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"Asylum and the evolution of international protection in Europe through the case law of the CJEU and the ECtHR"

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Introduction

The global refugee total had as of mid-2015[1], for the first time since 1992, surpassed the 20 million threshold[2] while an unprecedented record of 65.3 million people around the world according to the UNHCR in the end of the same year faced forced displacement compared to 59.5 million in 2014[3]. Not all of those persons forced from home of course are eligible to qualify for international protection – 21.3 million being already granted refugee status[4] – as internally displaced persons are included among this figure. What this figure does show however is the potential of a further increase with regard to the number of asylum seekers should these persons cross an international border owing to persecution. Further statistics are staggering. The number of asylum seekers has nearly doubled from 1.8 million in 2014 to 3.2 million in 2015.[5] According to the UNHCR, only 6 per cent of the aforementioned refugee population is hosted in Europe compared with 68 per cent of refugees being hosted in the Africa and the Middle East regions[6]. In fact, 9 out of 10 refugees are to be found in the global South, the leading countries in this respect being: Turkey, Pakistan and Lebanon[7]. Owing to the aforementioned interest and concern over asylum seeking and issues related thereto has risen.

Why specifically concentrate upon the European protection regime? Despite the aforementioned statistics, in the first half of 2015 Germany was the largest recipient of new asylum claims on a global scale, reaching 159.000 new applications, a figure which was close to the entire world total for the same period in 2014.[8] Beyond statistics indicating the trend for asylum seekers' desire to reach Europe and the significance of its protection regime as it stands in that respect, an analysis of the latter is also of interest and great importance from a legal perspective as well. Although the 1951 Geneva Convention and

[1] 2015 is the year up to which UNHCR statistics are available.
[2] http://www.unhcr.org/news/latest/2015/12/5672c2576/2015-likely-break-records-forced-displacement-study.html (accessed 7 January 2017).
[3] http://www.unhcr.org/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html (accessed 7 January 2017).
[4] http://www.unhcr.org/figures-at-a-glance.html (accessed 7 January 2017)
[5] http://popstats.unhcr.org/en/overview#_ga=1.3293174.753586905.1476184071 (accessed 7 January 2017).
[6] http://www.unhcr.org/figures-at-a-glance.html (accessed 7 January 2017).
[7] http://www.unhcr.org/global-trends-2015.html (accessed 7 January 2017).

1967 Protocol constitute the instrument setting on global scale the core principles upon which international protection is built, the International Court of Justice which is competent to deal with the settlement of interstate disputes relating to its interpretation or application[9] has according to Lambert not yet been requested to do so and it is unlikely to ever be used[10]. Asylum seekers' fate, as provided for by the Geneva Convention rests upon the "free access to the courts of law on the territory of all Contracting States"[11]. In the absence therefore of a global court[12] ruling upon asylum cases "the courts of law in the territory" of the contracting parties to the Geneva Convention are those who interpret and apply it. The development by European states of a "regionally specific legal framework"[13] for controlling their handling, at their national courts, of asylum related issues and most importantly its evolution is destined, by means of an multifaceted vertical and horizontal transjudicial dialogue, to play a very significant role both within[14] and without[15] Europe not least because Europe is considered to dispose the "most advanced regional protection regime in the world"[16] which is very frequently emulated. For these reasons, the current

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[8] http://www.unhcr.org/news/latest/2015/12/5672c2576/2015-likely-break-records-forced-displacement-study.html (accessed 7 January 2017).

[9] Article 38. UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189.

[10] H. Lambert, "Introduction: European Refugee Law and Transnational Emulation", in: H. Lambert, J. Mc Adam, M. Fullerton (eds.), *The Global Reach of European Refugee Law*, New York, Cambridge University Press, 2013, p.18.

[11] Article 16 of the Geneva Convention on Access to Courts under Chapter II regarding Juridical Status contains the relevant provisions and reads as follows: 1. A refugee shall have free access to the courts of law on the territory of all Contracting States. 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*. 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence. UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189.

[12] H. Lambert, , "Transnational law, judges and refugees in the European Union", in: G. S. Goodwin-Gill, H. Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, New York, Cambridge University Press, 2010, p. 4.

[13] V. Turk, Nicholson, "Refugee protection in international law: an overall perspective", in: E. Feller, V. Turk, F. Nicholson (eds.), *Refugee Protection in International Law UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003, p 6.

[14] As argued by Goodwin-Gill and Lambert the lack of national courts dialogue within Europe on asylum issues makes even more important the jurisprudence of the CJEU in that respect. H. Lambert, "Transnational law, judges and refugees in the European Union", *op cit*, p. 6-7.

[15] The impact of European refugee law and its emulation – as a process of diffusion – on a worldwide level constitutes the core argument of H. Lambert, "Introduction: European Refugee Law and Transnational Emulation", *op cit*, p. 1-23.

[16] H. Lambert, "Introduction: European Refugee Law and Transnational Emulation", *op cit*, p. 1.

study is focused upon the European regime and its evolution as evinced through the case law of its two supranational adjudicating bodies, namely the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

The aforementioned, regarding the regional protection regime, mainly refer to the EU and the role of the CJEU. A comprehensive consideration and understanding of the European regime as it currently stands, and under what checks and balances it is supposed to develop in the future, would be incomplete without the ECHR and the ECtHR's case law being taken into account. The latter – despite the fact that there is no explicit reference to asylum throughout the ECHR – as argued throughout the following study is intrinsic to the European protection regime as it was being established by the expanding EU asylum *acquis* and interpreted by the CJEU. Not only has the ECtHR through its case law directly extended its protection to asylum seekers under article 3 ECHR thus forming part of the architecture of the regional protection regime *per se*, it has also developed a considerable case law concerning the EU in general and has specifically ruled upon EU asylum related cases brought before it. In this way it has brought the EU's asylum *acquis*[17] under its scrutiny and has greatly impacted upon subsequent secondary EU law and the CJEU's subsequent case law. Having said so it is important to clarify that the ECtHR is not "immune" from the CJEU's case law as, in fact, it is also in its turn influenced by the latter. Under this complex procedure the regional protection regime evolves and operates.

[17] As will be explained in chapter A there are two generations of EU secondary law pertaining asylum. The first generation comprises of: Council Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ. L 50/1 [hereafter Dublin II]; 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 [2004] OJ L 304/2 [hereafter QDI]; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status [2006] OJ L 326/13. [hereafter PDI]; Council Regulation 562/2006/EC of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1. [hereafter SBC] and the second generation comprises of:
Council Regulation 604/2013/EU of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31. [hereafter Dublin III]; Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries 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) [2011] OJ L 337/9. [hereafter QDII]; Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60. [hereafter PDII].

The main objective of the current study is to first examine what is in practice the available level and standards of protection offered to asylum seekers reaching Europe as formulated by and "contained" in the Continent's two supranational adjudicating bodies case law and second which are the determinants which have and shall define its evolution. In doing so, issues of substance and procedure as "formulated" by the latest case law of the two Courts and their in between relationship shall be analysed both as a means to illustrate the evolution of protection and for reaching conclusions regarding the actual level of protection as applied in practice for asylum claims related to persecution on grounds of sexual orientation and to the remedies and any rights available to asylum seekers with regard to Dublin transfers.

While undertaking to examine what is in practise the level and standards of protection available to asylum seekers in issues of both substance and procedure – which as will be shown are intimately related, one being dependent on the other - it is important to refer to certain "technical" issues and characteristics of the two distinct yet interlinked legal orders constituting the regional protection regime or "mechanism". This is necessary for enhancing the understanding of substantial and procedural aspects being analysed but also has a value in itself. For instance, if one is to determine and understand the level of protection at it stands in practice one cannot oversee the fact that the CJEU in contrast to the ECtHR does not in essence - but in exceptional cases, provide for direct access to individuals. The technical issues considered in the first two chapters can be separated in two categories. Beyond the objective of putting into perspective the "terms" and conditions under which the mechanism operates by examining the relationship between the two legal orders as developed by the ECtHR's case law, the applicable law chapter is also necessary to clarify and delimitate the general legal framework under which protection operates and evolves. The UNHCR and its authoritative interpretation of the 1951 Geneva Convention must equally be taken into consideration, under the applicable law chapter, as it is regularly referred to in the case law of the two Courts and moreover, in the case of the CJEU, their in between "relationship" is in a sort of way institutionally provided for. On the other hand, there are technical issues which are destined to practically impact upon the level of protection which include: the territorial scope of protection as formulated through the case

law of the ECtHR and *locus standi* provisions regarding access to the CJEU and ECtHR. The legal effect of the Courts' rulings is also considered in order to clarify the practical and potential implications it bears to subsequent and future asylum applications that will be lodged to European states.

A. Applicable Law

The issue regarding the law applicable to asylum cases brought before the two Courts determining to a significant extent the standards and level of protection, especially in the case of the CJEU, is not a straightforward one. As a preliminary remark one should refer to the fact that the ECHR contains no explicit provision regarding asylum. Protection for asylum seekers under the ECHR has materialised through the evolving interpretation of the rights contained therein by the ECtHR. On the other hand, over the years the initially centred purely on economic affairs cooperation of EEC member states has undergone immense evolution and the EU has brought into being a comprehensive body of secondary law regarding asylum touching upon both the granting of international protection and upon procedural issues related thereto. In addition, owing to EU primary law – treaty based – provisions the CJEU is under the legal obligation to consider the Geneva Convention and the ECtHR's case law while ruling upon asylum cases. The relationship between the two Courts having being institutionally established is central to an inclusive analysis regarding the standards of protection available to asylum seekers within Europe not least because the ECtHR has in addition to that relationship, gradually through its case law, ruled upon and brought under its scrutiny cases specifically concerning either directly or indirectly the EU legal order.

I. The ECHR and Indirect Protection through article 3 ECHR

It is well known that the ECHR does not contain any specific provision regarding asylum and very few of the articles directly refer to third country nationals[18]. In fact, one of these provisions contained in Article 5 regarding the right to liberty and security

[18] ECHR provisions referring to aliens first tend to limit the scope of protection of certain ECHR rights and second refer to lawfully residing third country nationals. For instance, Article 16 sets the limits to the right to freedom of expression (Article 10) and the right to freedom of assembly and association (Article 11) for aliens stating that the aforementioned rights shall not prevent the contracting parties from imposing restrictions to the political activity of aliens. In addition, Article 1 of Protocol 7 containing procedural safeguards relating to the expulsion of aliens defines the latter as individuals lawfully residing in the territory of a contracting party. Furthermore, it must be noted, that article 4 of Protocol 4 prohibiting the collective expulsions of aliens which has been applied to asylum cases is beyond the scope of the current study. For a summary of provisions contained in the ECHR referring to third country nationals see Parlement Européen, Direction Générale Des Politiques Internes, *Impact de la Jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration,* (Etude), Bruxelles, Parlement Européen, 2012, p. 27-28.

reaffirms the prerogative of states regarding admission of third country nationals as it allows for the lawful arrest or detention of a person to prevent him to effectuate an unauthorised entry into the territory of a contracting party.[19] In addition, as the ECtHR has clarified and repeatedly confirmed in its case law:

> At the outset the Court observes that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3, to control the entry, residence and expulsion of aliens Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols.[20]

In fact, ECHR state parties had originally intentionally decided to avoid integrating within the ECHR's scope asylum issues considering that the Geneva Convention was the appropriate instrument in dealing with asylum related issues.[21] There is therefore neither a positive obligation to contracting parties to provide asylum under the ECHR nor is the ECtHR required to treat asylum related applications. Yet the ECtHR, beginning in the early 1990's[22], has developed a substantial asylum related case law offering both substantial protection and procedural safeguards in order to ensure the former. In the words of Einarsen, it is the discretion concerning negative decisions such as rejection and expulsion resulting in the refoulement[23] of asylum seekers which is restricted.[24] The ECtHR in the

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[19] Article 5 (1) (f). Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (hereafter ECHR)

[20] *Vilvarajah v. the United Kindgom*, No. 13447/87 (ECHR, 20 October 1991), par. 102.

[21] K. Hailbronner, D. Thym, "Legal Framework for EU Asylum Policy", in: K. Hailbronner, D. Thym (eds.), EU Immigration and Asylum Law, Oxford, Hart Publishing, 2016, p. 1049.

[22] *Soering* constitutes the landmark case against removal, in respect though of extradition which is not the focus of the current study. In that case the ECtHR held that the United Kingdom would be in breach of article 3 in case it extradited the applicant to the United States in which case he was facing the death sentence (Article 2 on the right to life was not applicable as the death penalty was abolished much later under the ECHR with Protocol 13 in 2002). Soering's exposure to the death row phenomenon in Virginia (long waiting period - 6-8 years - exposure to homosexual abuse and physical attack) before execution and the fact he was suffering from an "abnormality of mind" while also being under 18 while committing murder contributed to the decision of the ECtHR. *Soering v. the United Kingdom*, No. 14038/88, (ECHR, 7 July 1989), paras. 99, 103, 106-108, 111.

[23] The principle of non-refoulement derives from the Geneva Convention whose article 33 on the prohibition of expulsion has as follow: "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. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.". As a preliminary remark, one ought to highlight that although the prohibition to expel, remove and deport in the case of Article 3 ECHR is absolute, in the sense that there can be no derogation once the threshold of the said article is

absence of *de jure* protection has *de facto*[25] extended its reach and protection to asylum seekers under the jurisdiction[26] of the contracting parties establishing their responsibility for exposing individuals to treatment contrary to the standards provided by the ECHR in case of removal.

This indirect - *par ricochet*[27] protection has over the years developed to encompass various ECHR articles depending on the specific context of cases lodged to the ECtHR. It has first though been employed under article 3[28] to which the bulk of asylum cases fall under.[29] For the purpose of the current study, regarding substantial and procedural issues for the granting of international protection, the focus must necessarily lie on claims brought under article 3 of the ECHR[30]. The application of article 13 in conjunction with article 3 of

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reached, the same does not apply under the EU *acquis.* See for example QDII, Article 12 (2) (b) on exclusion which states that a third country national or a stateless person is excluded from being a refugee in case "he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;".

[24] T. Einarsen, "The European Convention on Human Rights and the Notion of an Implied Right to de Facto Asylum", *International Journal of Refugee Law*, 1990, Vol. 2, No. 3, p. 364.

[25] In fact, the ECtHR has in numerous cases, owing to its interim measures proved to be an asylum seeker's last resort in actually avoiding refoulement. As the ECtHR held in *I.M.* regarding an applicant who was to be removed from France but was subsequently granted refugee status: "Or, la Cour réitère que seule l'application de l'article 39 de son règlement a pu suspendre l'éloignement du requérant, pour lequel un laissez-passer avait déjà été émis par les autorités soudanaises. En effet, à l'issue des procédures devant l'OFPRA et le juge administratif, rien n'aurait pu empêcher l'éloignement du requérant, ni, par conséquent, la décision de non-lieu à statuer de la CNDA." *I.M. c. France*, No. 9152/09, (ECHR, 2 May 2012), par. 157

[26] For the evolving interpretation of the jurisdictional clause contained in Article 1 and its applicability and use in offering protection to asylum seekers see *infra,* chapter B (I).

[27] This is the term employed to designate the indirect nature of protection offered in asylum cases by Labayle and De Bruycker. Parlement Européen, Direction Générale Des Politiques Internes, *Impact de la Jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration*, *op cit*, p. 28.

[28] For an overview of article 3 application to cases of removal see Einarsen. The fact that a removal can give rise to an article 3 violation was brought up as early as 1962 in *X. v. Federal Republic of Germany*. A renowned early case brought in 1972 is *Amekrane v. United Kindgom* which was ruled admissible on the basis of an article 3 violation. In that case, in which friendly settlement took place, the wife of a Moroccan officer was tortured to death after being removed from the United Kingdom where he had sought political asylum following an assassination attempt to the king of Morocco. T. Einarsen, "The European Convention on Human Rights and the Notion of an Implied Right to de Facto Asylum", *op cit*, p. 365.

[29] See *ibid,* p. 364-5; S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts,* London, Springer, 2014, p. 79; K. Hailbronner, D. Thym, "Legal Framework for EU Asylum Policy", *op cit,* p. 1049.

[30] Article 2 case law on the right to life is obviously also relevant for the purpose of the current study. The ECtHR has the tendency to first deal with alleged or potential article 3 claims before moving to article 2. In addition, once a claim has succeeded under article 3 the Court in most cases refrains from dealing with article 2. For instance, in the *Al-Sadoon and Mufdhi* case two Iraqi nationals under UK custody in British-run detention facilities in Iraq where facing the death penalty for murder of two British officer in Iraq in case they

the ECHR will also be considered[31] in terms of the aforementioned procedural safeguards provided to asylum seekers - article 13 being by the ECtHR in asylum cases instead of article 6[32]. It must be noted, as already mentioned, that in the absence of specific provisions regarding asylum, article 3 offers indirect protection through the prohibition of removal. There is therefore no official status granting but for the purpose of the current study a ruling on this basis can be equated, or at least be considered the equivalent with the granting of refugee or subsidiary protection status to be found in the much more developed asylum *acquis* of the EU providing for at least three years and one year of residence permit respectively[33].

