.

Article 19(2) extends the fundamental principle of *non-refoulement* (chiefly Article 33 of the Geneva Convention) to all cases of removal, extradition and deportation where a person would be sent to a country where there is a real risk of being executed, tortured or subjected to other inhuman or degrading treatment or punishment. While Member States retain the power to control the entry, residence and expulsion of non-nationals, [31] they are nevertheless bound by their obligation under Article 19(2) EUCFR, Article 3 of the Torture Convention, Article 33 of the Refugee Convention and Article 3 ECHR not to remove a person where they would face death, torture or other ill-treatment contrary to the above instruments. Furthermore, although Member States are not responsible for violations that occur outside their territory, to return someone to a place where there is a serious or 'real risk' that such ill-treatment would occur is itself deemed to be within the responsibility of the Member State. [32]

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[28] See *Ahmed v Austria* (1997); 24 EHRR 278; *Soering v United Kingdom* (1989) 11 *EHRR* 439.

[29] *Conka v Belgium* (2002) 34 *EHRR* 54.

[30] *Idem.*

[31] *Abdulaziz Cabales* and *Balkandali* v *United Kingdom* (*1985*) 7 *EHRR* 471.

[32] *Cruz Varas and Others v Sweden* [1991] 14 EHRR 1; *Vilvarajah and Others v the United Kingdom* [1991] 14 *EHRR* 248; *Chahal v the United Kingdom* [1996] 23 EHRR 413.

The ill-treatment feared as a consequence of expulsion [33] or extradition must be sufficiently serious to constitute a breach of the right against ill-treatment. Where the risk of ill-treatment is posed by non-state actors rather than the receiving state itself, it must be shown that the receiving state is unable or unwilling to provide protection to prevent the risk. [34]

The protection afforded by the ECtHR in cases concerning EU asylum law

In Europe the ECtHR and the ECJ have gradually established themeselves as the two key "regional refugee law courts." [35] Although the ECHR itself does not provide for asylum seekers based right, the ECtHR has held that 'in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct, however undesirable or dangerous. The expulsion of an alien may give rise to an issue under this provision, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country.' [36] Hence, it is in the context of Article 3 ECHR that asylum applications have been more frequently brought before the ECtHR.

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[33] *Cruz Varas and Others v Sweden* [1991] 14 EHRR 1.

[34] *HLR v France*, (1998) 26 *EHRR* 29.

[35] To date there has been no case brought before the International Court of Justice as provided for by Article 38 of the Refugee Convention.

[36] *Salah Sheekh v. the Netherlands,* application no. 1948/04, judgment of 11 January 2007, para 135. The application of Article 3 to asylum issues had already been specifically admitted by the Court in *Cruz Varas and others v. Sweden,* application no. 15576/89, judgment of 20 March 1991; *Vilvarajah and others v. the United Kingdom,* application nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991; *Chahal v. the United Kingdom,* application no. 22414/93, judgment of 15 November 1996 and *Amuur v. France,* application no. 19776/92, judgment of 25 June 1996. It has also been reaffirmed in *Saadi v. Italy,* application no. 37201/06, judgment [GC] of 28 February 2008 and in subsequently cases law.

However, this is not the only Convention article relevant to asylum questions. In particular, the processing of applications for asylum may also raise issues of return to face risks under Article 2 ECHR (right to life), Article 4 ECHR (prohibition of slavery, servitude, and compulsory labour), Article 5 ECHR (right to liberty and security of the person), Article 6 ECHR (right to a fair trial), Article 7 ECHR (prohibition on retroactive criminal punishment), Article 8 ECHR (right to respect for family and private life), Article 9 ECHR (right to freedom of thought, conscience, and religion), Article 10 ECHR (freedom of expression), Article 11 ECHR (freedom of assembly and association), Article 13 ECHR (right to an effective remedy)[37], Article 14 ECHR (prohibition of discrimination in the enjoyment of Convention rights), Article 4 of Protocol No. 4 (collective expulsion of aliens), Article 1 of Protocol No. 7 (procedural safeguards relating to expul- sion of aliens), Article 3 of Protocol No. 7 (exclusion of own nationals), Article 4 of Protocol No. 7 (prohibition on double jeopardy), Article 1 of Protocol No. 12 (general prohibition on discrimination) [38]. A violation of these conventional provisions may arise *ipso facto* because of national acts or omissions which are not in accordance with EU asylum law which are considered to provide the same level of protection of substantive and procedural rights as those of the ECHR. However, the EU legal framework for protecting asylum seekers still has significant limitations and weaknesses due to the attempt to strike a balance between the interests of the Member States and the protection of asylum seekers. Hence, what may occur and has in fact already happened is that, when a state has relied on relevant EU law provisions to justify the alleged violations of the ECHR the ECtHR has exercised indirect control over these EU provisions in order to identify any legislative gap and define the minimum standards of protection for asylum seekers and persons who are in need of international protection.

A direct control over EU primary law was originally declared inadmissible *ratione personae* by the former European Commission of Human Rights on the ground that the then European Community (EC) was not a party to the ECHR. [39] Even though

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[37] S*harifi and others v. Greece and Italy,* application no. 16643/09, communicated 13 July 2009; *Hirsi e Hussun and others v. Italy,* application no. 10171/05, decision of 11 May 2006.

[38] See for a detailed analsis of the cases-law N. Mole, *Asylum and the European Copnvention of Human Rights*, Strasbourg, 2000.

[39] ECtHR, *CFDT c. European Community*, Application 8030/77.

the EU has not yet acceded to the Convention, [40] such direct control was subsequently considered admissible in relation to those primary EC treaties over which the ECJ had no jurisdiction. [41] According to the theory of successive treaties, Member States should remain generally accountable for human rights violations caused by the laws of the EU. If this were not the case the guarantees of the Convention could be wantonly limited or excluded and thus be deprived of their peremptory character. On the other hand, in cases where the ECtHR assesses Member States' responsibility *ratione materiae,* there is a presumption that under EU law fundamental rights are protected in a way which could be considered 'equivalent' to that provided for by the Convention. It was at the time of *M & Co.*[42] that the ECHR started to develop this theory, recalled in *Heinz,* [43] where ECtHR was faced with a claim that a decision by the European Patent Office constituted an infringement on the right to property according to Article 1 of Protocol no. 1 and that Member States, having set up this institution, were thus in breach of their obligations according to the Convention. This was further developed in *Bosphorus,* [44] concerning an application brought by a Turkish airline charter company which had leased two aircrafts from a Yugoslav airline which were seized by Irish authorities in compliance with a UN resolution calling for sanctions against the former Republic of Yugoslavia and which had been implemented in the EU with Council Regulation 990/93 ordering the seizure of, among other things, aircraft 'in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia.' In the *Bosphorus* case the Strasbourg Court elaborated the concept of "equivalency" (of protection under EU law) referring to the idea of "comparable"

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[40] On the evolution of the ongoing process of adhesion of the EU to the ECHR see, for all, O. De Schutter , «L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme : feuille de route de la négociation », *Revue trimestrielle des droits de l'homme*, 2010, p. 535-571.

[41] ECtHR, *Matthews v United Kingdom* (Application n° 24833/94), para 32-33. Such a principle has been reiterated then in *Waite and Kennedy v. Germany,* Application n° 26083/94, para 67.

[42] ECtHR, *M & Co. v. Federal Republic of Germany*, Application n° 13258/87

[43] ECtHR, *Heinz c. Germania*, Application N° 21090/1994.

[44] ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim $irketi v. Ireland* , (Application N° 45036/98), paras 155-57

rather than identical level of protection of human rights. [45] Linked to these two concepts it also went on to develop the so-called notion of 'presumption of conventionality,' namely, once it is demonstrated that an equivalent protection is provided within an international organization, the presumption will be that a State has not departed from the requirements of the ECHR when it does no more than implement legal obligations flowing from its membership of the organization. Hence, in the *Bosphorus* judgment, the ECtHR not only confirmed the equivalent-protection doctrine but also recognized that, in principle, the protection offered in the EU system meets the requirement of equivalency and thus gives rise to 'the presumption of conventionality'. The consequence of the so-called 'Bosphorus test' is that if a Member State has no discretion in implementing the legal obligations deriving from its membership of the organization, it may escape the otherwise general responsibility for the acts and omissions of the international organization on which it has conferred powers. The only exception is where such presumption is rebutted on the basis that protection in a particular case may be regarded as 'manifestly deficient'. Therefore, the underlying message of the Strasbourg Court seems to be that while it is accepting the jurisdiction of the Luxembourg Court in relation to the protection of human rights, at the same time, it is not willing to fully renounce its jurisdiction.

In the context of asylum, when the ECtHR was faced with removals or returns under the Dublin Convention (now Dublin Regulation), it originally considered that, since it was not acceptable to place *automatic* reliance on the arrangements made under the 'Dublin system', the presumption must be that each Member State will abide by its obligations under the Council Directives 2005/85/EC (APD) and 2003/9/EC (Reception conditions) to adhere to minimum standards in asylum procedures and to provide for minimum standards for the reception of asylum seekers. In particular, in

[45] For a comment on this notion of equivalent protection in the Court's cases law see B. Conforti, *Le principe d'équivalence et le contrôle sur les actes communautaires dans la jurisprudence de la Cour européenne des droits de l'homme*, in S. Breitenmoser, B. Ehrenzeller, M. Sassòli, W. Stoffel, B. Wagner Pfeifer, a cura di, *Human Rights, Democracy and the Rule of Law*, Dike Verlag, Zurigo, 2007, 173 ff.

K.R.S. v. United Kingdom[46], concerning the Dublin Regulation alongside Member States' additional obligations under Council Directives 2005/85/EC and 2003/9/EC the Court stated that the system so created 'protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance.'

However, this presumption just like the presumption that remedies organized at EU level respect the requirements of ECHR (*Bosphorus*), is rebuttable in the framework of a "case by case" examination by the ECtHR. In 2011 among the 960 cases on the application of the Dublin II Regulation to asylum seekers, [47] this presumption was considered rebutted for the first time in the *M.S.S. v. Belgium and Greece* judgment. [48] In this case, the Court has stated that there should be a proper *ad hoc* assessment everytime there is a serious doubt for the sending State that the Procedures and Reception Directives are not being implemented effectively in the destination State to the extent that there are "major structural deficiencies"[49] in the

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[46] *K.R.S. v. United Kingdom*, Application no. 32733/08, 2 December 2008, available at: http://www.unhcr.org/refworld/docid/49476fd72.html [accessed 10 March 2011].

[47] See for example, *Ahmed Ali v. the Netherlands and Greece,* application no. 26494/09, *Djelani Sufi & Hassan Guduud v. the Netherlands and Greece,* application no. 28631/09, *Saied Ahmed v. the Netherlands and Greece,* application no. 29936/09, *Mohammed Jele v. the Netherlands and Greece,* application no. 29940/09, *Abwali v. the Netherlands and Greece,* application no. 30416/ 09, *Aweys Ahmed v. the Netherlands and Greece,* application no. 31930/09, *Mohamed Ilmi v. the Netherlands and Greece,* application no. 32212/09, *Yahia Yasir v. the Netherlands and Greece,* application no. 32256/09, *Moosa Mahamoud v. the Netherlands and Greece,* application no. 32729/09, *Alem Abraha v. the Netherlands and Greece,* application no. 32758/09, *Ali Elmi v. the Netherlands and Greece,* application no. 33212/09, *Nuur Haji v. the Netherlands and Greece,* application no. 34565/09, *Abshir Samatar v. the Netherlands and Greece,* application no. 36092/ 09, *Malaaq Showri v. the Netherlands and Greece,* application no. 37728/09, *N.I. v. Belgium,* application no. 51599/08, *K.R.S v. the United Kingdom,* application no. 32733/08, decision of 2 December 2008 (declared inadmissible) and *M.S.S. v. Belgium,* application no. 30696/09, *M.E.G. v. France,* application no. 42101/09. Before concerning the Dublin Convention see : *T.I. v. the United Kingdom,* application no. 43844/98, judgment of 7 March 2000.

[48] Note that in the first intervention of the ECtHR on behaph of the applicant it decided to refuse the provisional measures applied against Belgium under Rule 39 to prevent the return of the applicant to Greece, as it was confident that Greece would honour its obligations under the Convention and comply with EU legislation on asylum.