A final clarification needs to be made regarding the exclusion from the analysis of asylum related cases brought to the ECtHR under articles 5 and 8 of the ECHR on the right to liberty and security and the right to respect private and family life respectively. Of course, as regards detention, it can affect the position of an asylum seeker by posing practical difficulties to the effective lodging of an asylum application. Detention *per se* though regards the treatment of asylum seekers[34] rather than protection against refoulement, the granting of status and accessing the procedure and is beyond the scope of

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were transferred – a fact which indeed took place – to the Iraqi authorities. The Court found that their **protracted** fear of being executed during their detention in UK custody and their trial by Iraqi Courts owing to the charges they were facing constituted a violation of article 3 and did not proceed to examine a possible article 2 violation "the applicants have been subjected, since at least May 2006, to the fear of execution by the Iraqi authorities. The Court has held above that causing the applicants psychological suffering of this nature and degree constituted inhuman treatment. It follows that there has been a violation of Article 3 of the Convention. In the circumstances, and in view of the above finding, the Court does not consider it necessary to decide whether there have also been violations of the applicants' rights under Article 2 of the Convention and Article 1 of Protocol No. 13." *Al-Saadoon and Mufdhi v. the United Kingdom***,** No. 61498/08, (ECHR, 2 March 2010), paras. 144-145. On this issue see also the *MSS* case at paragraphs 360-361, which is referred to and further analysed below. *M.S.S. v. Belgium and Greece*, No. 30696/09, (ECHR, 21 January, 2011). See *infra*, chapters, A (III), D.

[31] See *infra*, chapter D.

[32] Article 6 on the right to a fair trial is automatically excluded as non-applicable to asylum cases as it refers to a fair trial "in the determination of civil rights and obligations or of any criminal charge". As the ECtHR held in *Maaoui v France* "the Court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a "civil right" for the purposes of Article 6 § 1 […] the Court further considers that orders excluding aliens from French territory do not concern the determination of a criminal charge either." *Maaouia v. France*, No. 39652/98, (ECHR, 5 October 2000), paras. 38-39.

[33] Article 24 (1)(2) of QDII.

[34] See in that respect European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications of the European Union, 2014, chapter 6 on detention and restrictions to freedom of movement.

the current study. As regards article 8 and the right to family life as argued by Einarsen, it may lead to *de facto* asylum for family members under the principle of family unity which implies that the dependents of a *refugee* may not be subjected to deportation or refused entry to the territory of a contracting state where the refugee family member is already present.[35] It becomes evident that in this case the status of an individual is already determined in the sense that a person has already received international protection status and is subsequently asking for family reunification. It is therefore beyond the scope of the current study whose concern is centred on the access to the procedure and highlighting certain substantial aspects related to the granting of international protection. The same approach regarding family reunification seems to be endorsed by the EU asylum *acquis*[36]. Upon how the latter came into being and upon the primary and secondary law provisions it contains the analysis shall now turn to.

II. The EU *asylum acquis*

Cooperation in asylum, before finding its way in EU treaties and becoming part of primary EU law, begun at the intergovernmental level as a solution to the gradual abolishment of internal border controls - to supplement the establishment of the single European market - for EC member states participating at the Schengen Agreement signed

[35] T. Einarsen, "The European Convention on Human Rights and the Notion of an Implied Right to de Facto Asylum", *op cit,* p. 375. In addition, article 8 claims in their majority do not concern asylum seekers and refugees but migrants facing expulsion orders under article 8 (2) ECHR for which the ECtHR has articulated the renowned Boultif criteria against which an expulsion order is to be balanced against by means of a proportionality test: "In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled […]" – *Boultif v. Switzerland,* No. 54273/00, (ECHR, 2 November 2011), par. 48. Such a test does not take place when the threshold for article 3 is reached as the latter constitutes, according to article 15 (2) ECHR, an absolute right against which no derogation is possible. As the Court held "The Court further reiterates that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country" *Al-Saadoon and Mufdhi v. the United Kingdom***,** No. 61498/08, (ECHR, 2 March 2010), par. 123; See also S. Morano-Foadi, S. Andreadakis, "The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: the ECJ and the ECtHR Jurisprudence", *European Journal of International Law*, 2011, Vol. 22, No. 4, p. 1082.

[36] For instance, article 23 (2) of QDII on family unity reads as follows: "Member states shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits". Specific reference is made to an individual who has *already*

in 1985. The Dublin Convention signed in 1990 was also meant to supplement the abolishment of internal border control by defining which state had jurisdiction in terms of an asylum application as once an individual crossed the EU border he could access without being susceptible to further control all Schengen member states. From then onwards two contradicting objectives had to be reconciled: the security and economic concerns (burden sharing) of member states *vis-à-vis* illegal migration and the effective protection of human rights through the granting of international protection to those indeed qualifying for it.[37] The EU *asylum acquis* has been negotiated under this context, of preventing "forum shopping" on the part of asylum seekers who tended to apply to EU members who offered the most generous asylum provisions once they had crossed the external border taking advantage of the absence of internal border controls and avoid the phenomenon of "refugees in orbit" whereby the latter were transferred from one EU state to another each refraining it had jurisdiction to examine their request.[38]

a. Primary and Secondary EU law on asylum

It was the treaty of Amsterdam signed in 1997 and entered into force on May 1999 that significantly changed the landscape with regard to asylum. The treaty of Amsterdam brought asylum under the EC Pillar[39]. This meant that the legislative competence had now been brought at the supranational level. The result was the first generation of asylum related secondary EU legislation which also encompassed the amendment of the Dublin Convention.[40] As an indication of the evolution of primary EU law which is subsequently and gradually reflected in secondary law one can note the fact that the initial establishment

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benefited of international protection who has therefore been granted protection and has been able to effectively access the asylum procedure.

[37] S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts, op cit*, p. 8.

[38] K. Hailbronner, D. Thym, "Legal Framework for EU Asylum Policy", *op cit*, p. 1024-25.

[39] The Pillar structure was introduced by the Maastricht Treaty signed in 1992 entering into force in 1993. Pillar I mainly focused on economic issues, contained the EEC established by the Treaty of Rome which was renamed EC and which was the supranational pillar within the newly created European Union whereby legislation was enacted at the supranational level. In Pillar II and III, asylum falling under the latter named Justice and Home Affairs; initiatives for cooperation, legislation and decision making remained largely intergovernmental. For a detailed analysis in respect of the evolution of EC and EU competencies with regard to asylum see F. Cherubini, *Asylum Law in the European Union*, Oxon, Rutledge, 2015, p. 129-166.

of "minimum standards" of protection has been replaced by legislative "harmonisation"[41] required by EU member states in the field of asylum following the fully fledged supranationalisation of asylum and immigration by the Treaty of Lisbon which entered in force in 2009[42]. The said evolution is as already mentioned equally reflected in secondary EU law.[43] EU states no longer enjoy the previous degree of discretion once those minimum requirements had been reached but they are asked, by law, to harmonise their policies and offer common standards. It is the practical implications of this evolution regarding the current status of EU asylum *acquis* which will be analysed in the following paragraphs and sections. Finally, another relevant development concerns the Schengen agreement, of increased relevance for asylum in terms of accessing EU territory[44], which was also gradually communitarised in a long process which begun from the Treaty of Amsterdam[45] and was concluded by the Treaty of Lisbon[46].

The Treaty of Lisbon provides the current primary law basis – through article 78 – for the ensuing secondary legislation regarding asylum. Through the Treaty of Lisbon the EU Charter of Fundamental Rights[47] has acquired the status of Treaty along the Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)

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[40] The relative first generation legislative instruments for the purposes of the current study are QDI, PDI, SBC. Following treaty based rearrangement of competencies the Dublin Convention was also amended after the Treaty of Amsterdam by Regulation Dublin II.

[41] One ought to compare article 63 EC Treaty compared to article 78 (2) (a) TFEU. Such firm treaty language in article 78 TFEU does not "allow" deviation from EU legislation in comparison to the less stringent minimum standards. K. Hailbronner, D. Thym, "Legal Framework for EU Asylum Policy", *op cit,* p. 1031. 1029

[42] The new generation of EU law amending secondary legislation *supra* n. 40, refers to QDII, PDII, Dublin III.

[43] Indicative of this evolution is Directive 2013/32/3U on *common procedures* for the granting and withdrawing of international protection which replaced PDI on *minimum standards* on procedures in Member States for granting and withdrawing refugee status.

[44] SBC.

[45] Given the sensitivities related with border management and control opt outs where put in place for the United Kingdom, Ireland and Denmark. From the Treaty of Amsterdam onwards the Shengen *acquis* become binding for prospective EU member states. F. Cherubini, *Asylum Law in the European Union*, *op cit,* p. 151-159.

[46] Safeguards include the evaluation of the implementation of the Schengen *acquis* and the possibility of reintroducing of controls at internal borders in cases of threats to public policy or internal security. For a comprehensive analysis of the evolution of the Schengen *acquis* see E. De Capitani, , "The Schengen system after Lisbon: from cooperation to integration", *ERA Forum, (*2014) 15, p. 101-118

[47] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

within the EU legal system[48] and is thus binding upon EU member states. There are two remarks which ought to be made with regard to the aforementioned provision. Article 78 (1) under the inclusive Chapter 2 of the TFEU referring on policies on border checks, asylum and immigration has as follows:

> 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.

According to Hailbronner and Thym non-compliance with the Geneva Convention constitutes an infringement of article 78 (1) TFEU that could first potentially result in the annulment of secondary legislation and second and most importantly for the purpose of the current study is the fact, as they argue, that the least requirement of the aforementioned article would be that of interpreting secondary EU legislation in conformity with the Geneva Convention.[49] For this reason the "positions" of the UNHCR, as will be explained below[50], on the Geneva Convention must be taken into account when the CJEU rules on asylum cases even though the UNHCR cannot intervene as the statute of the CJEU does not permit third-party intervention.[51]

The EU Charter is also relevant and extremely promising for the vindication of asylum seekers rights and their effective protection. Article 18 guarantees the right to asylum[52] while article 19 (2)[53] provides substantial guarantees against refoulement, by

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[48] This is provided by Article 6 (1) TEU which states: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

[49] K. Hailbronner, D. Thym, "Legal Framework for EU Asylum Policy", *op cit,* p. 1029.

[50] See *infra,* (IV).

[51] S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts, op cit,* p. 22. The importance of the UNHCR is acknowledged in numerous EU secondary asylum legislation. For instance, Recital 22 of QDII states: "Consultations with the UNHCR may provide valuable guidance for Member states when determining refugee status according to Article 1 of the Geneva Convention", *idem,* p. 22. In contrast the ECtHR allows the UNHCR to participate in its proceedings. See for instance in the *MSS* case the list of intervening parties. *M.S.S. v. Belgium and Greece*, No. 30696/09. (ECHR, 21 January, 2011).

[52] See Article 18 on the Rights to Asylum, "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 establishing the European Community.", Charter of Fundamental Rights of the European Union [2012] OJ C 326/391. The position developed, by Gil-Bazo, that Article 18 of the EU Charter confers a "subjective and enforceable right of individuals to be granted asylum which can be

granting protection in the event of removal, expulsion and extradition. Article 47 on the right to an effective remedy and to a fair trial[54] is also of relevance for the purpose of the current study providing procedural safeguards such as the access to the asylum procedure. The EU Charter is also significant in another respect. Both the explanations to the EU Charter[55] and article 6 (3) of the TEU[56] bring within the EU legal order the ECHR as the latter is interpreted through it case law. The CJEU should therefore be interpreting the EU's fundamental rights, as those are codified in the EU Charter and operationalized by EU secondary law, in accordance with the ECtHR case law. For this reason, if one is to understand the practical implications of the aforementioned regarding the protection of those in need of international protection, it will be necessary to analyse not only the relationship between the two European supranational legal orders[57] as it has evolved through the case law of the ECtHR, but also to keep in mind the compatibility of the

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directly applicable within the national legal orders without the transposition or incorporation" is noticeable. See M.T. Gil-Bazo, "Asylum as a General Principle of International Law", *International Journal of Refugee Law*, Vol. 27, No. 1, 2015, p. 51-52. It is irrelevant though for the purpose of the current study which focuses on the supranational control mechanisms and remedies upon national jurisdictions especially if considered in combination with the fact of the near total lack of direct access to the CJEU on the part of those who would potentially make use of such right. See *infra* chapter B (II) on direct access to the CJEU. The said, is valid in relation to the ECtHR as well, as, as it has held, "the Court reiterates that it is not its task to apply directly the level of protection offered in other international instruments. The applicant's submissions on the basis of Directive 2004/83/EC [QDI] are outside the scope of its examination of the present application" *Ahmed v. United Kingdom*, No. 31668/05, (ECHR, 14 October 2008) (inadmissible). In that case the applicant was asking the Court to rule upon rights conferred to him by the said directive which the United Kingdom has allegedly deprived him of.

[53] Article 19 of the EU Charter reads as follows: "No one shall be removed, expelled or extradited to a State where there is serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment of punishment".

[54] Article 47 of the EU Charter on the right to an effective remedy and to a fair trial states: "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 in this article". One ought to compare the more comprehensive provision found in the EU Charter which provides "for the right to an effective remedy against a decision on international protection, a refusal to reopen a previously discontinued application and a decision to withdraw international protection" with the safeguards offered by article 13 ECHR – given the non-applicability of ECHR article 6 – which provides for an effective before a national authority but not a tribunal. European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to asylum, borders and immigration*, *op cit*, p. 100. It seems though that the more substantive protection and safeguards offered by the EU Charter lack significantly when applied in practice in comparison to article 13 ECHR. See *infra*, chapter, D.

[55] Explanations relating to the Charter of Fundamental Rights [2007], OJ C 303/17. See *infra*, (b).

[56] Article 6 (3) reads as follows: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"

[57] See *infra*, (III).

CJEU's case law with primary EU law the latter requiring the former to take into account ECtHR case law when it rules on asylum cases.

III. The interplay of the two supranational legal regimes governing international protection and ECtHR's control over the EU legal order

Apart from the aforementioned "institutional" reasons articulated above the analysis of the relationship between the two supranational legal regimes and the oversight gradually established through the ECtHR's case law is deemed as necessary as it has practical implications upon the personal condition of asylum seekers especially in terms of preventing their direct and indirect refoulement and has been informing, as will be illustrated[58], not only the case law of the CJEU in respect to asylum cases but also EU secondary legislation in general. Even if EU primary law explicitly calls for the adhesion of the EU to the ECHR[59], as the former has not yet acceded to the latter, the ECtHR has ruled from the 1970's that it can hold neither the EU directly accountable nor rule directly upon the compatibility and validity of EU law in respect to the ECHR[60]. As Costello argues though:

> Loss of control over EU action and Member States acts based thereon would create an intolerable gap in legal protection which would overtime denude the ECHR of relevance as the scope of EU action increases.[61]

The ECtHR has established an indirect mechanism of control over the EU legal order which has been gradually and reluctantly developed through its case law. The *Bosphorus* Judgment constitutes the landmark case in which the Grand Chamber formulated the principles underlying the legal relationship between the two supranational legal systems and clarified the extent to which EU member state's responsibility may be engaged. In that specific case[62], the Irish authorities in 1993 seized an aircraft owned by the Yugoslav national airline which was leased by a Turkish company, as mandated by an EC Regulation

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[58] See *infra*, (III)(IV), chapter B (I) (b).

[59] Article 6 (2) TEU provides for the EU to: "accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

[60] As the ECtHR reaffirmed "The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party." *Matthews v. the United Kingdom*, No. 24833/94, (ECHR, 18 February 1999), par.32.

[61] C. Costello, "The Bosphorus Ruling of the European Court of Human Right: Fundamental Rights and Blurred Boundaries in Europe", *Human Rights Law Review*, Vol. 6, No. 1, 2006, p. 88.

implementing UN Security Council sanctions in connection to the Yugoslav conflict. The Turkish company which had leased the aircraft belonging to the Yugoslav airlines lodged an application to the ECtHR for a violation of Article 1 of Protocol No. 1. Following the relaxation of the sanctions regime in 1996 and the termination of the lease the aircraft was returned to the Yugoslav national airline with the Turkish company being essentially deprived of its investment – not being able to make use of the aircraft during the period it has leased it. The relevant passage on equivalent protection has as follows:

> In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides]…] any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued […] However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
>
> If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.[63]

In essence, what the ECtHR argued was that under certain conditions the EU legal order offers an equivalent level of protection to fundamental rights which though is rebuttable and susceptible to review on a case by case basis. If the preconditions are upheld EU member states cannot be held responsible under the ECHR, "conditional immunity"[64] is therefore established by the ECtHR for EU member states when state action is taken in compliance with their international – EU – legal obligations. The ECtHR highlighted the lack of discretion on the part of Ireland in the implementation of the EC Regulation, as well as, the fact that the Irish decision was susceptible to judicial review as indeed a preliminary question had been sent to the CJEU.[65] What differentiates this judgment from earlier ECtHR rulings in which equivalent protection was also mentioned according to Costello, is the fact that the ECtHR did not refer to judicial mechanisms available under the EU legal system in abstract but specifically referred to the fact that "the protection of fundamental

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[62] *Bosphorus v. Ireland*, No. 45036/98, (ECHR, 30 June 2005), paras.11-13, 16, 24, 56, 60

[63] *Bosphorus v. Ireland*, No. 45036/98, (ECHR, 30 June 2005), paras. 155- 156.

[64] This is the term employed by Costello. C. Costello, "The Bosphorus Ruling of the European Court of Human Right: Fundamental Rights and Blurred Boundaries in Europe", *op cit*, p. 101.