[49] *M.S.S.*, para 300.

asylum procedure and reception conditions for asylum applicants resulting in inhuman or degrading treatment. Hence, the presumption upon which the CEAS is based is no longer considered *per se* a sufficient basis for intra-EU transfers of asylum seekers: the *practical* implementation of protection standards by the Member State concerned must be verified first. The protection of human rights in the EU (and especially the protection against indirect *refoulement*), [50] therefore, was ensured on the basis of the application of a derogation clause provided by Article 3(2) of the Dublin Regulation rather than on the general rule established in the Dublin system. Consequently, the nature of the clause is basically changed from a residual guarantee of the national sovereignty of Member States to a necessary guarantee of the EU and international human rights. Looking at the practice cited in the Commission Staff Working Document accompanying the Recast proposal of the Dublin Regulation[51], it appears that the circumstances under which the sovereignty clause had been (reluctantly) used before that judgement range from purely practical reasons to humanitarian ones when a risk of violation of Article 3 and/or Article 8

[50] According to the ECtHR the *non-refoulement* obligation under Article 3 ECHR does not only cover direct *refoulement* to a country of persecution (as an absolute obligation already established in the cases *Soering v. United Kingdom* and *Chahal v. the United Kingdom*), but also «par ricochet» indirect *refoulement* which entails return to a country from where there is a risk of onward return to ill-treatment[50]. See *T.I. v. United Kingdom*, Appl. No. 43844/98, 7 March 2000, p. 15. The principle has been reaffirmed in *Salah Sheekh v. The Netherlands*, 11 Jan. 2007, para. 141; in *K.R.S. v. UK,* Application No. 32733/08, admissibility decision, 2 Dec. 2008, p. 16; and in *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 Sept. 2009, paras. 88–89. It should be noted that a violation of indirect *refoulement* can also be envisaged in other circumstances, unlike the non application of the sovereignty clause under Art. 3 (2) of the Dublin Regulation, such as when the State denies Dublin II's application and returns the asylum seekers to another Member State under the different basis of a Readmission Agreement – even if inconsistent with the terms of the Dublin II Regulation - as was the case between Italy and Greece in *Sharifi and others v Italy and Greece* (Application No. 16643/09). The Italian practice was *inter alia* based on a translation error in the Italian version of the Regulation. The authorities argued that the practice of sending asylum seekers directly to Greece was permitted under Article 3(3) which states that 'Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention'. However, while the authoritative English text refers to a "third country", i.e. to a country not bound by the Dublin Regulation, the Italian version omits the word 'third' - and Italy maintains this confers a right on Italy to send people without formalities to other Dublin participating States.

[51] SEC(2008) 2962

ECHR was ascertained; or where asylum legislation and practice does not offer sufficient safeguards to ensure that persons in need of protection have access to a fair and efficient asylum procedure; where inadequate reception conditions constitute inhuman treatment; where access to healthcare is lacking; where procedural guarantees under the Dublin Regulation were not respected; and where procedural guarantees of the right to asylum were violated. Moreover, the sovereignty clause has been used for humanitarian reasons when the application was lodged by particularly vulnerable asylum seekers such as unaccompanied or separated child asylum-seekers, single women, the elderly, and families with minors or persons with serious health concerns. The same can be said for cases where countries do not ensure reception standards in line with the UN Convention on the Rights of the Child and the EU Reception Directive; similar situations would contravene the principle of the best interest of the child.

Despite such important legislative gaps in the minimum standards of protection for asylum seekers have been clearly acknowledged in *M.S.S.* with the ECtHR underlying the need for a 'comprehensive reconsideration of the existing European legal regime,' [52] the EU legislator seems unwilling to tackle these gaps. In particular, the European Commission's proposal [53] - contrary to what it held in its Report evaluating the Dublin system-[54] still fails to better specify the circumstances and procedures for applying both the sovereignty and humanitarian clauses. According to new Article 31, where a Member State is concerned that another Member State is not providing claimants with the protection to which they are entitled under EU law (Article 31 specifically cites the Procedure Directive and the Reception Conditions Directive), it can only request the Commission to order a suspension of the transfer. Alternatively, the Commission would *motu proprio* base a decision to suspend transfers on 'an examination of all the relevant circumstances prevailing in the

[52] The Court stressed how such a needed on-going reform process of the CEAS' instruments was aimed in particular, "at substantially strengthening the protection of the fundamental rights of asylum seekers 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" (para 350).

[53] COM (2008) 820 final.

[54] COM (2007) 299 final.

Member State'. In this respect, the Commission will use any relevant information at its disposal regarding the reception capacity or the asylum procedures in the concerned Member State. [55] Moreover, the EU Council's recent amendments to the original recast proposal of the Dublin Regulation by the EU Commission see a progressive rejection of the idea of a mechanism to suspend transfers and use of an 'early warning mechanism' advantage which would not affect the application of the Regulation as such. [56]

What is interesting to note about the *M.S.S.* judgment, is that it illustrates how EU asylum law has gradually become increasingly relevant in the ECtHR's asylum case law even though it is not being implemented effectively by the Member States. The relevance of EU law is not new to the Court. In *Aristimuño Mendizabal v. France,* for example, it considered that the failure to issue the Spanish applicant with a residence permit as a citizen of another Member State for over fourteen years, thus interfering with her Article 8 ECHR rights, was not 'in accordance with the law' as it amounted to a breach of her EU law rights. In *Hornsby*, the Strasbourg Court indirectly condemned the non-execution of an ECJ judgment as being contrary to Article 6 of the Convention ruling that a refusal by a national court to use the preliminary reference procedure might violate the right to a fair trial under Article 6 of the Convention if such refusal appears to be arbitrary. In *Goodwin* v. *The United Kingdom, [57]* a case concerning transgender rights, the ECtHR (anticipating the ECJ) made reference to the EUCFR and, in particular, to Article 9 EUCFR, stating that unlike Article 12 of the Convention it does not refer only to men and women as partners in a marriage.

If the foregoing examples can be seen as different steps towards what Callewaert

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[55] See Comments of the European Commission on opinions of National Parliaments concerning COM (2008) 820, Reply of 7th October 2009 to Czech Senate COM20080815_0820_EN.pdf

[56] S. Peers, The revised 'Dublin' rules on responsibility for asylum-seekers: The Council's failure to fix a broken system (available at http://www.statewatch.org/analyses/no-173-dublin-III.pdf) refers to the Council as appearing "to have little regard for the case law of the European Court of Human Rights or the EU's Court of Justice, as regards the issue of suspending transfers in light of justified human rights concerns".