[65] *Bosphorus v. Ireland*, No. 45036/98, (ECHR, 30 June 2005), paras. 148, 165.

rights by Community law can be considered to be, and to have been at the *relevant time*, "equivalent" to that of the Convention system".[66] It is the inclusion of the phrase "relevant time" that implies that there is no enduring assumption of compliance[67].

Such presumption of equivalence in the protection of fundamental rights was reversed in *MSS*[68], a case specifically concerning asylum, in which Belgium enjoyed the discretion Ireland had lacked and found an EU member state in violation of the ECHR – article 3 – in the implementation of the provisions of secondary EU law. In that case, Belgium tried to avoid responsibility under the ECHR by arguing that under Dublin II – EC Regulation 2003/343 – it was Greece's responsibility to examine the applicant's request for asylum as the latter was the state of first entry. In its defence Belgium further argued that the "sovereignty clause" found in article 3 (2) of the said regulation allowing states to derogate from the rules designating the responsible state[69] was to be used only in exceptional circumstances indicating in which instances it had itself already made use of it: family reunification, health issues of the applicant and in cases involving minor asylum seekers. The ECtHR though held Belgium in breach of article 3 ECHR because of the "Dublin transfer" of the applicant to Greece and rejected the Belgian arguments that the transfer fell under Belgium's international obligations owing to the sovereignty clause of article 3 (2) and Belgium's discretion in the implementation of the EC Regulation. The ECtHR further ruled that the Belgian authorities "knew or ought or to have known" that in implementing the transfer they exposed the applicant to treatment contrary to article 3 because of the conditions faced by asylum seekers in Greece.

As a final remark, one should take notice of the fact that the ECtHR is called to rule upon two kinds of EU-related complaints in the field of asylum, first when a state relies upon EU law to justify violations of the ECHR - in which case responsibility of the EU state remains intact as was the case in *MSS*, and second when states act or fail to do so in

[66] *Ibid*, par. 165; C. Costello, "The Bosphorus Ruling of the European Court of Human Right: Fundamental Rights and Blurred Boundaries in Europe", *op cit*, p. 103.
[67] *Idem*.
[68] The relevant passages are to be found in paragraphs 326-327, 340 and 358-360. *M.S.S. v. Belgium and Greece, No. 30696/09.* (ECHR, 21 January, 2011).
[69] Article 3 (1) and Chapter III of Dublin II.

violation of the EU asylum *acquis* and thus fail to act in *accordance with the law* as required by several ECHR articles[70].[71]

Having concluded the analysis concerning the law applicable, by the two Courts in asylum cases – originating within their respective institutional framework and having considered the institutional relationship which EU primary law establishes and imposes upon the CJEU in connection to ECtHR case law, but also the implications of the latter's entanglement with cases of concern to and related to the EU, it is important to turn to the UNHCR which by means of its Guidelines relating to the implementation and interpretation of the Geneva Convention complements and completes the framework of "applicable law" in terms of asylum issues within the European continent.

IV. The ECtHR and the Role of the UNHCR's Guidelines[72]

As already mentioned despite the fact that there are no asylum provisions to be found in the ECHR and as of course the ECtHR is not bound by the Geneva Convention, in nevertheless deals with asylum related applications. When it does so it draws insights upon UNHCR material namely the latter's "Handbook and Guidelines on Procedures and Criteria

[70] For instance, in a non-asylum case the ECtHR held France in violation of article 8 (2): "Dans ces conditions, la Cour conclut que le délai de plus de quatorze ans mis par les autorités françaises pour délivrer un titre de séjour à la requérante *n'était pas prévu par la loi, que la « loi » en question soit française ou communautaire*, et qu'il y a eu en l'espèce violation de l'article 8 de la Convention, sans qu'il soit besoin d'examiner les autres conditions posées par l'article 8 § 2 de la Convention", *Aristimuno Mendizabal v. France,* N. 51431/99, (ECHR, 17 January 2006), par. 79. This could be of practical use to asylum seekers especially in respect of Article 5 ECHR on the deprivation of liberty which is only allowed *in accordance with a procedure prescribed by law* in case EU secondary law provides for more generous provisions when compared to ECHR Article 5 (f) allowing for the detention of persons to prevent them from effectuating an unauthorised entry into a ECHR contracting party which can have implications specifically to the lodging of an asylum application. For instance, according to article 26 of PDII "a member state shall not hold a person in detention for the sole reason that he or she is an applicant". Safeguards not available at the ECHR therefore could be therefore effectively enforced through the ECtHR when they are not in "accordance with law". The importance of such possibility becomes even more striking in case national authorities administrative and judicial fail to act as required by EU law in combination with the limited possibility of direct access to the CJEU, see *infra*, chapter B (II). This is what in fact happened in *MSS*. The ECtHR took into consideration Greek Law, Presidential Decree no. 81/2009 amending the transposition of PDI (whose article 18 is identical with the aforementioned recast PDII article 26) whereby lodging an application for asylum is not a criminal offence and cannot justify the applicant's detention and by extension found Greece in violation of article 3 as the applicant did not on the face of it have the profile of an "illegal immigrant*". M.S.S. v. Belgium and Greece*, No. 30696/09, (ECHR, 21 January 2011), paras. 98, 225, 234.

[71] Council of Europe, *Asylum and the European Convention on Human Rights*, (Human Rights Files, No. 9), Strasbourg, Council of Europe Publishing, 2010, p. 244.

[72] For how the Guidelines of the UNHCR came into being see V. Turk, "Introductory Note to UNHCR Guidelines on International Protection", International Journal of Refugee Law, Vol. 12, No. 2, p. 303-306.

for Determining Refugee Status".[73] The extent and the nature of the impact of these Guidelines, given that there is no obligation whatsoever imposed upon the ECtHR to take them into account, could be equated or compared with the impact "soft law" bears upon states. As the UNHCR's Guidelines, are actually and indeed applied by both Courts in asylum cases they must be taken into consideration as constituting "part" of the European system of international protection. They are also important in another respect. Being used in practice by the two Courts it is likely for the Guidelines to contribute to the evolution of the standards and level of protection offered to asylum seekers within Europe and provide valuable insights thereto - that is why they should be included in the current analysis.

There is no single widely accepted definition in the academic community of the notion of 'soft law'. In contrast to custom law and legally binding hard law treaties – which have been ratified and entered into force – and whose clauses by definition legally bind actors to a certain conduct by imposing the obligation to observe their terms or face the consequences – international responsibility – in case of a behaviour contrary to the terms of a treaty to which they are signatories[74] soft law may be defined according to Shelton as anything other than treaty i.e. an international instrument containing norms, principles and standards of expected behaviour which is not legally binding at the time of its conception and by extension not readily enforceable.[75,]

Two important factors regarding soft law, frequently appearing in soft law literature, regard its normative value and its obligatory nature. These define the extent to which a non-legally binding instrument can apply pressure and impact the conduct of actors. Normative value depends according to Fatouros upon the significance of the origin, the 'parentage' of soft law; the institutional framework within which it is created.[76] The obligatory nature refers to the binding nature of a "rule", "the mandatory quality of the language" of a soft law instrument and refers to the actual document produced, more

[73] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3. [hereafter UNHCR Handbook]

[74] Α. Φατούρος, "Προλεγόμενα στη μελέτη του μαλακού δικαίου", *Ελληνική Επιθεώρηση Ευρωπαϊκού Δικαίου*, Vol. 14 , 1994, p. 998-999.

[75] J. Nolan, "The Corporate Responsibility to Respect Rights: Soft Law or Not Law?", in: S. Deva, D. Bilchitz, (eds.) Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? Cambridge University Press, 2013), UNSW Law Research Paper No. 2013/72, 2013, https://ssrn.com/abstract=2338356, p. 5-6.

specifically to its wording requiring precision, referring the extent to which it "unambiguously defines the conduct it requires, authorizes or proscribes".[77] In addition, according to Fatouros another important factor which contributes to the effectiveness of soft law instruments is whether the creation of institutional mechanisms "accompanies" its creation[78]. Such mechanisms may include the monitoring of the implementation of the instrument – who has the authority of monitoring also plays a role, the submission of progress reports on the part of stakeholders and review mechanisms to name but a few.[79] In fact, soft law can include mechanisms that provide guidelines which even if not legally binding have force by virtue of the consent that governments, non-governmental organisations and other civil society actors accord them.[80] The existence of such mechanisms, the UNHCR, can provide soft law instruments – its Guidelines – with certain dynamism by socialising actors - the ECtHR, to 'soft law' increasing their acceptance and dissemination and by extension compliance by social pressure or moral persuasion. One should also note that in our case the UNHCR has the double role of being the "mechanism" which created the soft law instrument but which is also overseeing its "implementation". The analysis shall therefore turn to the examination of the possible impact the Guidelines and the UNHCR may have upon the European system of international protection.

It is true that the Geneva Convention does not provide for a body or a mechanism to review asylum cases.[81] As argued by Roots, during the drafting of the Geneva Convention "no one thought of creating an international court or a body composed of experts in charge of overseeing its implementation by state parties, on the model of the monitoring systems included later on in the UN human rights conventions adopted from the mid-1960's".[82] For instance, the ICCPR is better equipped as concerns review and supervision having at its

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[76] Α. Φατούρος, "Προλεγόμενα στη μελέτη του μαλακού δικαίου", *op cit*, p. 994.

[77] H. Kalimo, T. Staal, "'Softness' in international instruments – The case of trans-national corporations", Syracuse Journal of International Law & Commerce, Vol. 41, No. 2, p. 281.

[78] Α. Φατούρος, "Προλεγόμενα στη μελέτη του μαλακού δικαίου", *op cit*, p. 1003.

[79] *Idem*.

[80] Nolan, J., "The Corporate Responsibility to Respect Rights: Soft Law or Not Law?", *op cit*, p. 8,

[81] Article 38 of the Geneva Convention, on the settlement of disputes regards interstate disputes and refers to the ICJ as its forum: "Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any of the parties to the dispute" Chapter IV, Final Clauses.

disposal the universal periodic review[83] mechanism and the complaint procedure[84] which the Geneva Convention lacks. What the latter though has at its disposal, through the UNCHR's Guidelines, is the equivalent of the HRC's "interpretative statements" the "General Comments" the HRC issues which supplement its work by qualifying the application of ICCPR's provisions and have as such significant normative value[85]. In the case of the UNHCR, "interpretative statements" have been developed over the years and continue to evolve and are included in the UNHCR Handbook.

Despite the UNHCR's primary role being operational – providing humanitarian assistance[86] the Geneva Convention in its Preamble refers to the UNHCR's as follows:

> Noting that the United Nations is charged with the task of supervising international conventions providing for the protection of refugees, and recognising that the effective coordination of measures taken to deal with this problem will depend upon the cooperation of States with the High Commissioner.[87]

In addition, the Geneva Convention imposes specific obligations upon contracting parties with regard to their relationship with the UNCHR. The contracting parties are therefore required to:

> …undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and

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[82] L. Roots, "European Court of Asylum - Does It Exist?", in: T., Kerikmae (ed.), *Protecting Human Rights in the EU -Controversies and Challenges of the Charter of Fundamental Rights*, London, Springer, 2014, p. 130.

[83] According to Article 40 (1) ICCPR state parties undertake to submit reports on the progress made in the implementation of the ICCPR and on measures they have taken to give effect to it. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999.

[84] Individual complaints, under the prior condition of exhaustion of domestic remedies, are made to the Human Rights Council which produces non-legally binding "views". Individual Complaints are possible for ICCPR contracting parties who have adhered to the ICCPR's Optional Protocol. Article 1 of the latter provides "A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol." UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999

[85] J. Crawford, *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press, 2008, p. 640.

[86] See Chapter II of the UNHCR Statute regarding its functions which include among other: the admission, resettlement, assimilation and repatriation of refugees. UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December, A/RES/428(V) [hereafter UNHCR Statute]

[87] Geneva Convention, Preamble. UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189.

> shall in particular facilitate its duty of supervising the application of the provisions of this Convention[88]

Following the legal obligation imposed on contracting parties to cooperate with the UNHCR in order for the latter to accomplish its function it would be necessary to turn to the Statute of the UNHCR in which those are defined. In fact, the Statute clearly indicates a role to be played by the UNHCR regarding the development of "legal standards" in the field of asylum law:

> The High Commissioner shall provide for the protection of refugees falling under the competence of his body by promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[89]

Using the variables articulated in the preceding paragraphs one could argue the UNHCR is well equipped for delivering interpretative statements which serve to inform the provisions of the Geneva Convention. The "parentage" of the UNCHR soft law Guidelines is firmly established in the Preamble of the Geneva Convection and contained in its statute. In addition, the Geneva Convention imposes upon its contracting parties the obligation to cooperate with the UNHCR in the exercise of its "functions" which include the promotion and conclusion of international conventions and the supervision and application of amendments thereto. The Guidelines could be perceived under this context as complementing the Geneva Convection, as a soft law "addition" to the latter. For these reasons, the ECtHR takes notice in its asylum related case law the relevant international instruments and as such the UNHCR's Guidelines owing to the above-mentioned reasons are supposed and expected to impact upon its rulings and the evolution of the European international protection regime. Of course, the language of the Guideline's provisions used as already mentioned above shall also have a role in the "implementation" of the UNHCR guidelines.[90]

The Guidelines and the UNHCR are of increased value within the EU's legal order as well, a fact recognised in the Qualification Directives[91] which specifically mention its role in consulting EU member states with respect to the granting of international protection

[88] Geneva Convention, Chapter IV, Executory and Transitory Provisions, Article 35 (1). *Idem.*
[89] Chapter II, Article 8 (a). UNHCR Statute.
[90] See *infra*, chapter C.
[91] QDI, QDII.

– constituting by extent proof of a high level of "consent" imputed on the part of the EU and EU member states to the UNHCR and its work. In addition, and in contrast to the ECtHR, there is a much firmer "institutional" basis regarding the relationship between the EU legal order and the UNCHR's and its Guidelines. One could argue that the CJEU under article 78 TFEU[92] ought to consult and take into consideration the UNHCR Guideline's when treating asylum cases brought before it.

Having completed the analysis regarding the applicable law in asylum cases brought before the CJEU and the ECtHR one can draw some general conclusions. Through its evolution the EU legal order has come to provide a comprehensive body of asylum law encompassing nearly all aspects pertaining to asylum and is by treaty firmly intertwined with the Geneva Convention – even if the EU is not a contracting party itself. By extension the CJEU is provided with and has at its disposal a much more comprehensive and extensive pool of law from which it ought to draw in order to rule upon asylum cases and by extension on the standards of protection available to asylum seekers. The fact that it is also by treaty obliged to follow the ECtHR case law when ruling on the interpretation of respective EU Charter rights can only reinforce the implications of such observation. On the other hand the ECHR whose initial mandate specifically excluded asylum issues has indirectly through the evolving case law of the ECtHR extended its reach and protection to asylum seekers by prohibiting removals in cases where there is a risk for an individual to be exposed to treatment contrary to article 3 of the ECHR. While doing so it all takes into consideration the UNHCR Guidelines. Finally, the ECtHR has also recognised procedural rights and provided safeguards in that respect, under article 13 of the ECHR.

[92] See *supra* (II)

B. Jurisdiction, *locus standi* and legal effect under the two legal orders

Despite, the remarks on applicable law, one must – before turning to the case law concerning issues of substance and procedure in order to examine how the law is actually applied and what is in practice the level of protection offered – take into consideration certain important jurisdictional issues concerning the two legal regimes which can significantly impact upon the level and standards of protection in the application by the two Courts of their respective provisions on asylum – article 3 ECHR in the case of the ECHR.

I. The territorial scope of protection

One of the most central concerns of asylum seekers, which precedes but also allows for the examination of the substance of a claim by the authorities of the receiving state, is effective access to asylum procedures. Seeking asylum in most cases involves an element of movement[93] and border crossing either by sea or land. For this reason, the conduct of state authorities at the borders of receiving states[94] and the supervision of such conduct can be determinative of the fate of a persecuted individual. Generous asylum systems might therefore be rendered obsolete if applicants are barred from reaching them. Both primary and secondary EU law call for a respect of the principle of non-refoulement whereas as argued the ECtHR through its case has ruled against the refoulement of individuals who run the risk of treatment contrary to Article 3 of the ECHR.[95] The analysis therefore shall now turn to the territorial scope of protection as it stands "in law", for the case of the EU, and as developed in practice through the case law of the ECtHR under the ECHR.

[93] There are also *sur place* claims of asylum. For instance, asylum seekers can also find themselves legally within the territory of a state to which they apply for asylum following a coup d'etat in their country of origin.
[94] For instance, one could mention the practice of Greek authorities at the border crossing of Evros who forcibly return third country national to Turkey depriving them the opportunity to have their asylum claims heard. A. R. Ascoli, "Conditions and Criteria for Determining Asylum", in: Goudappel, F. A. N. J., Raulus, H. S. (eds.), *The future of asylum in the European Union*, p 127.
[95] See *infra*, chapter A.

a. From *Loizidou* and *Bankovic*'s *espace juridique* to extraterritorial control over individuals[96] and *Hirsi Jamaa*

The ECHR does not explicitly refer to the territorial scope of protection of the ECHR. Article 1 the relevant jurisdictional clause requires the contracting parties to "secure to everyone within their jurisdiction the rights and freedoms" as contained in the ECHR. According to Ryngaert the reference to the concept "within their jurisdiction" rather than "within their territory" implies an obligation for contracting parties to apply ECHR standards beyond their borders[97] – a fact confirmed in the *Loizidou*[98] case. In that case effective control encompassed a spatial element – jurisdiction and by extension responsibility was a result of effective control over territory. This reading of effective control was subsequently confirmed in the *Bankovic*[99] case which though seemed to impose further restrictions regarding extraterritorial jurisdiction. The case was ruled inadmissible as the control over the airspace of the Federal Republic of Yugoslavia which brought about the deaths complained for, following the NATO bombings in 1999, could in no way be compared to the effective control of territory on the part of Turkey.[100] The ECtHR though further ruled:

> [the Convention is operating] in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. […]-Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[101]

This reading of effective control over territories that "would normally be covered" seemed to imply that the extraterritorial application of the ECHR would be only limited to

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[96] For an insightful analysis on the extraterritorial application of the ECHR upon which the ensuing analysis also largely draws see C. Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, Vol. 12, No. 2, 2012, p. 295-300.

[97] C. Ryngaert, "Clarifying the Extraterritorial Application of the European Convention on Human Rights", *Utrecht Journal of International and European Law*, Merkourios 2012 – Volume 28/Issue 74, Case Note, p. 78.

[98] … the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. *Loizidou v. Turkey*, No. 15318/89, (ECHR, 23 March 1995) (preliminary observations), par. 62.

[99] *Bankovic vs Belgium and Others*, No.52207/99, (ECHR, 12 December 2001) (inadmissible).

[100] *Ibid*, par.76.

territories of ECHR states that would fall under the effective control of other contracting parties. This would be a cause for real concern given the policy of "extension" of borders in both land and sea in which ECHR and EU member states have engaged. Costello's and Rabinovitch's remarks, on the practice of EU states employing a huge variety of means to control their borders and access thereto extending well beyond their territory are highly relevant in this respect and include: joint border control operations, push back operation on the high seas, the stationing of border control officials in transit states and the offshore processing of asylum applications. [102] In a theoretical scenario in which a ECHR member state[103] reaches an agreement with a third non-ECHR country and acquires effective control beyond its border to control the entry of third country nationals to its territory it could use any means at its disposal to deter protection-seekers as the territory of a non-contracting party "would not normally be covered" by the ECHR.

The *espace juridique* approach has been revisited[104] in subsequent case law in which the ECtHR articulated expanding notions of control over either individuals or territory which establish the extraterritorial application of the ECHR significantly enhancing the position and protection of asylum seekers. As a preliminary remark the "exceptional circumstances"[105] under which the ECHR is applicable extraterritorially ought to be highlighted. Judge Bonello in his concurring opinion to *Al Skeini* argues for a functional approach[106] to jurisdiction against "an observance parcelled off by territory on

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[101] *Ibid*, par.80.

[102] C. Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, *op cit*, pp. 290-92, 302-304; Zara Rabinovitch, Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing, Migration Policy Institute, 2014, http://www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing

[103] The example of Turkey strikes out as the latter has also placed a geographical limitation to the Geneva Convention on Refugees which it has maintained while acceding to the latter's 1967 Protocol to only cover events occurring in Europe meaning that only people fleeing persecution taking place within Europe are covered and by extension any legal responsibility toward third country non-European nationals is avoided. J. C. Hathaway, *The Rights of Refugess under International Law*, New York, Cambridge University Press, 2005, p. 97.

[104] C. Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, *op cit*, p. 295-300.

[105] This is a term consistently applied in cases involving the extraterritorial application of the ECHR by the ECtHR.

[106] According to Judge Bonello if it is within a state's authority and control to observe any of the 5 minimum functions assumed in its capacity as a contracting party failure to do so should fall within a state's jurisdiction

the checkerboard of geography".[107] Regarding control over territory in *Al Skeini*[108] the ECtHR endorsed a more relaxed notion of effective control than in the *Loizidou* case this time in the territory of a non-ECHR member state. In aforementioned case 5 Iraqi nationals had been shot dead by British troops in Iraq. The ECtHR held that the acts of British troops in Iraq fell within the jurisdiction of the United Kingdom:

> the United Kingdom […] assumed in Iraq the exercise of *some of the public powers normally to be exercised by a sovereign government* […] In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals[109]

Regarding extraterritorial control over individuals two cases are of increased importance and could be potentially useful in the specific context of asylum seekers. These cases are *Issa*[110] and *Medvedyev*[111]. Although, in *Issa* because of the lack of factual evidence the Court did not establish Turkey's responsibility under the ECHR, the Court argued upon Turkish operation in Northern Iraq that:

> may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State[112]

In addition, the same reasoning applied to the *Medvedyev* case although this time the ECHR jurisdiction was established in international waters following the intersection of a vessel with a Cambodian flag.

> the Court considers that, as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention[113]

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for the purposes of Article 1. The minimum functions consist of ensuring the observance of human rights in five primordial ways: "firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights." *Al-Skeini v. the United Kindgom*, No. 55721/07, Concurring Opinion of Judge Bonello, (ECHR, 7 June 2011), paras. 10-11.

[107] *Ibid*, par. 3.

[108] *Al-Skeini v. the United Kindgom*, No. 55721/07, (ECHR, 7 June 2011).

[109] *Ibid*, par. 149.

[110] *Issa v Turkey*, No. 31821/96, (ECHR, 16 November 2004)

[111] *Medvedyev v. France*, No. 3394/03, (ECHR, 29 March 2010).

[112] *Issa v Turkey*, No. 31821/96, (ECHR, 16 November 2004), par.71.

[113] *Medvedyev v. France*, No. 3394/03, (ECHR, 29 March 2010), par. 67.

These two cases can be juxtaposed to the *Al Skeini* case in that jurisdiction was solely based on the control over individuals as in latter these cases there was no control over territory and no other legal basis for such authority over those individuals.[114] In *Al Skeini* the United Kingdom was not only effectively controlling the territory in question in Iraq but was also mandated to do so following UN Security Council Resolutions calling it to act as a "caretaker administration"[115]. Of increased importance is the notion of *de facto* control which brought the seamen under French jurisdiction and established Turkish jurisdiction through its extraterritorial military operations. Such expansion of the notion of jurisdiction of the ECtHR over "non ECHR" territory simply through the lawful or unlawful control over persons can be extremely valuable for asylum seekers. These expanding notions of control and by extension of jurisdiction of the ECtHR have been indeed applied to the *Hirsi Jamaa*[116] case involving the Italian's navy push back operations in international waters. In this case the ECtHR held that the individuals whose vessel had been intercepted on the high seas and who were subsequently boarded on ships of the Italian armed forces and returned to Libya from where they had departed constituted a breach of article 3 as the applicants fell "under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities"[117]. The Court subsequently found Italy in breach of article 3 for both exposing the applicants to inhuman and degrading treatment in Libya and for to the risk of arbitrary repatriation to Eritrea and Somalia.[118]

b. <u>The functional approach to jurisdiction under the EU legal system</u>

There can be no comparison between the ECHR and EU primary and secondary law which is evidently much more extensive in its scope encompassing and directly covering asylum matters binding EU member states. In order to clarify to what extent asylum seekers can have effective and practical access to asylum procedures one should examine the territorial scope of directives and regulations relative to asylum procedures and border controls. The Asylum Procedures Directive should be disregarded as a means, through

[114] C. Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, *op cit*, p. 298-300.
[115] *Al-Skeini v. the United Kindgom*, No. 55721/07, (ECHR, 7 June 2011), paras. 12-13, 143-148.
[116] *Hirsi Jamaa and others v. Italy*, No. 27765/09, (ECHR, 23 February 2012).
[117] *Ibid*, paras. 77, 81-82.

which one can access international protection procedures as, as argued by Cherubini, it nowhere explicitly states that third country nationals have the right *to enter* the territory of a Member state simply because "they have made or want to make an asylum application".[119] On the other hand the SBC and its subsequent supplementary instruments do contain safeguards against non-refoulement; the primary question arising in this case is to what extend do those apply in operations beyond the land borders and territorial waters of EU member states and what happens in practice in the sense whether supervision of the provisions and safeguards contained therein does indeed take place.

Article 3 (b) of the SBC states that it is to be applied without prejudice to "the rights of refugees and persons requesting international protection, in particular as regards non-refoulement". Although therefore the rights of persons requesting international protection are indeed taken into account one should aim at ascertaining what are the practical implications of such reference. In fact Costello[120] and Den Heijer[121] argue that article 2 (2)[122] SBC providing definitional elements of external borders, which do not seem to extend the scope of application of the regulation beyond the members state's land and sea borders should be read in conjunction with its Annex VI containing a functional definition of its territorial scope. In fact, part 3 (1) (1) of Annex VI on sea borders provides for border controls beyond the territorial waters of member states:

> "However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country."

Interception and the ensuing push back to Libya in the case of *Hirsi Jamaa* took place under a bilateral agreement between Italy and Libya which explicitly mentioned action in

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[118] *Ibid*, paras. 137-8, 157-8.

[119] F. Cherubini, *Asylum Law in the European Union*, *op cit*, p. 227. In fact Article 3 of PDII regarding its scope states that it shall apply "to all applicants for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the member states". Incidents such as those which occurred in international waters in *Hirsi Jamaa* case which regarded the attempt *to enter* are not covered. The same goes to land borders and possible limitations of access which can potentially be put in place by EU member states.

[120] C. Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, *op cit*, p. 308-309.

[121] M. Den Heijer, "Reflections on Refoulement and Collective Expulsion in the Hirsi Case", *International Journal of Refugee Law*, Vol. 25, No. 2, 2013, p. 288-289.

[122] External Borders are defined as: land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders.

international waters[123]. That being said, one could arguably claim that Annex VI of the SBC was applicable[124] and the protection against refoulement contained in the SBC ought to have provided some sort of action within the EU legal system for the protection of those intercepted. Notwithstanding, a letter from Jacques Barrot at the time Vice-President of the European Commission to the European Parliament referred to in the *Hirsi Jamaa* case[125] providing clarifications at the latter's request that the SBC was in fact applicable to Italy's push back operations even in operations conducted at international waters no action was taken at the EU level and the case had to reach the ECtHR for an end to be brought to them.[126]

Placing in a larger context the central question dealt under this section of how to enhance practical access to asylum procedures and avoid EU member states' extra-border conduct aiming to prevent it one should certainly take into account an extremely promising framework provided by primary EU law which, following the *Hirsi Jamaa* judgment, has been influencing and informing subsequent developments regarding secondary law[127]

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[123] See paragraph 19 of the judgment referring to the bilateral agreement "Surveillance, search and rescue operations shall be conducted in the departure and transit areas of vessels used to transport clandestine immigrants, *both in Libyan territorial waters and in international waters*, in compliance with the international conventions in force" *Hirsi Jamaa and others v. Italy*, No. 27765/09, (ECHR, 23 February 2012). par. 19.

[124] Although neither the EU nor Frontex was involved in the push backs the ECtHR included in the relevant aspects of European Law not only the SBC but also EC Regulation 2007/2004 establishing Frontex. *Ibid*, paras. 30-32.

[125] *Ibid*, par.34.

[126] For the limited access of individuals to the CJEU see *infra*, (II). Although falling beyond the scope of the current analysis focusing upon the possibilities of protection and redress offered to individuals it is important to note the lack of actions brought to the CJEU against member states for failure to fulfil an obligation under article 263 TFEU by the European Commission in the field of asylum brought up in the European Parliament study published in 2012 in the aftermath of the *Hirsi Jamaa* case regarding the role of the two European Courts in asylum. Parlement Européen, Direction Générale Des Politiques Internes, *Impact de la Jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration, op cit*, p. 24-25.

[127] For instance, while supplementing the SBC and replacing the Frontex Regulation 2007/2004/EC, Regulation No. 656/2014/EU [Council Regulation 656/2014/EU of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2014] OJ L 189/93] establishing rules for the surveillance of the external sea borders seems to incorporate key points of the Hirsi Jamaa judgment. Preamble recital 10 directly links border controls on the high seas with the asylum procedure directive and *non refoulement*, there is a specific article on operations and interception on the high seas (Article 7) and most importantly article 4 (1) setting the general rules can be regarded as the the EU's legislative reply to the push back to Libya leading to indirect refoulement to Eritrea and Somalia *Hirsi Jamaa* stating "No person shall, in contravention of the principle of *non-refoulement*, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture […]or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the

within the EU. More specifically, one ought to turn to EU Charter articles 18 on the right to asylum and 19 (2) containing substantial guarantees against the refoulement of individuals.[128] These articles should be read in conjunction with articles 51 (1)[129] stipulating that the Charter is applicable when EU member states implement EU law[130] and 52 (3)[131] stating that EU charter rights correspond to rights as guaranteed by the ECHR affirming that the said provision shall not prevent Union law to provide more extensive protection. As already argued[132], the official explanations to the EU Charter clarifies and explicitly states that the ECHR in article 52 (3) also encompasses ECtHR case law[133].[134]

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principle of *non-refoulement*." It is remarkable that in the previous Frontex Regulation, 2007/2004/EC, "refoulement" was not at all mentioned. Council Regulation 2007/2004/EC of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L 349/1.

[128] See *supra* chapter A (II).

[129] See Article 51 (1) on Scope – "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law." Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

[130] The CJEU tends to adopt an expansive interpretation of the term "implementing EU law" found in Article 51 (1) in order to put under the scrutiny of the EU Charter member states' actions . As argued by Moreno-Lax and Costello while referring to *NS and ME*, a broad discretionary option under EU law regarding Dublin transfers (under the "sovereignty clause" of Article 3(2), Dublin II) will be treated as implementing EU law. V. Moreno-Lax, C. Costello**, "**The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model" in Peers, S, Hervey, T, Kenner, J, Ward, A et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, 2014, p. 1680, See also Joined Cases C-411/10 και C-493/10, *N. S. and M.E. v Secretary of State for the Home Department*, [2011] I-13991 paras. 64-68. Even more striking and although not related to asylum - is the CJEU's finding on the applicability of the EU Charter in the *Fransson* case were there was no implementation of EU legislation on the part of the national court. Both criminal charges and a financial penalty were applied to a tax evader in Sweden. The CJEU found article 50 of the EU Charter regarding the right not to be tried or punished twice for the same criminal offense applicable. As argued by Lazowski the link with EU law was remote and if it existed it did in relation to VAT, in general, which is regulated by secondary EU legislation (Directive 2006/112/EC calls for measures taken on behalf of member states to collect VAT and avoid evasion). Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, (GC of 26 February 2013), paras. 16, 23-25, 31; Lazowski, A., "Decoding a Legal Enigma: the Charter of Fundamental Rights of the European Union and infringement proceedings", *ERA Forum*, (2013) 14, p. 579; V. Moreno-Lax, C. Costello, **"**The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model", *op cit*, p. 1681.

[131] See Article 52 (2) on Scope of Guaranteed Rights "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.", Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

[132] See, s*upra*, Chapter A (II).

[133] See Explanation to Article 52 – Scope and interpretation of rights and principles, "The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union". Explanations relating to the Charter of Fundamental Rights [2007], OJ C 303/17. This is in fact an obligation stemming from primary EU law as, as, stated in Article 6 (1) TEU: "The rights, freedoms and principles in the Charter shall be interpreted in

This in fact constitutes the core of the argumentation of Moreno-Lax and Costello while analysing the extraterritorial application of the EU Charter. They put forward the argument that the field of the Charter's application is autonomously regulated and that the debate regarding the extraterritorial application of the Charter "should and is in fact being liberated from the *laden* debate on borders and territory and brought to the less-statist space of EU competences and legality".[135] Although this constitutes a much welcome approach one cannot fail to see the deficiencies and practical shortcomings in the implementation of secondary EU law and the effective supervision of EU member states in the absence of checks provided through ECtHR case law as evinced in the *Hirsi Jamaa*. In 2010 Italian authorities, in the name of their responsible minister, were suggesting the emulation of their push backs from other EU member states as they considered it had solved Italy's problem regarding illegal boat migration.[136]

II. Accessing the European Courts

The potential for increased protection which though has not yet materialized under the EU's functional approach to jurisdiction significantly lacks when compared with the evolution of the ECtHR's jurisdictional clause as evinced through the latter's case law. *Locus standi* provisions providing access to the two Courts could potentially counterbalance the limitations to protection imposed by the non-implementation of the EU's functional approach to jurisdiction. In fact though, as the ensuing analysis aims at highlighting, the limitation observed regarding jurisdiction are only reinforced by poor EU law provisions on direct access for private parties to the CJEU. In contract, "generous" *locus standi* provisions under the ECHR enable the ECtHR to serve as a safeguard against the EU's shortcomings in that respect.

a. Direct access for natural and legal persons to the ECtHR and the CJEU

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accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions"

[134] For this reason Costello argues regarding the territorial scope of the EU Charter that a minimum requirement would have EU fundamental rights track the notion of 'jurisdiction' under Article 1 ECHR in line with the analysis in the preceding paragraphs. See, *infra,* Chapter B (I) (a).

[135] V. Moreno-Lax, C. Costello, **"**The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model", *op cit,* p**.** 1679-1682.