[57] *Goodwin* v. *The United Kingdom*, application n. 28957/95, para 100.

called the "unionisation" of the Convention, [58] *M.S.S.* may be said to represent the benchmark of a judicial "integrated European approach" developing a "European" *ius commune* so that EU accession to the ECHR constitutes the end result of a progressive intersection of the two systems. In fact, the EU asylum standards set out in the EU Procedures and Reception Directives have been used by the ECtHR in order to identify the lack of adequate protection *beyond* the traditional Conventional rights. In particular, the Strasbourg Court has relied on EU asylum standards to extend the notion of inhuman and degrading treatment to 'living conditions' of asylum-seekers, thus, into the area of destitution and poverty, [59] the 'particularly serious' deprivation of material reception conditions (including accommodation, food and clothing, in kind or in the form of monetary allowances) sufficient to protect the asylum seekers from *extreme* need provided by EU law and entered into positive national law.[60]

In *MSS*, failure by Greece to comply with the Reception Directive was somewhat influential in the Court's reasoning – independently of whether it was used as an aggravating factor [61] or as a determinant element of the decision. [62] On the contrary,

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[58] See J. Callewaert, '"Unionisation " and "Conventionalisation " of Fundamental Rights in Europe', in J. Wouters, A. Nollkaemper and E. De Wet (eds), *The Europeanisation of Public International Law: the Status of Public International Law in the EU and its Member States* (T.M.C. Asser Press, 2008), pp. 109-136.

[59] Para 250. However, the ECtHR had already communicated the *Budina v. Russia,* Application n° 45603/05, under Article 3 stating in as an *obiter dicta,* that State responsibility could arise for "inhuman and degrading treatment" where an applicant, *in circumstances wholly dependent on State support,* found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.

[60] Moreover, when the Court decided to refuse the application of provisional measures against Belgium under Rule 39 to prevent his return to Greece, it based its decision on its confidence that Greece would honour its obligations under the Convention and comply with EU legislation on asylum, asking the Greek government to inform the Court of the progress of any asylum claim made by the applicant in Greece as well as the place of detention, if he is detained on arrival in Greece. The Court thus made it plain that it regarded these provisions as relevant to the delivery of Convention rights.

[61] G. Clayton, *Asylum Seekers in Europe: M.S.S. v Belgium and Greece*, HRLR 11 (2011), 758-773, at p. 768 suggested that "compliance with the Reception Directive does not amount to a component of the right protected by Article 3, but rather is treated as an aggravating factor that compounded the systemic frustration of MSS's needs and increased his sense of lack of redress".

[62] According to Lavrysen the breach of the domestic provisions transposing the Reception Directive is

when the deprivation benefits accruing under the subsidiary protection status regulated by the Qualification Directive 2004/83/EC were considered, the Court stated that it was not its task to apply directly the level of protection offered in other international instruments. [63]

On the other hand, while recognizing the infringement of Article 13 ECHR, the Court has broadened the scope of the provision to the first stage of the procedure, since expulsion or the decision to expel (generally the object of scrutiny under article 13 ECHR) has not yet taken place. [64] It may be argued that if Article 13 ECHR is to be invoked solely on the basis of deficient procedures the ECtHR is *de facto* monitoring compliance with the Procedures Directive. It follows that the role of the ECJ as enforcer of the directives and regulations which form the CEAS seems at least partially to have been reduced in the light of the construction of a genuine 'European' system for the protection of asylum seekers.

The role of the ECJ in asylum cases after Lisbon: the importance of the EUCFR and its relationship with the ECHR

Prior to the TL, the ECHR was a source of inspiration for the ECJ in determining the content of EU fundamental rights guaranteed as general principles of EU law. As

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treated by the Court as critical to the finding of a breach. If that is the case, it might have a negative impact on the absolute character of Article 3 ECHR as for the specific reasons laid down in the Directive, there is the possibility for the State to deny reception facilities, see L. Lavrysen, 'M.S.S. v Belgium and Greece (2): The Impact on EU Asylum Law', 24 February 2011, available at: <http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece> [last accessed 30 September 2011].

[63] ECtHR, *Ahmed v. the United Kingdom* application n° 31668/05, decision (inadmissible*).* The decision is in line with the precedent *N.A. v. the United Kingdom,* application no. 25904/07 judgment of 17 July 2008, where the ECtHR already held that its supervisory role under Article 19 was confined to examining alleged breaches of provisions of the ECHR (e.g. in that case, Article 3) and therefore any submissions on EU asylum law (concerning the Qualification Directive 2004/83/EC) would remain outside the scope of examination. Moreover, the idea of inappropriateness of any opinion on the ambit or scope of EU law has been recently reaffirmed in *Sufi and Elmi* at para 225.

[64] *M.S.S. v Belgium and Greece* , qt., para 301. The Court requires there to be an opportunity for the asylum seeker to have a proper hearing of their objection to the Dublin transfer where Article 3 violations are anticipated.

seen above, [65] Article 52(3) EUCFR considers the ECHR as providing the minimum standard of human rights protection within the EU. In cases where the content of the right protected in both human rights instruments is essentially the same the ECJ has to follow the interpretation of the ECHR given by the Strasbourg Court. However, does the ECJ have to follow the same ermeneutic approach in cases where the content of the right differs?

The "constitutionnalisation" [66] of the material scope of the right to asylum in the EU by Article 18 EUCFR implies a consistent interpretation of EU asylum legislation. However, if we were to consider the EUCFR as a yardstick in the protection of fundamental rights in the EU, would the ECJ then, on the basis of the EUCFR, be developing progressive standards of human rights protection? It may be argued that this what happened in *Bolbol* [67] where the ECJ adopted an interpretation of Article 12 (1) (a) of the Qualification Directive which reproduces Article 1 D of the 1951 Geneva Convention and thus excludes from the scope of the Refugee Convention persons receiving protection or assistance from bodies or agencies of the United Nations other than the United Nations High Commissioner for Refugees (UNHCR), which is more generous to potential Palestinian refugee. [68]

The first reference to the EUCFR as a key human rights instrument for the interpretation of EU asylum *acquis* was made - even before the EUCFR acquired a binding status - in *Salahadin Abdulla and Others* [69] concerning the revocation by the German authorities of the refugee status of Iraqi nationals as a result of the change in the circumstances in Iraq. [70] Already in the *European Parliament v. the Council*

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[65] Section 2.

[66] Study for the European Parliament, *Setting up a Common European Asylum System, Report on the Application of existing instruments and proposals for the new system*, 2010, p. 430.

[67] See case C-31/09, *Bolbol*,not yet reported. For a comment see P.J. Cardwell, "Determining Refugee Status Under Directive 2004/83 : Comment on Bolbol (C-31/09)", *European Law Review*, 36(1), 2011, 135-145.

[68] In that case the Court followed the Opinion of Advocate General Sharpston which had disagreed with the interpretation of Article 1D put forward by the Office of the UNHCR. See Case C-31/09 Bolbol Opinion of Advocate General Sharpston 4 March 2010, para 38

[69] ECJ, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla & Others*, ECR [2009] I-1493

[70] ECJ, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla & Others*, qt.

case it was held that EU legislation should be interpreted in the light of the provisions of the Charter that the legislator referred to in the motivation of the legislation. [71] Hence, in *Abdulla* the ECJ, following the AG Opinion's, held that the Qualification Directive provisions 'must […] be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter.'[72] Such an approach has been reaffirmed in *Bolbol* and in Joined Cases *Germany v. B. and Germany v. D. and others*. [73] In the former case, the Grand Chamber of the ECJ held that by applying Directive 2004/83 in compliance with the EUCFR only those persons who have actually availed themselves of the assistance provided by UNRWA come within the exclusion clause in Article 12(1)(a). Persons, such as Ms Bolbol, a stateless person of Palestinian origin from the Gaza Strip who sought asylum in Hungary and who did not avail herself of protection or assistance from UNRWA prior to her application for refugee status, therefore, may have their case examined on an individual basis under Article 2(c) of the Directive. In *B and D*, the ECJ again interpreted the Qualification Directive in accordance with the EUCFR and held that a former member of a terrorist group is not automatically excluded from the status of refugee. The decision whether to grant refugee status is conditional on an individual assessment of the specific facts making it possible to determine whether there are serious reasons for considering that in the context of his activities within that organization, the person concerned can be held personally responsible for acts of terrorism. Such an individual assessment of responsibility has to be made in the light of both objective and subjective criteria. [74] To that end, according to the Court, and in line with the UNHCR Guidelines of 2003 the following considerations should be taken into account: 'the effective role of the asylum-seeker in the commission of the acts, his/her position in the group, the degree of consciousness he/she had or should have had about the activity of the group, eventual physical or mental constraint or

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[71] ECJ, 27 June 2006, *European Parliament against the Council*, C-540/03, ECR [2006] I-5769 , para 38

[72] ECJ, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, ***Salahadin Abdulla & Others*, qt., para** 54. And Opinion at para 49

[73] Joined Cases C-57/09 and C-101/09, *Germany v. B. and Germany v. D. and others*, **Unreported 17 June 2010, and** Opinion of Advocate General Mengozzi in Bundesrepublik Deutschland v B and D (Joined Cases C-57/09 and C- 101/09), 1 June 2010, para 78.

[74] *Ibid*., para 97.

the effective possibility for him/her to prevent the commission of the acts without any risk for his/her safety.' [75] However, if an asylum-seeker cannot be protected against *refoulement* in other ways, Member States may not exclude him/her from the refugee status except if he/she has committed a crime of exceptional seriousness. In any case, the Qualification Directive does not prevent a Member State from granting a protection status under its national law to someone otherwise excluded from refugee status by Article 12(2), as long as the applicant is not being granted such protection under the Qualification Directive.

On the contrary, in *Elgafaji* [76] no similar specification that the Directive must be interpreted in a manner consistent with the fundamental rights and the principles recognised by the EUCFR or even a mere reference to it, in particular to Article 18 EUCFR, is to be found. In this first important contribution of the ECJ to the development of the EU *acquis* in the field of asylum, the Court referred to ECHR and its case law, although mostly confirmatory of an EU fundamental right or principle determined through an *autonomous* interpretation of EU law. [77] In particular, using as a starting point a difference in content between the right in question and ECHR rights, both the AG and the judges adopted an autonomous interpretation of a provision of the Qualification Directive. While AG Maduro stressed the importance of

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[75] As pointed out by the Advocate General Mengozzi in his Opinion of 1 June 2010, the Court of Justice – in the different context of the public order's limit to freedom of workers – has suggested that "although a person's past association cannot, in general, justify a decision refusing him the right to move freely within the Community, it is nevertheless the case that present association, which reflects participation in the activities of the body or of the organization as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct". See Court of Justice of the European Union (ECJ), Case 41/74, *Van Duyn*, E.C.R. (1974), 1337, para 17.

[76] ECJ, *Elgafaji*, case C-465/07 ECR [2009] I-921

[77] According to Douglas Scott and Jacobs, the Luxembourg judges have not cited any other body of case law with such regularity. See: Jacobs, "Interaction of case law of the ECHR and ECJ: Recent developments" Strasbourg Seminar, Jan. 2005; Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis ' (2006) *Common Market Law Review* 619 See among others decisions ECJ, *Spector Photo Group NV e Chris Van Raemdonck v. Commissie voor het Baank, Financie en Assurantiewezen (CBFA),* case C-45/08, [2009] ECR I-12073 and ECJ, *ASML Netherlands BV v. Semiconductor Industry Services GmbH (SEMIS)*, case C-238/05, [2006] ECR I-12041.

an ‘independent interpretation’ of the EU provisions underlining that it would not be up to the Luxembourg judges to decide which of the dynamic interpretations of Article 3 ECHR proposed by the ECtHR prevails, [78] the ECJ reformulated the reference made by the national court and, starting from the opposite premise that Article 15(c) of the Directive was a provision, the content of which is different from that of Article 3 ECHR, [79] underlined how its interpretation ‘must be carried out independently.’ [80] The Court then went on to hold that the ‘individual threat’ would be violated where substantial grounds were shown for believing that a civilian, returned to the relevant country, would, solely on account of his presence on the territory of that country or region, face a real risk of being subjected to a threat of serious harm. In order to demonstrate such a risk the applicant is not required to adduce evidence that he would be specifically targeted by reason of factors particular to his personal circumstances. [81] Nevertheless, the ECJ considered that such a situation would be ‘exceptional’ in the context of such a high level of indiscriminate violence, concerning civilians coming from territories of armed conflict from which refuge is sought. [82] The more the applicant could show that he was specifically affected by factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection. [83] The reference in an *obiter dictum* to the ECtHR case of *NA v United Kingdom*[84] aimed to confirm that the right to subsidiary protection autonomously interpreted was *also* ‘compliant’ with ECHR

[78] Opinion AG Maduro, para 20.