The substantial and procedural requirements for an admissible application to the ECtHR are set in articles 34 and 35 of the ECtHR. Article 34 provides the possibility to "any person, non-governmental organization or group claiming to be the victim of the rights set forth in the Convention or the Protocols thereto" to lodge an application to the ECtHR. Under article 35 containing the procedural requirements the applicant shall first exhaust all domestic remedies and apply to the ECtHR within six months[137] from the date on which the final decision was taken[138]. Furthermore, the Court shall reject anonymous applications[139], applications submitted to another procedure of international investigation and contains no relevant new information[140], those considered manifestly ill-founded or abusive of the right to individual applications[141] and those in which the applicant has not suffered a significant disadvantage[142]. The most relevant admissibility requirement of substance regarding asylum seekers is the notion of victim found in article 34 ECHR and it is upon this requirement that we need to turn to and compare it with the respective requirements regarding direct access to private parties under EU law to the CJEU. Such comparison shall offer valuable insights with regard to the possibilities for protection offered to asylum seekers against decisions at the national level.

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[136] M. Den Heijer, "Reflections on Refoulement and Collective Expulsion in the Hirsi Case", *op cit*, p. 290.

[137] Under Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 24/06/2013 the six month period is reduced to four. Protocol No. 15 is not yet in force. For further information regarding Protocol N. 15 see: https://www.coe.int/en/web/conventions/full-list.

[138] Article 35 (1) ECHR

[139] Article 35 (2) (a). ECHR

[140] Article 35 (2) (b). ECHR. It is quite unlikely for an application reaching the ECtHR to be rejected for having also reached the CJEU. The preliminary rulings procedure which is available to asylum seekers – see, *supra* (II) – regards questions posed by national courts to the CJEU and concern the interpretation of EU law whereas applications to the ECtHR specifically concern violation of individual rights of the applicant. For a practical illustration of the aforementioned see *infra*, chapter D, (I) (II), in which Dublin transfers are referred to the ECtHR as violations to articles 3 and 13 of the ECHR whereas preliminary questions sent to the CJEU regard the extent of state discretion with regard to the same transfers.

[141] Article 35 (3)(a) ECHR

[142] Article 35 (3) (b) ECHR was introduced by Protocol 14 as an additional admissibility criterion in an effort to handle the increasing backlog of the ECtHR. Protocol No. 15, *supra*, n. 137, amends article 35 § 3 (b) by allowing for the rejection on the basis of a lack of significant disadvantage of an application which has not been duly considered by a domestic tribunal. For the purpose of the current analysis this admissibility criterion is not relevant. In a research report of the ECtHR regarding its first two years of implementation the majority of cases regarded article 6. As was explained – see *infra*, Chapter A (I), article 6 is not applicable in asylum cases. See the research report and its annex Council of Europe/European Court of Human Rights, *The New Admissibility Criterion Under Article 35 § 3 (b) of the Convention: Case Law Principles Two Years On*, (Research Report) 2012, http://www.echr.coe.int/Documents/Research_report_admissibility_criterion_ENG.pdf .

The notion of victim has been formulated and expanded through the case law of the ECtHR.[143] Obviously, for lodging an admissible application to the ECtHR one must be able to prove that the alleged act or omission on the part of state authorities of a contracting party is linked to the harm one has suffered in the alleged violation of the ECHR.[144] In *Karner v Austria* the Court ruled that

> "this criterion [the existence of a "victim of violation"] cannot be applied in a rigid, mechanical and inflexible way […] when considering whether the examination of an application after the applicant's death should be continued. All the more so if the main issue raised by the case transcends the person and the interests of the applicant."[145]

The Court's flexibility and its non-restrictive interpretation of the notion of victim is demonstrated by the fact that the ECtHR has endorsed and applied the status of victim to those who have been indirectly affected by an act or an omission of state authorities. For instance, the ECtHR has first accepted applications on the part of next of kin and second to those to whom a "violation *would* cause harm or who *would* have a valid and personal interest in seeing it brought to an end"[146].

A closer look at two cases, referred to in the admissibility guide compiled by ECtHR to illustrate the notion of victim and indirect victim, shall clarify the aforementioned notions as formulated through the jurisprudence of the Court.[147] In *McCann*,[148] terrorists members of the IRA who had already been convicted of bombing offences[149] were shot dead while attempting to perpetrate a terrorist attack, the court found a violation of article 2 § 2 as the anti-terrorist operation at Gibraltar was not planned by the authorities so as to minimise to the greatest extent possible, recourse to lethal force.[150] The Court held the application lodged by family members of the deceased IRA terrorists admissible. In the Grand Chamber judgment *Vallianatos and others v Greece* the Court

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[143] F. Korenica, , *The EU Accession to the ECHR – Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection*, London, Springer, 2015, p. 379-382.
[144] *Ibid*, p. 381; In *Gorraiz Lizarraga* the Court stated that "there must be a sufficiently direct link between the applicant and the harm which they consider they have sustained on account of the alleged violation *Gorraiz Lizarraga v. Spain*, No. 62543/00, (ECHR, 27 April 2004), par. 35.
[145] *Karner v. Austria*, No. 40016/98, (ECHR, 24 July 2003), par. 25.
[146] *Vallianatos v. Greece*, No. 29381/09 (ECHR, 7 November 2013), par. 47.
[147] Council of Europe/European Court of Human Rights, *Practical Guide to Admissibility Criteria*, 2014, http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/admi_guide, p. 14-15, paras. 15-20.
[148] *McCann and others v. the United Kindgom*, N. 18984/91, (ECHR, 27 September 1995).
[149] *Ibid*, par.193.

found a violation of article 14 in conjunction with article 8. The case concerned the exclusion of same sex couples from civil union provided for by a newly enacted Greek law. The Greek government argued that the applicants could not be considered as victims as they did not suffer direct and immediate adverse effects as a result of their exclusion as the harm they claimed was hypothetical and based on speculation. [151] The government further argued that the regulation of financial issues within same sex couples such as inheritance arrangements could be achieved by means of a will or contract. [152] The court held that the applicants should be considered as "victims"[153] and argued:

> … Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation *would* cause harm or who *would* have a valid and personal interest in seeing it brought to an end[154]

Through its expansive interpretation of the notion of victim the ECtHR offers asylum seekers and to those who have a valid and personal interest the possibility to directly challenge acts or omissions on the part of state authorities in breach of rights guaranteed by the ECHR. Applying the preceding analysis of direct and indirect victim status to the specific context of asylum seekers one cannot fail to notice the potential provided even to next of kin of asylum seekers to challenge the implementation of EU law under specific conditions[155] and to the extent it contradicts obligations under the ECHR.

In contrast, direct access for any natural of legal person is much more restricted in the case of the CJEU. The relevant provisions allowing for private parties to reach the CJEU and become parties to its proceedings are to be found in Article 263 § 4 and 265 § 3 of the TFEU. Articles 263 and 265 allow to individuals to seek redress regarding the legality of acts of the EU institutions (action for annulment) and the failure to act by a EU institution (action for failure to act) respectively.[156] The two Articles have identical

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[150] *Ibid*, paras.194, 213-214.
[151] *Vallianatos v. Greece*, No. 29381/09 (ECHR, 7 November 2013), paras. 37-38.
[152] *Idem.*
[153] *Ibid*, par. 49.
[154] *Ibid*, par. 47.
[155] See *infra*,chapter A (III).
[156] In the ToL it was first recognised that not only act of EU institutions but also those of EU bodies, offices or agencies fall under the jurisdiction of the CJEU. Article 263 § 3 explicitly provides for a complaint to be brought to the CJEU against any institution, body, office or agency of the Union although the CJEU had already recognised the possibility of challenging acts from bodies, offices and agencies. A. Kaczirowska, European Union Law (3rd edition), Oxon, Routledge, 2013, p. 419

conditions for access as article 265 refers to the access conditions of "preceding paragraphs" as those are to be found in article 263 which reads as follows:

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

As argued by Mastroianni and Pezza the CJEU has given to these conditions a very strict interpretation rendering "extremely difficult" to satisfy the treaty requirement for access of private parties to its proceedings.[157] Under article 263 therefore there are three causes of action for a natural person to institute proceedings. First, against an act "addressed to that person", second against an act "which is of direct and individual concern to him" and third against "a regulatory act which is of direct concern to them and does not entail implementing measures". The third cause of action constitutes a new addition of the Treaty of Lisbon.[158] The need for individual concern is removed for regulatory acts not entailing implementing measures.[159] The aforementioned conditions strike out when compared to the straightforward requirement under article 34 of the ECHR providing access to private parties "claiming to be the victim of a violation" which have been expanded through the case law of the ECtHR to include indirect victims as well. As in the case of the ECtHR the CJEU has through its case law elaborated upon the conditions of access.

As the CJEU has ruled for a complaint to be admissible under the first cause of action an act has to be addressed to a person directly and the addressee of the measure must have no discretion in its implementation.[160] In case *NV International Fruit Company* the CJEU ruled that the complaint against the Commission was admissible as the latter:

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[157] R. Mastroianni, A. Pezza, "Access of Individuals to the European Court of Justice of the European Union Under the New Text of Article 263, Para 4, TFEU", *Rivista Italiana Di Dirito Publico Comunitario,* No. 5, 2014, p. 924.

[158] The first two causes of action were already available and contained in articles 230 TEC and 173 EEC. The latter provided for any legal or natural persons to "appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him".

[159] M. Eliantonio, H. Roer-Eide, , Regional "Regional Courts and *Locus Standi* Provisions for Private Parties: Can the CJEU Learn Something from the Others?", *The law and Practice of Iternational Courts and Tribunals*, Vol 13, 2014, p. 33.

[160] "First, as regards the condition of direct concern as laid down in the fourth paragraph of Article 230 EC, it has been held that that condition required that, firstly, the contested Community measure must directly affect the legal situation of the individual and, secondly, it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules" Case T-262/10, *Microban International*

> refused to grant them licences to import dessert apples from third countries, and which was notified to them through the intermediary to the Produktschap voor Groenten en Fruit (the 'PGF') at The Hague.[161]

The EU directives[162] and regulations[163] pertaining asylum seekers clearly do not fall under this category as the member states are involved in their implementation and have a certain amount of discretion while doing so. For instance, it is the authorities of a particular member state which are required to take a decision for granting asylum under the Qualification Directives. In addition, Regulations which do not require transposition in the national legal orders of member states contain "safeguards" allowing for state discretion in their implementation such as the "sovereignty clause" found in article 17 (1) of Dublin III which allows for considerable discretion on the part of national authorities enabling them not to proceed with a transfer if a specific case requires so.[164] Asylum seekers are thus unable to obtain judicial review regarding the validity of EU asylum instruments. The said applies for the remaining two causes of action on which our analysis now turns to.

The interpretation of the term individual concern is central to the understanding of the second cause of action potentially provided for natural persons. It has been articulated in *Plaumann* in 1963, a landmark case defining individual concern, from which the CJEU has not deviated since[165]. The relevant passage reads as follows:

> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[166]

Markedly, under this reading of individual concern, the second cause of action available is of no use to asylum seekers either as the relevant regulations and directives are of general

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and Microban (Europe) v Commission, [2011] ECR II-07697, par. 27. See European Parliament, Directorate General for Internal Affairs, *Standing Up for your Right(s) in Europe Locus Standi,* (Study), Brussels, European Parliament, 2012 p. 28.

[161] Joined Cases 41 to 44/70, *NV International Fruit Company and others v Commission of the European Communities,* [1971] ECR 412, par. 1.

[162] QDII, PDII.

[163] Dublin III which amends and replaces Dublin II already referred to.

[164] The so called sovereignty clause was previously found in article 3 (2) of Dublin II amended by Dublin III. See *infra* chapter A (III), D.

[165] M. Eliantonio, H. Roer-Eide, , Regional "Regional Courts and *Locus Standi* Provisions for Private Parties: Can the CJEU Learn Something from the Others?", *op cit,* p, 32; European Parliament, Directorate General for Internal Affairs, *Standing Up for your Right(s) in Europe Locus Standi, op cit,* p. 50.

[166] Case 25/62, *Plaumann & Co. v Commission of the European Economic Community,* [1963] ECR 253.

scope and application. A comparison against an admissible complaint brought under a direct and individual concern is illustrative. In *Codorníu SA*[167] the CJEU found admissible the complaint of a Spanish wine maker regarding a regulation for the description and presentation of products of the wine sector adopted to specify a regulation of general scope regarding the common organization of the market in wine. The provisions complained specifically reserved the use of the term "cremant" to French and Luxembourg producers. The fact that the Spanish company had since 1924 used in its graphic trade mark the term cremant differentiated it from all other traders while involving a direct damage by means of a loss of 38% of its turnover. In the specific context of asylum seekers this means they would have to prove the impossible scenario in which any harm caused by the applicable regulations and directives must specifically and individually target them and that their situation is distinguishable from the one in which other asylum seekers found themselves.

The relevant for asylum seekers directives and regulations are automatically excluded from the third cause of action. While articulating on regulatory acts in the *Inuit Tapiriit Kanatami* **c**ase the CJEU held that the latter do not encompass legislative acts contained in article 289[168] TFEU.[169] The EU regulations and directives are acts adopted under the ordinary legislative procedure by the European Parliament and the Council as defined in article 289 § 1 TFEU. Furthermore, directives and asylum regulations require implementation measures on the part of EU member states.

b. Article 267 TFEU – indirect access to the CJEU through preliminary rulings

The CJEU has consistently held that the EU Treaties have established a complete system of remedies[170]. As a means to compensate for such a limited access to individuals –

[167] Case C-309/89, *Codorníu SA v Council of the European Union,* [1994] ECR I-01853 p. 1883, 1885-6, paras. 10, 16, 21-23.

[168] According to article 289 TFEU: The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.

[169] Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union,* (Grand Chamber, 3 October 2013**),** paras. 45, 58-59, 61**.** Acts of general application other than legislative acts are to be found in articles 290 § 1 and article 291 § 2 and refer to implementing and delegated acts of the Commission

[170] In the *Inuit Tapiriit Kanatami* case the CJEU held: "**…**the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures

which the CJEU has consistently supported through its case law – the procedure of preliminary rulings has been established. According to Article 19 § 1 of the TEU "member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" thus complementing the work of the CJEU in that respect. Article 267 TFEU provides to individuals the possibility to indirectly challenge EU acts through their national courts.[171] The preliminary ruling procedure has been significantly enhanced by the Treaty of Lisbon allowing to all national courts to refer to the CJEU repealing article 68 TEC which restricted the request for a preliminary ruling to the highest judicial bodies.[172] As the ensuing analysis shall illustrate though the preliminary ruling procedure is not as an effective alternative to the restricted access of private parties to the CJEU especially when compared to the *locus standi* provisions contained in the ECHR.

According to article 267 the CJEU has jurisdiction to give a preliminary ruling regarding the interpretation of treaties and the validity of acts of EU institutions, bodies, offices and agencies.[173] It must be noted that the CJEU has ruled that the request for a preliminary ruling regarding the validity of EU acts is necessary even for court which are not of last resort.[174] The cases analysed though for the purposes of the current study fall under the interpretation and not the validity category for which such discretion on the part of national courts is upheld. It is at the discretion of a national courts therefore to refer to the CJEU for a preliminary reference "if it considers [the national court] that a decision on the question is necessary to enable it to give judgment"[175] whereas in cases pending before national courts the latter are obliged to do so if there is no judicial remedy following their decision[176]. Leaving aside for the moment the discretionary power of national courts, it is important to mention that the violation of the duty to refer for last resort courts is not enforceable. In fact, the breach of the obligation to refer allows but not obliges the

designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union. *Ibid*, par. 92.

[171] European Parliament, Directorate General for Internal Affairs, *Standing Up for your Right(s) in Europe Locus Standi*, *op cit,* p. 32.

[172] S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts*, *op cit,* p. 21.

[173] Article 267 (1)TFEU.

[174] Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost.*, [1987] ECR 04199, p 4231, par 15-17

[175] Article 267 (2) TFEU.

[176] Article 267 (3) TFEU.

Commission, the latter according to the CJEU enjoying discretion in doing so[177], to open an infringement proceeding against a member state under article 258 of the TFEU while the CJEU's judgment has no consequences for decisions of domestic courts taken in breach of the obligation to refer.[178] It becomes evident that crucial safeguards for ensuring the obligation to refer which complements the restricted access for individuals are not in place. It is possible in a theoretic scenario therefore for a national court to take a decision upon the interpretation of EU law negatively affecting an asylum seekers right or condition in violation of the obligation to refer in which case it would be at the discretion of the Commission to initiate infringement proceedings while at the same time the national court's decision would be upheld.

Further deficiencies regarding the preliminary ruling procedure which have a real impact upon the level of protection afforded to asylum seekers and relate to the aforementioned discretion of the national judge to refer to the CJEU are revealed. This has as a result to seriously undermine the "complete system of remedies" available as argued by the CJEU in its case law and provided for by EU Treaties. A possible scenario might be that of a national judge called to rule upon an asylum case during which he considers that a preliminary ruling is not necessary for him to reach a decision.[179] Owing to the fact that EU law is extremely extended in its reach governing both substantial and procedural issues regarding asylum seekers such discretion on the part of national courts becomes

[177] Case 247/87, *Star Fruit Company SA v Commission of the European Communities,* [1989] ECR 00291, p.301, par. 11.

[178] See also Mastroianni and Pezza who argue that once a decision at the national level becomes *res judicata* following the exhaustion of domestic legal remedies it can no longer be called into question citing the *Kapfeler* whose paragraphs 20-21 read as follows, "In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted […] can no longer be called into question. Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue". Case C-234/04, *Rosmarie Kapferer v Schlank & Schick GmbH,* [2006] ECR I-02585, par. 20-21. ; R. Mastroianni, A. Pezza, "Access of Individuals to the European Court of Justice of the European Union Under the New Text of Article 263, Para 4, TFEU", *op cit,* p. 938-9.

[179] As argued by Advocate General Jacobs in his critique on the preliminary ruling procedure: "…under the preliminary ruling procedure the applicant has no right to decide whether a reference is made, which measures are referred for review or what grounds of invalidity are raised and thus no right of access to the Court of Justice; on the other hand, the national court cannot itself grant the desired remedy to declare the general measure in issue invalid", Opinion of Advocate General Jacobs, 21 March 2002 in Case C-50/00 P, Unión de Pequeños Agricultores v Council of the European Union, par 102

problematic. Even more so, in case a national judge endorses a more restrictive reading of an asylum seeker's right contrary to a possible more positive interpretation which might have occurred had the CJEU been asked. Not only though do national courts enjoy wide discretion in referring to the CJEU for a preliminary ruling but they are also those who determine the exact question to be sent to the CJEU[180] the phrasing[181] of which might have serious implications for the individual at the national level once the preliminary ruling is delivered but might also impact upon the "quality" or the reply.[182] A final point to be made and which must be taken in conjunction with the impossibility of a private party – an asylum seeker in our case – to directly access the CJEU is the fact that the latter's ruling only answers the exact questions posed to it by the national court in which a private party has no say.

An example[183] shall help clarify the above and illustrate in practical terms the shortcomings of the current system as it stands. French judges had been interpreting "international or internal armed conflict" under article 15 (c) of the Qualification Directive[184] in line with International Humanitarian Law in order to rule on the existence of armed conflict and grant subsidiary protection to asylum seekers.[185] In contrast, the CJEU in a preliminary ruling requested by the Belgian Council of State ruled that article 15 (c) and the terms contained therein should be distinguished from the respective terms within IHL which are not applicable as the aforementioned constitute "different regimes which pursue different aims and establish distinct protection mechanisms"[186]. One cannot fail to notice the practical consequences for asylum seekers emanating from the decision of

[180] *Idem.*

[181] The wording of the question might even be different from that suggested by the parties. R. Mastroianni, A. Pezza, "Access of Individuals to the European Court of Justice of the European Union Under the New Text of Article 263, Para 4, TFEU", *op cit,* p. 938-9.

[182] For further analysis and the practical implications of this observations see *infra,* chapter D (II)

[183] For a more detailed analysis and further examples upon this issue see N. Hart, "Complementary Protection and Transjudicial Dialogue: Global Best Practice or Race to the Bottom", *International Journal of Refugee Law*, Vol. 28, No. 2, 2016, p. 196-7.

[184] Article 15 (c) defining serious harm as a factor for determining subsidiary protection is identical for QDI and its recast QDII and reads as follows:
"serious harm and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict"

[185] N. Hart, "Complementary Protection and Transjudicial Dialogue: Global Best Practice or Race to the Bottom" p. 196.

[186] Case C-285/12, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides,* (Fourth Section, 30 January 2014), par. 20-26.

French judges not to address a preliminary ruling to the CJEU regarding article 15 (c) but to interpret it using IHL which sets a much higher threshold to the detriment of asylum seekers protection and was even criticized in that respect by the UNHCR[187].

Overall, while keeping in mind the distinct purpose and functions of the two Courts, the increased potential for protection offered through the expansive notion of victim adopted by the ECtHR – makes the latter directly accessible to individuals – has no match when compared to the EU system of protection. The CJEU through its case law has severely restricted access for private parties making it practically inaccessible for asylum seekers while the preliminary ruling procedure does not seem to make up for it by providing an effective alternative of indirect access through the national courts of EU member states. This becomes even more problematic if one considers that EU law sets to a great extent and in detail the substantial and procedural rules of protection – through its regulations and directives – establishing a comprehensive legal regime for asylum without putting in place an effective system of remedies and judicial control when the latter is put into effect by national authorities. It becomes evident under the current system as it stands, that on an individual basis redress is more accessible and more readily provided for through the ECtHR. On the other hand, one could argue that CJEU is in a better position to impact on a much larger scale, either positively or negatively depending on its rulings on the evolution of asylum seekers' rights owing to the legal effect of its interpretation of EU law and the impact this interpretation shall bear upon subsequent asylum application lodged at the national level.

III. Legal effect of CJEU and ECtHR rulings

The legal effects of the rulings of the two supranational judicial protection mechanisms available to asylum seekers are important in determining the extent of protection by means of formulating state practice following a decision of the two Courts.

As already argued asylum seekers - as private parties - are destined to have indirect access to the CJEU through the preliminary ruling procedure. For this reason, the following

[187] N. Hart, "Complementary Protection and Transjudicial Dialogue: Global Best Practice or Race to the Bottom", *op cit*, p. 196-7.

analysis shall concentrate on the legal effect of preliminary rulings of the CJEU when the latter is called to interpret EU secondary law in view of the fact that the CJEU's rulings regarding asylum directives and regulations fall within this category. The doctrines of *stare decisis* and precedent do not formally exist in EU law.[188] In fact, though preliminary rulings are binding and do have an *erga omnes* effect[189] which has considerable ramifications on asylum seekers. This conclusion has been reached through the case law of the CJEU. First, in *Kühne & Heitz NV* the CJEU confirmed the binding nature of its rulings while it interprets EU law:

> The interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC [Article 267 TFEU], the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force […][190] It follows that a rule of Community law interpreted in this way must be applied by an administrative body within the sphere of its competence

In addition, as argued by Baudenbacher a "factual" *erga omnes* effect binding member states which are not parties to a specific case is evinced through the practice of the CJEU to reject a preliminary ruling request when a matter has previously been dealt with through the same procedure rendering the subsequent request superfluous.[191] In this context, the CJEU's preliminary rulings either enhancing or diminishing the protection to asylum seekers become increasingly important owing to the fact that they determine the upper and lower threshold for protection for the entirety of EU member states bound the respective provisions.

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[188] D. Chalmers, G. Davies, G. Monti, (eds.), *European Union Law Cases and Materials* (2nd edition), New York, Cambridge University Press, 2010, p. 169.

[189] Parlement Européen, Direction Générale Des Politiques Internes, *Impact de la Jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration*, *op cit*, p. 76. The *erga omnes* effect is explicitly referred in the EP's study while articulating on the legal effect of preliminary rulings. The ramifications for asylum seekers of a preliminary ruling might not always be positive, see *ifra*, chapter D (II)

[190] In that particular case the question posed was the extent to which review of a final decision at the national level should take place in order to take into account a subsequent preliminary ruling in which case the CJEU ruled that, under certain conditions, it should.

[191] C. Baudenbacher, "The Implementation of Decisions of the ECJ and of the EFTA Court in Member States' Domestic Legal Orders", *Texas International Law Journal*, Vol. 40, 2005, pp. 397-398, p. In Da Costa en Schaake N.V the CJEU ruled: "the authority of an interpretation under Article 177 [Article 267 TFEU] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case". Joined Cases 28 to 30/62, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*, [1963] ECR 00061, p. 38.

In contrast to the *erga omnes* effect of the CJEU's judgments, Article 46 § 1of the ECHR on the binding force and execution of judgments reads as follows:

> "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".

Final judgments of the ECtHR are therefore legally binding *inter partes* only. A possible solution to this problem which would enhance the implementation of the ECHR at the national level and reduce the backlog of the ECtHR is the *res interpretata* effect which is gaining pre-eminence as a possible solution to the backlog of the ECtHR which is increasingly referred to in soft law instruments of the Council of Europe[192] and appears in the case law of the Court[193]. According to Bodnar the *res interpetata* effect which primarily refers to judgments - without excluding a role to be played even for decisions - setting new legal principles which should have a persuasive authority and provide an incentive for state parties to change their practices in order to avoid breaches of the ECHR in cases brought against them concerning similar issues.[194]

Although the abovementioned constitute developments towards the right direction they do not create legally binding obligations. Furthermore, making ECtHR judgments binding beyond the parties to a case, thus changing their legal character, would require an amendment of the ECHR.[195] For the time being, taking positive measures to enhance the protection afforded to asylum seekers in line with the jurisprudence of the ECtHR for states

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[192] Brighton's Declaration point A (9) (iv) following the High Level Conference on the Future of the European Court of Human Rights called member states to enable and encourage national courts and tribunals among other to take the following measures in order to ensure the implementation of the ECHR at the national level: "…to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court. http://www.echr.coe.int/documents/2012_brighton_finaldeclaration_eng.pdf

[193] As the ECtHR argued in *Pretty*: "The applicant's counsel attempted to persuade the Court that a finding of a violation in this case would not create a general precedent or any risk to others. It is true that it is not this Court's role under Article 34 of the Convention to issue opinions in the abstract but to apply the Convention to the concrete facts of the individual case. However, judgments issued in individual cases establish precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases. *Pretty v. the United Kingdom*, No. 2346/02, (ECHR, 29 April 2002),
par. 75.

[194] A. Bodnar, "*Res Interpretata*: Legal Effect of the European Court of Human Rights' Judgments for other States than those which were Part to the Proceedings", in Y. Haeck, E. Brems (eds.), *Human Rights and Civil Liberties in the 21st Century*, London, Springer, 2014, p. 224. According to Bodnar the legal basis of *res interpetata* derives from Article 1 read in conjunction with Article 19 of the ECHR, *ibid*, p. 226-7.

who are not parties in a given case remains at large at their discretion. For instance, during a Conference held in Skopje in 2010 Pourgourides, at that time Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe while referring to similar violations of the ECHR by contracting parties brought before the ECtHR illustrated the shortcomings emanating from Article 46. He argued:

> The Court held as early as in 1979, in *Marckx v. Belgium*, that children born out of wedlock must not be discriminated. French law was similarly discriminatory. But the necessary changes were made only after France herself was condemned by the Court in the case of *Mazurek v. France*, in 2000[196]

In this specific case it took France 21 years to abide by the standards of protection of the ECHR as articulated through the case law of the ECtHR. Irrespective of the extent of protection afforded to asylum seekers in cases brought before the ECtHR one could argue that a particular state might still not abide to the standards of protection as those are evolving through the Court's case law unless that particular state is also condemned.

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[195] *Ibid*, p. 231.

[196] Council of Europe, PACE, Committee on Legal Affairs and Human Rights, *Contribution to the Conference on the Principle of Subsidiarity Skopje, 1-2 October 2010, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice"*, November 2010, AS/Jur/Inf/2010/04. http://www.assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf, p. 2.

C. Issues of substance regarding the granting of international protection: sexual orientation

Having examined the international mechanism of protection available within the European continent to asylum seekers as established by the two separate yet interlinked regimes, it is important to turn to specific facets of the granting of international protection as those are being developed by the case law of the two Courts in order to see how their strengths and weaknesses practically impact upon asylum standards and the level of protection. By doing so, in a comparative way one shall be able to understand the extent of interaction between the two Courts and the effect of such interaction on specific issues related to the procedure and substance of asylum claims – how the two Courts and their in between relation impacts upon asylum seekers. The established mechanism of protection therefore as analysed in the preceding chapters shall offer significant insights and will be applied when necessary as a possible explanation to the contradictions observed in the case law of the two Courts and as a means through which one can judge whether the rulings are compatible with the respective treaty based obligations binding the two Courts, especially in the case of the CJEU. As already stated, the following two chapters concentrating on issues of substance and procedure of the case law on asylum do not purport to offer an all-encompassing review of the case law but shall concentrate on important aspects and contradictions witnessed and which, as will be shown not only have important practical ramifications upon actual protection of asylum seekers but provide useful insights upon the evolving system of protection.

Sexual orientation was, not included as a ground for persecution under the Geneva Convention. The definition of a refugee found in article 1 (A) (2) applies to persons who fear persecution for reasons of race, religion, nationality, membership of a particular social group owing or of their political opinion. Such limitation has been over the years made up for through the progressive interpretation – initiated by the United States – of the Geneva Convention leading to the granting of refugee status for persecution on the basis of sexual orientation.[197] The 2012 Guidelines on International Protection No. 9 on claims to refugee

[197] For an overview of early case law on sexual orientation as a ground for persecution and its evolution in the United States, Canada and the United Kingdom see S. Braiham, "Divorcing Sexual Orientation from Religion and Politics: Utilizing the Convention Grounds of Religion and Political Opinion in Same-Sex Oriented Asylum Claims", *International Journal of Refugee Law*, Vol. 27, No. 3, 2015, p. 482-484.

status based on sexual orientation and/or gender identity within the context of Article 1 (A) (2) of the 1951 Convention[198] indicate that claims of persecution for reasons of sexual orientation can be brought under three Geneva Convention grounds found in the definition of refugee namely, religion, political opinion and membership of a particular social group[199] the latter being the most utilised and applied in this particular case by the CJEU as well.

XYZ[200] regarding persecution on the basis of sexual orientation is a significant case for a number of reasons as it stands out when compared with the respective case law of the ECtHR by potentially – regarding the "concealment of sexual orientation" – offering more extensive protection in comparison to subsequent case law of the ECtHR on the same issue but also leading the latter to restricting protection on a certain aspect – "the mere criminalisation" of homosexual activities – as will be analysed in parts I and II below. While the XYZ restricts protection in that specific respect significantly moving from well-established case law of the Strasbourg Court from the 1980's it could be argued that the CJEU has in the end been influencing the former's subsequent case leading it to change course and endorse in its turn a more restricted version of protection. The case is also important in allowing us to check to what extent the CJEU is deviating from the EU's treaty requirements, namely article 6 TEU, providing for the relationship between the two Courts.[201]

I. The Definition of Persecution: the treatment of "mere criminalisation" by the two Courts

XYZ concerned the failed application attempt to the Netherlands of three asylum seekers from Sierra Leone, Uganda and Senegal. They had been subject to violent reactions by their families and to acts of repression by the authorities in their country of origin on account of

[198] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 [hereafter "SOGI Guidelines"]

[199] *Ibid*, p. 11, par. 40.

[200] Joined Cases C-199/12 to C-201/12, *X and Y and Z v Minister voor Immigratie en Asiel* (Fourth Chamber, 7 November 2013).

[201] See, *supra*, chapter (A), (II).

their sexual orientation.[202] The third in sequence preliminary question was asking to what extent the criminalisation[203] of homosexual activities and the potential threat of imprisonment constituted an act of persecution under article 9 (1) (a)[204] read in conjunction with 9 (2) (c)[205] of the QDI [206]. The CJEU argued that fundamental rights linked to sexual orientation, articles 8 of the ECHR and 7 of the EU Charter, regarding the respect of private and family life, are not among those from which no derogation is allowed. The relevant paragraphs read as follows:

> In those circumstances, the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive.
>
> However, the term of imprisonment which accompanies a legislative provision which, like those at issue in the main proceedings, punishes homosexual acts is capable, in itself of constituting an act of persecution within the meaning of Article 9(1) of the Directive, provided that it is actually applied in the country of origin which adopted such legislation.[207]

In this case the CJEU referred to the ECHR and the EU Charter and concluded that for non-derogable rights "mere criminalisation" is not sufficient to grant protection. It is in fact the application and proof of such application of laws criminalising homosexuality that would make an applicant eligible for protection and would by extension constitute an "act of persecution". The CJEU specifically linked imprisonment to an "act of prosecution", as a form of "punishment" under article 9 (2) (c) and as a requirement for article 9 (1) (a) to be

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[202] *Ibid*, par. 25.

[203] In all 3 countries of origin homosexuality is a criminal offense punishable by imprisonment, from ten years to life in the case of Sierra Leone, from one to five years in the case of Senegal and for a maximum sentence of life imprisonment in the case of Uganda. *Idem.*

[204] Article 9 (1) on acts of persecution under chapter III containing the provisions for the qualification of a person as a refugee has as follows: "In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, as act must: (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms".

[205] Article 9 (2) on acts of persecution as qualified in paragraph 1, see *supra* n. 204, can, inter alia, take the form of: (c) prosecution or punishment, which is disproportionate or discriminatory".

[206] QDI.

[207] Joined Cases C-199/12 to C-201/12, *X and Y and Z v Minister voor Immigratie en Asiel* (Fourth Chamber, 7 November 2013), paras. 55-56.

activated by downplaying and downgrading other forms of "punishment"[208] not involving imprisonment – without though totally rejecting them or excluding such a possibility.

On the other hand, the ECtHR has already ruled in a number of cases on facts similar to those in the *XYZ* case.[209] Even if therefore rights specifically linked to sexual orientation are not to be found in the non-derogable rights contained in article 15 (2)[210] ECHR as argued by the CJEU's and for this reason according to the latter require the actual application of legislation criminalising homosexual acts – and which legislation specifically imposes a term of imprisonment – for an act to be characterised as an act of persecution; the ECtHR as will be illustrated below has ruled to the contrary. One should note that owing to article 6 TEU and the EU Charter's explanations providing for an interpretation of EU Charter rights in accordance with the relevant ECtHR's case law, the CJEU should have taken the latter into account.