[79] According to the Court “it is [. . .] Article 15(b) which corresponds, in essence, to article 3 of the ECHR”, while article 15(c) covers “more general risks of harm” than the “particular ones” article 15(a) requires the applicant to be “specifically exposed” (para 28).

[80] It seems that the Court transposes to the ECHR the approach proposed in *Opinion 1/91* [(1991) ECR I-6079] about the Agreement creating a European Economic Area (EEA), negotiated between the former European Community, its Member States and the countries forming the European Free Trade Association (EFTA). At para 14 in particular it stated that:“The fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically.”

[81] *Elgafaji*, para 35

[82] Ibid., para 39

[83] *Idem*.

[84] ECtHR, *NA v. the United Kingdom,* application n° 25904/07*,* paragraph 115.

rights. [85] In this case the ECtHR expressly considered its previous decision in *Vilvarajah* and stated that Article 3 ECHR should not be interpreted so as to require an applicant to show the existence of special distinguishing features if he could otherwise show that the general situation of violence in the country of destination was of a sufficient level of intensity to create a real risk that any removal to that country would violate Article 3 ECHR. In any event, the Court would adopt such an approach only in the most extreme cases of general violence where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return. For example, in *F.H. v. Sweden*, [86] concerning the application of asylum and residence permit of an Iraqi national who had left the country due to his fear of Saddam Hussein and his regime - the Court concluded that whilst the *general situation* in Iraq, and in particular in Baghdad, is insecure and problematic, it is not so serious as to cause *per se* a violation of Article 3 ECHR if the applicant were to return to that country. What had to be established rather was whether the applicant's personal situation was such that his return to Iraq would contravene Articles 2 or 3 ECHR. Similarly, in *Mawaka* [87] the Court said that 'the general situation in the Democratic Republic of Congo (DRC) at the present time certainly gives cause for concern [...], with the circumstances in the Kivu provinces in the north-east being particularly dire.' However, the Court noted that there was no reason to assume that the applicant would be expelled to the north-eastern part of the DRC, and held that the situation in the rest of the DRC was not one of such extreme general violence that there existed a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

The *ratio* of such an *obiter dictum* is probably the will to avoid conflicts of interpretations between the two European human rights jurisdictions. However, the ECtHR followed a similar approach in *Sufi and Elmi*, where it was called to examine whether there were substantial grounds for believing that the applicants, if deported

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[85] In para 44 the ECJ in an *obiter dictum* held the interpretation given in *Elgafaji* of the relevant provisions of Directive 2004/83 was fully compatible/compliant with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR, namely case *NA v United Kingdom*.

[86] ECtHR, *F.H. v. Sweden*, Application no. 32621/06 , 20 January 2009, paragraph 93.

[87] ECtHR, *Mawaka v. The Netherlands,* Application no. 29031/04, 1 June 2010, paragraph 41.

to Somalia, would face a real risk of being subjected to treatment contrary to Article 3 ECHR on account of the general situation of violence there. [88] Whilst starting by avoiding any potential conflict with the ECJ's ermeneutic approach, the ECtHR underlined that it was not persuaded that Article 3 ECHR, as interpreted in *NA,* did not offer comparable protection to that afforded under the Directive. In particular, according to the Strasbourg judges, 'the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there.' In any case, the consequence of such an interpretation by both Courts seems that the scope of Article 15(c) might remain unclear. Furthermore, as the ECtHR has identified some specific (albeit not exhaustive) criteria for assessing the level of severity of a situation of general violence that must be met in order to reach the threshold of a 'real risk', in the future it may be the ECtHR that might provide guidance for the assessment of applications for subsidiary protection as well as the impact on the application of the *Elgafaji*'s principle by domestic courts. [89]

In *Diouf*, [90] the ECJ relied once again solely on the EUCFR and in comparison with *Elgafaji* it also gave an even stronger autonomous interpretation of EU law. In this case the ECJ was asked whether Directive 2005/85 or the general principle of effective remedy under EU law as entrenched in Articles 6 and 13 of the ECHR requires an appeal against an administrative authority's decision on granting international protection in accelerated procedures. Following the Opinion of the AG who found that the EUCFR – namely Article 47 – provided more extensive protection than the ECHR, [91] the Court primarily considered the protection of rights from the

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[88] ECtHR, *Sufi and Elmi v United Kingdom,* Applications nos. 8319/07 and 11449/07.

[89] ECtHR, *Sufi and Elmi v United Kingdom, qt.,* para 241.

[90] ECJ, *Samba Diouf*, case C-69/10, ECR not jet published.

[91] AG Cruz Villalon contended in his Opinion that: "the right to effective judicial protection (…) has, through being recognised as part of European Union law by virtue of Article 47, acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once the right to effective judicial protection is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own. (…) European Union law (…) as a system of law, has given rise to the development of its own set of defining principles." (para 39).

perspective of the EUCFR and not the ECHR. In the Court's view, the conformity of Directive 2005/85/EC was to be evaluated with Article 47 CFREU and 'therefore, *indirectly*, with the minimum content of the right to an effective remedy as represented by the requirements of the European Convention on Human Rights.'[92] Despite the approach of both the AG and the ECJ, the statement that the lack of appeal proceedings against accelerated administrative proceedings is not precluded under EU law on the condition that the reasons which led to the decision to apply this procedure can be subject to judicial review (for example, the final decision rejecting the application) bears striking similarities with the legal reasoning of the ECtHR in *Jabary*. [93]

In *NS and ME* concerning Afghan, Iranian and Algerian asylum seekers who challenged their return from the United Kingdom and Ireland to Greece under the Dublin Regulation, the ECJ had the opportunity to clarify whether the protection afforded by the general principles of EU law and the rights set out in the EUCFR (specifically, in Articles 1, 18 and 47) was wider than that afforded by the ECHR (namely, Article 3 ECHR). [94] However, it remained silent on this point and did not follow its same progressive approach as in *Bolbol* concerning the Geneva Convention.