There are two specific examples which illustrate the ECtHR's position in respect of cases with similar facts to those the CJEU faced in the *XYZ* case. In *Norris*[211] the ECtHR had to rule on the impact on the private life of the applicant under article 8 of the ECHR of legislation – ruled compatible with the Irish Constitution by national courts[212] – "penalising homosexual practices between consenting adult men" which could lead to a sentence of imprisonment for a maximum of two years or a fine[213]. Even though as the ECtHR highlighted "at no time before or since the court proceedings brought by the applicant has he been charged with any offence in relation to his admitted homosexual activities"[214] or of

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[208] This must be compared to the position taken by the ECtHR in similar cases analysed in the following paragraphs but also in relation to the position of the UNHCR on the same issue as will be explained. see

[209] See Matthew Fraser, The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and X v. Minister voor Immigratie en Asiel, Case Summary, European Database of Asylum Law - EDAL, 2013, http://www.asylumlawdatabase.eu/en/content/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y. Frazer criticizes the CJEU's approach on the matter specifically referring to *Dudgeon* and *Norris* cases in this respect.

[210] Article 15 (2) ECHR has as follows "2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision." Article 4 (1) refer to slavery and servitude and Article 7 regards punishment without law.

[211] *Norris v. Ireland*, No. 10581/83, (ECHR, 26 September 1988).

[212] *Ibid*, paras. 21-23.

[213] *Ibid*, paras. 8, 12-14.

[214] *Ibid*, par 11.

any other person being charged on those grounds[215] and although a minimal risk of persecution in the future[216] the ECtHR endorsed at the time a more cautious and protective approach than the CJEU, granting Norris victim status under the ECHR ruling that Ireland had violated article 8. The applicant was considered as being under the risk of prosecution as:

> …there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect. A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question. […] On the basis of the foregoing considerations, the Court finds that the applicant can claim to be the victim of a violation of the Convention within the meaning of Article 25 para. 1 thereof. [217]

Although therefore article 8 ECHR is not a non-derogable right and has lead the CJEU to request the actual application of legislation criminalising – a term of imprisonment being a prerequisite – homosexual activities, as a threshold for national authorities to grant protection; one could argue had the CJEU considered the relevant ECtHR case law on article 8 as developed in the *Norris* case as it ought a more protective stance might have been endorsed. The possibility of policy change in the future and the fact that an individual would "run the risk of being directly affected" was enough for the ECHR to find a violation of article 8 ECHR.

In addition, the reasoning of the ECtHR in respect of "mere criminalisation" as found in the *Norris* case seems to be endorsed by the UNHCR. This should have further reinforced the CJEU's to comply with its legal obligation to interpret the EU Charter's rights in accordance with corresponding ECHR rights as developed through the ECtHR's. Although requiring a close scrutiny on a case by case basis and not expressly stating that "mere criminalisation" amounts to an act of persecution, the SOGI Guidelines – clearly acknowledge[218] the fact that "mere criminalisation" can amount to an act of persecution:

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[215] *Ibid*, par 20.
[216] *Ibid*, par 30.
[217] *Ibid*, paras. 33-34.
[218] In his opinion to *XYZ* AG Sharpston while noticing the absence of an "express reference to a right to the expression of sexual orientation" in the Geneva Convention argued that the latter being a living instrument should be interpreted in accordance with developments in international law and specifically referred to the

> Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection. 28. Assessing the "well-founded fear of being persecuted" in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case.[219]

One could therefore argue that the CJEU, notwithstanding its EU primary law obligations in connection to the ECtHR's case law and the relevant position of the UNHCR on the same issue, has made the threshold for protection under article 9 (2) (a) harder to attain. By doing so it has also overseen the secondary EU law exhortations to member states as contained in the Qualification Directives[220] highlighting the important role to be played by the UNHCR on the granting of refugee status by asking member states to consult with it. Although not specifically referring to the CJEU the latter incitation to EU member states constitutes an indication of the importance to be afforded to the UNHCR Guidelines and which point to the significance of "mere criminalisation" of same-sex relations contrary to the CJEU's position which required the actual application of legislation criminalising homosexual acts.

II. The ECtHR's *ME* case: the evolution of "mere criminalisation" and the divergence of the ECtHR and CJEU over "concealment of sexual orientation"

What is interesting is the subsequent treatment and in a sense evolution of "mere criminalisation" this time under subsequent ECtHR case law specifically regarding an asylum case. In that respect the *ME* case can provide valuable insights. The applicant lodged an asylum application in Sweden which was rejected. He claimed among other[221] as a ground for asylum the fear of being persecuted and exposed to treatment contrary to

SOGI Guidelines. Joined Cases C-199/12 to C-201/12, X and Y and Z v Minister voor Immigratie en Asiel (Fourth Chamber, 7 November 2013), Opinion of AG Sharpston, paras. 24-25.

[219] SOGI Guidelines, p. 8-9, paras. 27-28.

[220] Preambular recital 15 of QDI states: "Consultations with the United Nations High Commissioner for refugees may provide valuable guidance for Member States of the European Union when determining refugee status according to Article 1 of the Geneva Convention". The exact same provision is to be found in recital 22 in the recast QDII.

[221] To be a Libyan national soldier under the Gadhafi regime who feared persecution and exposure to treatment contrary to article 3 ECHR by clan members as while involved in illegal transportation of weapons on their behalf he had been arrested, tortured and had revealed the names of powerful clan members involved in transportation of the weapons. *M.E. v. Sweden*, No. 71398/12, (ECHR, 26 June 2014), par. 23.

article 3 ECHR in Libya on account of his sexual orientation as since his arrival in Sweden he had come into a relationship with a transsexual person holding a Swedish permanent residence permit. He subsequently married that person, a fact he concealed from his family in Libya and claimed that the implementation of the deportation would also constitute a violation of his private and family life under article 8 (2) ECHR.[222] Although as repeated in numerous instances in the judgment there were certain credibility issues in his account regarding other asylum grounds the Swedish authorities and the Court did not at any time question his homosexuality.[223] The ECtHR though did not find the potential implementation of Sweden's decision to deport him to Libya to violate article 3 on account of his homosexuality and fear of persecution emanating therefrom. What is striking is how the ECtHR reached this conclusion in relation to the facts before it and other relevant material cited: the CJEU's *XYZ* case and the UNHCR Guidelines on Sexual Orientation mentioned above. The relevant paragraphs regarding the rejection of his claims under article 3 of the ECHR are worth quoting in length and have as follows:

> Although it is clear that homosexual acts are punishable by imprisonment under Articles 407 and 408 of the Libyan Penal Code, the applicant has not presented, and the Court has not found, any information or public record of anyone actually having been prosecuted or convicted under these provisions for homosexual acts since the end of Gadhafi's regime in 2011. Thus, while having regard to the fact that homosexuality is a taboo subject and seen as an immoral activity against Islam in Libya, the Court does not have sufficient foundation to conclude that the Libyan authorities actively persecute homosexuals. […]
> Moreover, it stresses that the present case does not concern a permanent expulsion of the applicant to his home country but only a temporary return while the Migration Board considers his application for family reunion. […] In the Court's view, this must be considered a reasonably short period of time [4 months] and, even if the applicant would have to be discreet about his private life during this time, it would not require him to conceal or supress an important part of his identity permanently or for any longer period of time. Thus, it cannot by itself be sufficient to reach the threshold of Article 3 of the Convention. […]
> He would thus only have to travel to a Swedish embassy in a neighbouring country for the actual interview which could be done in a few days. In such a short time-frame, the Court finds no reason to believe that the applicant's sexual orientation would be exposed so as to put him at risk of treatment contrary to Article 3 of the Convention in Algeria, Tunisia or Egypt.[224]

Although, evidence of persecution by local militias and non-state actors against homosexuals was presented before the Court in relation to even private events in numerous

[222] *Ibid*, par. 15.
[223] *Ibid*, par. 83.
[224] *Ibid*, paras. 87-89.

instances in Libya[225] and despite the Court's observation "that homosexuality is a taboo subject and seen as an immoral activity against Islam in Libya" the latter chose to rule solely on the basis of active persecution taking place by the authorities in contrast to its previous case law and in line with the CJEU. As argued by Judge Power-Forde in his dissenting opinion, the Court chose to downplay other relevant risks related to the revealing of the applicants sexual orientation emanating from the fact that the applicant would have to travel to a neighbouring country for the interview with the Swedish authorities to take place – which would necessarily involve the applicant's homosexuality – in connection with the treatment of his family unification request.[226] In all of those countries there was evidence that homosexual activities are either criminalised or actual persecution is taking place: in Egypt for instance the penal code provisions for the combating of prostitution are being applied to imprison homosexuals[227]. The Court then concluded that the threshold for an article 3 violation was not reached owing to "the reasonably short period of time" he would be required to stay in Libya before his application for family reunification was treated – as if the decision of the Swedish authorities in that respect would be predetermined and would allow him to return to Sweden – but also owing to the fact the applicant could be discreet and would not be required "to conceal or supress an important part of his identity permanently". The ECtHR therefore has made use of the CJEU case law and has been influenced by it regarding the "mere criminalisation" of homosexual activities against its own previous well established case law[228] while introducing a new test of

[225] *Ibid*, paras. 43-45. Persecution by non-state actors also triggers protection against removal under article 3 ECHR. In the *HLR* case the ECtHR although found no violation of article 3 in the applicant was deported it nevertheless accepted reprisals by drug traffickers because to the applicant owing to information given by the latter leading to the conviction of one them: "It is therefore necessary to examine whether the foreseeable consequences of H.L.R.'s deportation to Colombia are such as to bring Article 3 (art. 3) into play. In the present case the source of the risk on which the applicant relies is not the public authorities. […] Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. *H.L.R. v. France*, No. 24573/94, (ECHR, 29 April 1997), paras. 39-40. For a more recent case see the *J.K.* in which the ECtHR ruled that the return of the applicants to Iraq would constitute a violation of article 3 owing to persecution by Al Qaeda. *J.K. and Others v. Sweden*, No. 59166/12, (ECHR, 23 August 2016), paras. 117, 122-23.

[226] *M.E. v. Sweden*, No. 71398/12, Dissenting Opinion of Judge Power-Forde, (ECHR, 26 April 2014), p. 34-45.

[227] *M.E. v. Sweden*, No. 71398/12, (ECHR, 26 June 2014), paras. 51-53.

[228] This has been also specifically criticized in the separate opinion of Judge De Gaetano who argued that the reference to the CJEU's *XYZ* case was "totally unnecessary" arguing in regard to the latter's approach to "mere criminalisation" while citing the *Norris* case analysed in the preceding section that it could be seen "as

duration[229] which considerably restricts protection as regards asylum seekers to be found in a similar situation.

Of equal, if not of increased importance, to the duration test introduced, is the position taken by the ECtHR – also fiercely criticised in the aforementioned dissenting opinion of judge Power-Forde[230] – in respect of the applicant's discretion and the expectation on the part of the Court towards the applicant to conceal his sexual orientation for "a reasonably short period of time". It seems to be the case that ECtHR has been selectively influenced by the CJEU. In the paragraphs of *XYZ* quoted by the ECtHR in the *ME* case as relevant information to the case to be taken into consideration, along the "mere criminalisation" position of the CJEU the latter's absolute and unambiguous position on the fact that "an applicant cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution" was also included.[231] In addition the ECtHR also referred to the UNHCR's SOGI Guidelines which are very precise and straightforward on the issue of concealing one's sexual identity:

> The UNCHR also stresses that the fact that an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. […] The risk of discovery may also not necessarily be confined to their own conduct since there is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing.[232]

The ECtHR though while ruling upon the threshold of article 3 and the risk of persecution, in the relevant passage cited at length above, it did not at all refer the UNHCR Guidelines but was rather concerned on whether the applicant would be able through discretion and concealment of his sexual identity live up to the Swedish law requiring an applicant to apply from abroad for family reunification.

One could make a certain observation and a cautious remark. Although the relationship between the EU Charter and ECHR is institutionally set and contained in EU primary law the CJEU in the specific case of asylum at least does diverge from its

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somehow undermining the standards set by the Court as far back as the 1980's in connection with the criminalisation of homosexual acts and the resulting violation of Article 8". *M.E. v. Sweden*, No. 71398/12, Separate Opinion of Judge De Gaetano, (ECHR, 26 April 2014), par. 4.

[229] *M.E. v. Sweden*, No. 71398/12, Dissenting Opinion of Judge Power-Forde, (ECHR, 26 April 2014), p. 32.

[230] *Ibid*, p. 33.

[231] See Joined Cases C-199/12 to C-201/12, *X and Y and Z v Minister voor Immigratie en Asiel* (Fourth Chamber, 7 November 2013), par. 71, *M.E. v. Sweden*, No. 71398/12, (ECHR, 26 June 2014), par. 50.

obligation to interpret EU rights in accordance with the interpretation of respective rights as contained in ECHR and interpreted by the ECtHR. In fact, the CJEU endorsed a different approach from the ECtHR regarding the criminalisation of homosexual activities in a case specifically concerning asylum. The ECtHR followed this turn of the CJEU, contrary to its previous case law, but also further diminished the level of protection offered to asylum seekers by allowing for and accepting discretion and concealment of one's sexual orientation for a certain amount of time and found the latter to be compatible with article 3 ECHR. Even though there is no respective institutional provision on the part of the ECHR as article 6 of the TEU providing for the relationship between the two Charters, nor any expectation for the ECtHR to consider the CJEU's case law, one ought to highlight that the CJEU has surpassed the ECHR in providing for more generous protection by considering that the fact that an asylum seeker would have to conceal his sexual identity to avoid persecution amounts to actual persecution.

A cautious remark and a possible explanation for the above might be that the ECtHR indirectly deals with asylum issues by applying article 3 to prohibit removal. In this case it seems that an intrinsic "applicable law"[233] limitation of the ECHR owing to the absence of direct reference to asylum within the Convention lead the Court to adopt a more restrictive approach to protection while endorsing a more "immigration focused" approach. It is characteristic that the section on "relevant domestic law and practice" includes provisions of the Swedish Alien Act on the need on international protection and the requirement for family reunion[234] whereas asylum related material, the UNHCR's Guidelines and the CJEU asylum case law were placed under the section "other relevant information"[235]. In complete contrast, in *J.K* a case concerning removal and ECHR article 3 protection against it, the ECtHR referred to EU directives on asylum and asylum case law of the CJEU under the heading "Relevant European Union Law and case-law of the Court

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[232] *M.E. v. Sweden*, No. 71398/12, (ECHR, 26 June 2014), par . 49. SOGI Guidelines, p. 9 paras. 31-32.
[233] See *supra,* chapter A (I).
[234] The paragraph introducing the provisions on international protection contained in the Swedish Aliens Act referred to by the ECtHR has as follows: "the basic provisions mainly applicable in the present case, concerning the right of aliens to enter and to remain in Sweden in the 2005 Aliens Act. It defines the conditions under which an alien can be deported or expelled from the country". It is only further on that the Court merely acknowledges sexual orientation being recognised in Sweden as falling under grounds for persecution. *M.E. v. Sweden*, No. 71398/12, (ECHR, 26 June 2014), par. 28.
[235] *Ibid*, paras. 28-34, 46-50.

of Justice of the European Union"[236] while the UNHCR Guidelines where under the title "Relevant Guidelines and material of the UNHCR"[237] The aforementioned, were directly applied to the case before the Court such as for instance, in relation to the determination of the distribution of the burden of proof[238]. In contrast, and as already argued the immigration focused approach in the *ME* case can be evinced in the Court's reasoning on article 3 protection were the UNHCR Guidelines favourable for triggering protection for the applicant where not at all mentioned.

In the end, *ME* was finally granted refugee status by the Swedish authorities owing to the deteriorating situation in Libya. The applicant appealed the judgment of Court's fifth section even if he was granted permanent resident permit and the case was referred to the Grand Chamber. The applicant held that:

> The "matter" before the Grand Chamber now also included the correctness of the Chamber's reasoning under Article 3. Furthermore, according to the applicant, respect for human rights required that the Grand Chamber continue the examination of the case, since it raised serious issues of fundamental importance relating to homosexuals' rights and how to assess those rights in asylum cases all over Europe[239]

Even if the opportunity to revise its position came before the ECtHR, the Grand Chamber disagreed with the applicant and insisted in upholding the reasoning of the judgment of the Fifth Section discontinuing the case and striking out from its list of cases[240].

On the other hand, the CJEU has at its disposal and is found under an extensive web of primary and secondary EU law obligations and provisions regarding asylum. Although it deviated from the ECtHR case law and article 6 TEU, the CJEU in *XYZ* took into account first article 78 TFEU[241] requiring the EU asylum *acquis* to be interpreted in accordance with the Geneva Convention – by considering the position of the UNHCR – and second the preambular incitation albeit addressed to states – to be found within QDI – asking for the "consultation" of the UNHCR in the granting of international protection. Regarding the latter, it endorsed AG Sharpston's proposal[242] of taking into consideration the SOGI Guidelines. If in the case of criminalisation the CJEU had some room of manoeuvre owing

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[236] *J.K. and Others v. Sweden*, No. 59166/12, (ECHR, 23 August 2016), paras, 52-54.
[237] *Ibid*, paras. 47-51.
[238] *Ibid*, paras. 91-98.
[239] *M.E. v. Sweden*, No. 71398/12, (ECHR, 8 April 2015), (striking out), par. 30.
[240] *Ibid*, paras. 39-40.
[241] See *supra*, chapter (A) (II).

to non-absolute language employed by the UNHCR[243] in the treatment of "mere criminalisation" – even though its importance was highlighted, this could not be upheld under the more authoritative language used by the UNHCR regarding the concealment of sexual identity[244] leading the CJEU to rule that one cannot be expected to conceal his sexual orientation in order to avoid persecution.