In particular, AG Trstenjak did not enter into the merit of whether the right to asylum under Art 18 EUCFR overlaps with Articles 1 and 47, as well as Articles 4 and 19(2), but stated that it is not to be subsumed into those rights; nor are they to be subsumed into Art 18 (contrary to the European Commission's approach). [95] The AG simply noted that the protection guaranteed by the EUCFR which overlaps with the ECHR must be no less than the ECHR in the light of the aim of Article 52(3) EUCFR

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[92] Ibid. para 34.

[93] ECtHR, *Jabari v. Turkey*, application n° 40035/98.

[94] ECJ, *N. S. v Secretary of State for the Home Department et M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10, Unreported.

[95] The UNHCR, in its oral submissions in joined cases C-411/10 and C-493/10 [Luxembourg June the 28th 2011], held that the content of article 18 EUCFR embraces (a) access to fair and efficient asylum procedures and an effective remedy (with appropriate legal aid); (b) treatment in accordance with adequate reception and (where necessary) detention conditions and (c) the grant of asylum in the form of refugee or subsidiary protection status when the criteria are met (para 13).

and that 'particular significance and high importance' had to be attached to the ECtHR case-law in connection with the interpretation of the relevant provisions of the EUCFR by the ECJ. [96] Moreover, the AG in this case referred to the dynamic reference to the ECtHR case law by article 52 (3) of the EUCFR in a different manner than AG Maduro in *Elgagaji* who avoided any reference to the ECtHR case law precisely because of the dynamic interpretation of the ECHR by the Strasbourg judges. The approach of the AG should be seen as being in line with the concept of autonomy of EU law and that of the ECJ thus underlining how the judgments of the ECtHR 'essentially always constitute case-specific judicial decisions and not rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter.' [97] Similarly, the ECJ also left the foregoing question on the scope of the right to asylum in Article 18 EUCFR unanswered as it only went on to uphold the responsibility of the sending state ex Art 3(2) Dublin Regulation for determining the claim when there are 'systemic deficiencies in the asylum procedure and reception conditions for asylum applicants' [98] resulting in inhuman or degrading treatment, within the meaning of Article 4 EUCFR. [99]

Moreover, in order to determine that the existence of systemic deficiencies in the asylum procedure and reception conditions for asylum applicants resulting in inhuman or degrading treatment form a basis for rebuttal of the presumption of equivalent protection, the ECJ referred to 'the extent of the infringement of fundamental rights described in *M.S.S. v. Belgium and Greece* [100] (thus, the absence of any guarantee that the asylum application would be seriously examined by the Greek authorities and the exposure of the applicant to conditions of detention and

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[96] AG Trstenjak Opinion of 22 September 2011 Case C-411/10, not jet Reported para 146.

[97] *Ibidem.*

[98] On the contrary, "serious" risks of infringements of individual provisions of the Common European Asylum System Directives in the Member State primarily responsible are not sufficient to create an obligation on the part of the transferring state to assume responsibility for the asylum examination, provided these infringements do not also violate the Charter rights of the asylum seeker to be transferred.

[99] ECJ, *N.S. and M.E.*, qt., paras 86 and 94.

[100] ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09.

living conditions that amounted to degrading treatment).'[101]

The concept of "substantial grounds for a real risk" has been embedded in the case law of the ECtHR, at least since *Soering* [102] and has continued to be applied in relation to Dublin returns, in *TI,* [103] *KRS* [104] and *M.S.S.* – here specifically rejecting the call by Belgium for "convincing" demonstration of risk and by the United Kingdom for a situation of wholesale exceptionality. An additional and endogenous notion to the EU legal order in assessing whether the national authorities of the sending State "knew or ought to have known" about the risk of ill-treatment in the country of destination would be the one recently proposed by the Meijers Committee. According to the said Committee, Member States should be obliged to report on the length of the procedure, the detention conditions and reception capacity in relation to the inflow of asylum seekers to the European Asylum Support Office (EASO) and the Commission statistical data (the Asylum Management Reporting System), on a quarterly basis. [105]

The forthcoming decision in *Puid* [106] will be the next testing ground for understanding whether the ECHR and its cases law will still be the benchmark for standards of protection of asylum seekers in the EU legal order. In fact, here it has been asked whether an enlarged hypothetical duty of the Member States to exercise the sovereignty clause (Article 3(2) Dublin Regulation) can also be inferred from reasons *not directly associated* with the asylum-seeker himself or other particularities of an individual case, but which result from a legal or administrative situation in the Member State assuming responsibility that pose a threat to the fundamental rights of asylum-seekers under the EUCFR.

It was in *M.S.S.* that the ECtHR, in assessing the risk of ill-treatment in the Member State responsible according to the criteria set out in the Dublin Regulation, found as

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[101] ECJ, *N.S. and M.E.*, paras 86 and 94.

[102] ECtHR, Soering v. United Kingdom, application n° 14038/88.

[103] ECtHR, *T.I. v. United Kingdom*, Application No. 43844/98

[104] ECtHR, *K.R.S. v. v. United Kingdom*, Appl. No. 32733/08

[105] Letter of 26 march 2012 from the Mejiers Committee to the EU Council on the proposal of the former Polish Presidency and the current Danish Presidency to install a process for early warning, preparedness and management of asylum crises (Council document 15055/11) in the recast of the Dublin regulation

[106] *Federal Republic of Germany v Kaveh Puid*, Case C-4/11.

mostly significant the general country's situation, rather than the individual circumstances of the asylum seeker. This has been the line of reasoning of AG Bot in the recent Opinion in the Joined Cases *Y and Z*. [107] The Court was asked whether and, if so, to what extent an act restricting freedom of religion and in particular the universal right of freedom of worship, is an 'act of persecution' within the meaning of Article 9(1)(a) of the Directive. The Advocate General proposed an interpretation which follows the ECtHR jurisprudence. [108] Thus, 'a severe violation of freedom of religion, regardless of which component of that freedom is targeted by the violation, is likely to amount to an "act of persecution" where the asylum-seeker, by exercising that freedom or infringing the restrictions placed on the exercise of that freedom in his country of origin, runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, of being reduced to slavery or servitude or of being prosecuted or imprisoned arbitrarily.' [109]

At present two pending preliminary references offer a new challenge for recognizing whether Article 18 EUCFR amounts to a free-standing right to asylum and whether a breach of such a right in cases of a transfer would not be avoided. In particular, in *Halaf* [110] the ECJ is being asked, *inter alia*, what the content of the right to asylum is under Article 18 EUCFR in conjunction with Article 53 EUCFR and in conjunction with the definition in Article 2(c) and recital 12 of Dublin II. Furthermore, in *K* [111] the Court will have to answer whether the sovereignty clause of Dublin II has to be applied beyond the risk of an infringement of Article 4 EUCFR, and, in the accessory interpretation and application of Article 3 or Article 8 ECHR (Article 4 or Article 7 EUCFR), if more extensive notions of 'inhuman treatment' or 'family' may, at variance with the interpretation developed by the Strasbourg Court, be applied.

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[107] Opinion of AG Bot in the Joined Cases C-71/11 and C-99/11 *Y and Z*, 23 April 2012.

[108] As in *Z* & *T v United Kingdom* (Application no. *27034/05*, 28 February 2006).

[109] Para 86.

[110] Case C-528/11, OJ C 370 from 17.12.2011, p. 18

[111] Case C-245/11, OJ C 269 from 10.09.2011, p.21

Conclusion

Asylum can no longer be considered solely a problem of management but also requires Member States to balance the achievement of efficiency in regulation with granting a set of basic rights.

With respect to fundamental rights, the adoption of the EUCFR and its subsequent ranking to the same legal status as the EU Treaties by the TL signifies an important step forward in protecting fundamental rights on a more universal scale. Entitlement to rights no longer depends on either constitutional settlements or on international human rights treaties. Indeed, the EUCFR is not limited in scope to Union citizens but also extends to TCNs and asylum-seekers can rely on most provisions of the EUCFR. In particular, the Charter with Article 18 EUCFR which provides for the right to asylum, that is, a subjective and enforceable right of individuals under the Union's legal order, may have the potential of ensuring a certain set of rights as well as strengthening the prohibition of non-*refoulement* under Article 19 EUCFR beyond that provided by Article 33 of the Geneva Convention and Article 3 ECHR. Hence, the EUCFR as a regional human rights instrument buttresses the protection of asylum in the international arena by bringing Europe into line with other regional developments that recognise not only the right to seek, but also the right to be granted asylum. [112]

With regard to EU asylum law, Article 78 TFEU constitutes an important legal basis for the creation of CEAS based on full and inclusive application of the Geneva Convention and, in particular, for the adoption of legislative measures in the field of asylum with the key inclusion of the European Parliament as co-legislator along the Council of Ministers thus ensuring the adoption of asylum measures in line with international human rights instruments. Moreover, the repeal by TL of old Article 68 EC and the extension of the ECJ's jurisdiction combined with the EUCFR may reinforce the judicial protection of asylum-seekers' rights. In addition, with the Stockholm Programme Member States have committed themselves to the further development of CEAS and, more generally, to safeguarding individual rights.

[112] See Gil-Bazo, supra n 40.

However, the paper has shown that there are also significant problems. The EUCFR can only be applied in the implementation of EU law and thus it is part of the Union context which is constructed in conceptual terms as an autonomous legal order aimed at integration and removing disparities between Member States through the principle of supremacy. Moreover, the horizontal clauses seem to contain contradictory provisions stating on the one hand that the EUCFR does not create any new power or task for the EU nor modify any existing task while on the other hand stating that Union law may provide further extensive protection than the ECHR. [113] The EUCFR is also silent on its relationship with the ECtHR jurisprudence leaving open the problem of the two-court system.

Added to this the legislative instruments adopted so far in the context of CEAS are themselves in breach or potentially violating fundamental rights and the adoption of the amending measures to remove the breach or, more generally, to ensure a more coherent commitment to the protection of human rights in the context of asylum is proving very difficult. As a consequence, the ECtHR has not shied away from adopting a more interventionist role in acting as a guarantor of human rights within the State parties to its conventional regime as confirmed by the *MSS* judgment which *de facto* has interrupted the system of transfers under Dublin II. The Strasbourg Court's findings mean that Member States can no longer take it as given that the system established by Dublin II absolves a sending state of responsibility for the procedure applied to asylum-seekers in the receiving state nor for their living conditions, nor that the receiving state's membership to CEAS entails that an asylum-seeker will be safe from *refoulement* there. In addition, in *Diouf* and *Elgafaji*, respectively, both the AG and the ECJ while formally endorsing the jurisprudence of the ECtHR clearly stress the growing centrality of the EUCFR as well as the interpretative autonomy of the ECJ almost implicitly suggesting that the EU legal order is – thanks to the changes of the TL- becoming a self-sufficient and closed legal system. Hence, whilst there certainly remains mutual respect for one another there is also a 'complex jurisdictional overlap […] linked to the fact that both courts are coming of age as European constitutional courts.' [114]

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[113] Compare Article 51(2) EUCF with Article 523) EUCF.

[114] See Douglas-Scott, supra n 112 at 660.

EU accession to the ECHR addresses all of the foregoing problems, particularly to remedy the present gap in the coordination of the two European supranational systems of human rights protection and to ensure external control in relation to the respect for fundamental rights within the EU's legal order, the ultimate goal being a more coherent system of protection of fundamental rights in Europe, namely, a European *ius commune* of human rights.

Hence the question remains: reform through the European Courts? Independently of these speculative conclusions, there is no guarantee or certainty that EU accession will actually happen. For the time being, what the paper has shown is that the EUCFR will increase in importance in the foreseeable future and the ECJ will rely on it more often in new asylum cases. At the same time, whilst the ECtHR seems keen to maintain a strong role as guarantor of human rights vis-à-vis the application of EU asylum law it also seems to be "borrowing" certain legal notions developed by the ECJ in its interpretation of EU asylum provisions.

Both the Luxembourg and Strasbourg Courts are showing a willingness to ensure further protection of asylum-seekers' fundamental rights thus sub-planting the legislative deadlock in the EU.

The question remains whether the objective of improving fundamental rights protection in the European legal space, that is progress, bodes well with the other equally important aim of avoiding open conflicts between the case law of the ECtHR and the ECJ on human rights issues, that is coherence, or whether the two objectives are conflicting ones and thus the achievement of one goes to the detriment of the other, as argued by Van de Heyning. [115]

[115] See Van de Heyning, 'Coherence and Progress in the European protection of human rights: friends or feuds?', paper presented at the Research Workshop, *A Europe of Rights: the EU and the ECHR*, School of Law, University of Surrey 8 and 8 June 2012.