[242] *Supra*, n. 218.
[243] See *supra*, n. 219.

D. Issues of procedure and effective remedies in asylum cases under the ECtHR and the CJEU

Following the analysis of how the Courts have dealt with substantial issues regarding the granting of international protection specifically focusing upon asylum claims related to the sexual orientation of the applicants it would be necessary – both as a means to acquire a more complete picture on how the international mechanism of protection evolves but also to consider in practical terms the current standards of protection and the remedies available in that respect – to turn our attention to the procedural aspects and examine through this lens the nature of the interrelationship between the two Courts and their combined impact upon international protection within Europe.

As already mentioned, no matter how generous the provisions on the granting of asylum under a given legal order might be if the applicant is prevented from accessing it the former are rendered futile. For this reason, the following chapter shall concentrate upon a very important yet rather specific dimension indirectly linked with the access of applicants to the asylum procedures but one which involves as will be explained a real danger of direct or indirect refoulement. Transfers of asylum seekers under the Dublin system[245] in combination with shortcomings within EU member states regarding the latter's asylum procedure and the processing of claims, as witnessed and described in the *MSS* case and will be further articulated in the following analysis, have exposed asylum seekers to treatment contrary to article 3 ECHR. For this reason, in the aforementioned case the ECtHR had to apply its standards of protection to a transfer within the borders of the EU in which "geographical space" asylum seekers are supposed to be under safety. Such a concentrated focus is deemed appropriate as in this way one can also be informed of the standards of protection provided for by the ECtHR in terms of issues of procedure and procedural rights – article 13 ECHR – pertaining asylum cases which of course do apply in case an EU member state is to implement a transfer or removal of an individual to a third non-EU and ECHR country in which he might be exposed directly or indirectly to treatment contrary to article 3 ECHR thus being subject of either direct or indirect refoulement. For instance, remedies regarding a transfer or removal decision in order to be

[244] See *supra*, n. 232.
[245] See *supra*, chapter A (III).

in accordance with article 13 standards must necessarily have a suspensive effect[246] to the decision in case there is the risk of treatment contrary to article 3 ECHR. This applies to both transfers within the EU under the Dublin Regulations but also regarding appeals against removal decisions following the rejection of asylum applications or under the accelerated or border examination of an application under the Asylum Procedures Directive[247]. It is also rather interesting to see how the ECtHR has extended and has applied its protection in a domain of EU law – the asylum *acquis* – where one would expect the CJEU to be better equipped and positioned to deal with and exercise more effective scrutiny.

As a final remark before proceeding to the analysis one should not omit mentioning the fact that in the *Hirsi Jamaa* case in which the ECtHR expanded the territorial scope of application of the ECHR to cover extraterritorial activities of states[248] the Court also found a violation of article 13 in conjunction with article 3[249]. This means that ECHR articles related to procedural aspects of asylum – providing safeguards in that respect, such as article 13 are also to be applied extraterritorially thus enhancing the level of protection for asylum seekers in that respect.

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[246] The need for suspensive effect of a transfer decision or a removal order in asylum cases in which an applicant has an arguable complaint of being exposed to treatment contrary to article 3 has been thoroughly established by the ECtHR. One of the first of such cases, specifically related to asylum was *Gebremedhin*. In that case, the Court held that remedies and safeguards available under the French asylum system for aliens on French soil where adequate under article 13 but the "procedure for claiming asylum at the border" applied to persons who have not received leave to enter the country and who are held in a "waiting zones" face "automatically" the danger of being removed in case their "planned asylum application" is held manifestly unfounded. In addition, the "urgent application for a stay of execution" which is available in border cases and which the applicant unsuccessfully used has no automatic suspensive effect. For that reason France was found in violation of article 13 in conjunction with article 3 as the applicant faced removal without having the opportunity to lodge an asylum application. *Gebremedhin v. France*, No. 25389/05, (ECHR, 26 April 2007), paras. 60,63,65. The applicant was in the end granted refugee status only because the ECtHR applied interim measures under article 39 of its rules. *Ibid* par. 54. For the evolution and necessity of the suspensive effect under article 13 of the ECtHR of appeals procedures in asylum cases see T. Spijkerboer, "Subsidiarity and 'Arguability': the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases", *International Journal of Refugee Law*, Vol. 48, 2009, p. 69-73.

[247] The accelerated and border or transit zone examination of asylum applications is provided for in article 31 (8) of the PDII under several non-exhaustive grounds. For a comprehensive analysis regarding effective remedies under the EU asylum procedures directives and their relationship and compliance with article 13 ECHR and the ECtHR's case law see M. Reneman, "Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Applicant's EU Right to an Effective Remedy", *International Journal of Refugee Law*, Vol. 25, No. 4, p. 717-748. See *supra*, n. 246.

[248] See *supra*, chapter B (I).

I. The Dublin Transfers and the *MSS* case

In the *MSS* case and by extension directly concerning the entire Dublin II system the ECtHR found Belgium in violation also of article 13 of the ECHR. The procedure of processing expulsion orders under Belgian Law in respect of Dublin transfers during the examination of the appeal against the order to leave the country[250] was in violation or article 13 ECHR in conjunction with the danger for the applicant of being exposed to treatment contrary to article 3. The Belgian authorities were in fact blindly applying Dublin transfers without considering if there was a real risk of exposure to treatment contrary to article 3 as they ought to in respect of their ECHR obligations. First, they were not considering the substance of such claims, not reaching into the merits – they were rejecting relevant information and proof submitted by the applicants with regard to article 3 treatment[251], and even if they did they were placing an unreachable burden of proof for the applicants by requiring them to "demonstrate a link between the general situation in Greece and the applicant's individual situation"[252]. Second, the Aliens Appeal Board practice in the examination of an appeal as in the particular case of the applicant in the *MSS* case was not accompanied by the suspension of the order to leave the country and the Court could not see how the applicant - already been transferred - would be offered "suitable redress"[253] given also the fact that decisions in this context seemed to be predetermined as the "applicant's appeal had no chance of success in view of the constant case law"[254] of the Belgian Aliens Appeal Board. In fact, what the ECtHR did was to read an individual right as guaranteed by article 13, in cases where there was an arguable claim of treatment contrary to article 3, enforceable under the ECtHR in respect of Dublin transfers.

As is very well know the CJEU followed the ECtHR's approach in the *NS*[255] case[256] and rebutted in its turn the assumption that membership to the CEAS[257] protects effectively

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[249] *Hirsi Jamaa and others v. Italy*, No. 27765/09, (ECHR, 23 February 2012) paras. 205-207.
[250] *M.S.S. v. Belgium and Greece*, No. 30696/09, (ECHR, 21 January 2011), par. 144.
[251] *Idem.*
[252] *Ibid*, par. 148.
[253] *Ibid*, par. 393.
[254] *Ibid*, par. 394.
[255] *N. S. and M.E. v Secretary of State for the Home Department*, [2011] I-13991. In this case similar to the *MSS* the preliminary questions sent regarded the transfer of asylum seekers to Greece, in view of the shortcomings in that country, under article 3(2) of the Dublin Regulation and the relationship with the EU Charter to such cases – whether the decision of such a transfer could be precluded because of the non-

asylum seekers by providing sufficient safeguards and guarantees including that against the danger of refoulement to a fellow EU member state.[258] In fact, as argued by Clayton in his comment on the *MSS* case, "the major legal and practical significance of the ECtHR judgment is in its impact on the CEAS".[259] In the case of the CJEU though the rebuttal of the assumption of safety under the CEAS system was translated and applied as a restriction of member states' discretion in Dublin Transfers. One cannot fail to notice the divergent approach of the two Courts in their respective treatment of Dublin transfers. One could argue that such deviation emanates from the construction of the two mechanisms, as will be explained further subsequently, referring to direct access of applicants in the case of the ECtHR and to the concept of indirect access available to asylum seekers through preliminary question posed by national courts to the CJEU. The preliminary questions sent to the CJEU specifically referred to and related to the extent of state discretion in respect of article 3 (2) of the Dublin II Regulation[260]:

> Is the duty of a member state to observe EU fundamental rights discharged where the state sends the asylum seeker to the Member State which article 3(1) [Dublin II] designates as the responsible state […]
> […] Alternatively, is a member state obliged by European Union Law, and if so, in what circumstances, to exercise, the power under Article 3(2) [Dublin II] to examine and take responsibility for a claim, where a transfer to the responsible state would expose the asylum claimant to a risk of violation of his fundamental rights […][261]
> […] Is the transferring state under…Regulation (EC) No. 343/2003 obliged to access the compliance of the receiving member state with Article 18 of the Charter […][262]

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observation of EU Charter rights to the EU state receiving back the asylum seeker. *M.S.S. v. Belgium and Greece*, No. 30696/09, (ECHR, 21 January 2011), paras. 50-53.

[256] In his opinion to the *NS* case, AG Trstenjak argued, "In answering the questions referred, regard must also be had to the judgment of the European Court of Human Rights in *MSS v Belgium and Greece* – which was delivered after the order for reference has been made". In addition, the CJEU specifically referred to the *MSS* case and accepted the standards of proof as submitted to the ECtHR as sufficient and relevant in the examination by EU member states of subsequent relevant cases. Joined Cases C-411/10 και C-493/10, *N. S. and M.E. v Secretary of State for the Home Department*, [2011] I-13991, Opinion of AG Trstenjak, paras. 89-91.

[257] Common European Asylum System

[258] The presumption of safety within the CEAS countries is to be found in numerous instruments of the EU. For instance, preamble recital two of Dublin II argues upon the establishment of the CEAS which is supposed to ensure that nobody is sent back to prosecution by fully and inclusively applying the Geneva Convention: "In this respect and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement are considered as safe countries fir third-country national".

[259] G. Clayton, "Asylum Seekers in Europe: *M.S.S. v Belgium and Greece" Human Rights Law Review,* Vol. 11, No. 4, 2011, p. 759.

[260] See *supra,* chapter A (III).

[261] Joined Cases C-411/10 και C-493/10, *N. S. and M.E. v Secretary of State for the Home Department*, [2011] I-13991, par. 50.

[262] *Ibid*, par. 53

In addition, the CJEU although in its ruling endorsed the ECtHR's reasoning regarding Dublin transfers and safety within participant member states, it nevertheless significantly increased the threshold to be reached for a transfer to be considered as incompatible with Article 4 of the EU Charter[263] in comparison to the ECtHR – thus reducing the level of protection for asylum seekers – arguing that:

> …if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the member state responsible, resulting in inhuman and degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that member state, the transfer would be incompatible with that provision.

Owing to the CJEU requiring "systemic flaws" the "threshold of seriousness is higher in the sense of a serious structural deficiency being in place able to undermine or even to remove mutual trust among states[264]. The suspensive effect of an appeal to a Dublin Transfer affirmatively guaranteed under the ECtHR in *MSS* under article 13 in conjunction with article 3 and the danger of further direct or indirect refoulement is not at all mentioned by the CJEU the latter establishing no safeguards nor any rights related thereto for asylum seekers. Furthermore, as a further indication of the CJEU "expansive" approach to state discretion in contrast to the ECtHR position on the same subject one can mention the latter's position that Belgium "knew of ought to have known" what the applicant would be facing if transferred to Greece, whereas, the CJEU on the basis of the same evidence cited in *MSS* - directly drawing upon the ECtHR's judgment in this respect[265] argued concerning EU member states, in a negative way, that transfers should not take place "where they

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[263] Article 4 of the EU Charter is the equivalent of article 3 ECHR. S. Morgades-Gil, "The Discretion of States in the Dublin II System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU", *International Journal of Refugee Law*, Vol. 27, No.3, 2015, p. 442.

[264] *Idem.*

[265] The CJEU argued "…information such as that cited by the European Court of Human Rights enables the Member states to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks". Joined Cases C-411/10 και C-493/10, *N. S. and M.E. v Secretary of State for the Home Department*, [2011] I-13991, par. 91. The CJEU was referring to "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 Dublin II in order to improve the efficiency of the system and the effective protection of fundamental rights". *Ibid*, par. 90. The aforementioned are to be found in *MSS* case in paragraphs 347-350. *M.S.S. v. Belgium and Greece*, No. 30696/09, (ECHR, 21 January 2011).

[Member states, including national courts] could not be unaware stat systemic deficiencies in the asylum procedure and in the reception conditions"[266]

II. CJEU's subsequent case law on asylum seekers rights' under Regulation 343/2003/EC and the "architecture" of the European protection mechanisms

The preceding, do not only constitute a simple remark which has practical implications regarding the level of protection offered to asylum seekers but one could arguably make a more general claim that it can be directly linked and be considered a result of the architecture of the two systems of protection available in Europe. The decreased role of private parties within the preliminary ruling procedure – in essence an instrument of cooperation among courts – as witnessed above by the preliminary questions posed in the *NS* case should be juxtaposed to the direct victim status granted under the ECHR[267] In other words, the CJEU had difficulties in providing for individual rights and safeguards regarding the Dublin system[268] in contrast to the ECtHR which had a freer hand under article 13 ECHR, and its established case law under that article[269], in determining rights of asylum seekers within the EU's inter-state Dublin system set to determine the responsible state for treating an asylum application. The "interstate" nature of the Dublin Regulation was reinforced by the preliminary ruling procedure and by the referring courts phrasing of the questions which specifically concerned the discretion of a state under the Dublin system which resulted in restricting protection to asylum seekers. Such perception of the Dublin Regulation's role, which one can argue had a determinative effect on the "limitations" in respect of protection and safeguards in the *NS* ruling as articulated above, is confirmed in subsequent CJEU's cases.

For instance, in *Puid,* the preliminary question posed asked whether under the Dublin II regulation an asylum seeker had the right to ask to have his application treated by the member state in which he finds himself in – "whether the latter would be obliged to

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[266] Joined Cases C-411/10 και C-493/10, N. S. and M.E. v Secretary of State for the Home Department, [2011] I-13991, par.94.

[267] See *supra,* chapter B (II).

[268] An insightful analysis upon this issue, upon the lines of which the present analysis draws, is to be found in S. Morgades-Gil, "The Discretion of States in the Dublin II System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU", *op cit,* p. 441-446.

[269] See *infra,* n. 287.

exercise the right to assume responsibility conferred by Article 3(2)"[270] – owing to his fundamental rights being under threat if expelled to the responsible state.[271] In that case, and as the member state in which the asylum seeker is found cannot not send him back to the responsible - under the Dublin II provisions – state, the former had, according to the CJEU, first, to continue to examine "the criteria set out, in order to establish whether another state can be identified as responsible in accordance with one of those criteria"[272] and second, was not required under Article 3(2) of the Regulation, to examine the application for asylum[273] in case a responsible state in which the applicant can be safely sent is not found. Even more illustrating is the reasoning behind the CJEU's ruling as articulated in AG's Jaaskinen opinion to the *Puid* case, who argues, while analysing the Dublin System:

> … the objective of Regulation No 343/2003 [Dublin II] is 'the establishment of criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States'. In other words, Regulation No 343/2003 is not directed at vesting individuals with rights, but with organising relations between Member States even though it contains some elements that are not irrelevant to the rights of asylum seekers. All this, coupled with the fact that Article 3(2) of Regulation No 343/2003 is a discretionary measure, points away from an interpretation that would vest asylum seekers with any individual rights relating to the application of that provision.[274]

Even though the ECtHR had already recognised individual rights for its applicant in "Dublin cases" under article 13 and had provided for the necessity of practical safeguards in the guise of a suspensive effect of an appeal to a Dublin transfer the CJEU was endorsing a very restricted approach which can effectively deprive asylum seekers from access to the asylum procedure altogether owing to the deficiencies noticed in asylum procedures in certain EU member states as in *MSS* in which case the applicant was deprived of the possibility of having his case examined in Belgium and risked the same occurring to him following his transfer to Greece which could have resulted in his indirect or indirect refoulement to Turkey or Afghanistan[275]. It is worth mentioning, as a final remark and as

[270] Case C-4/11, *Bundesrepublik Deutschland v Kaveh Puid*, (GC, 14 November 2013) 25
[271] *Ibid*, par. 24.
[272] *Ibid*, par. 36.
[273] *Ibid*, par. 37.
[274] Case C-4/11, *Bundesrepublik Deutschland v Kaveh Puid* , (Grand Chamber, 14 November 2013), Opinion of AG Jaaskinen, par. 58.
[275] *M.S.S. v. Belgium and Greece*, No. 30696/09, (ECHR, 21 January 2011), paras. 321, 347.

argued by Morgades-Gil, in another case[276] brought before the CJEU regarding Dublin transfers, the Court based on *Puid*'s reasoning that Dublin II only stipulates organisational rules' governing relations between members and not rights for asylum seekers" further increased the discretion of states[277] and decreased the protection available to asylum seekers by *strictly* confining the suspension of transfers under Dublin II to cases in which the applicant was susceptible to treatment contrary to article 4 of the EU Charter in view of "systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum"[278] - a higher threshold in comparison to the ECtHR's for ruling against a transfer.[279] In the *Abdullahi* case therefore article 19 of Dublin II, providing for the possibility to an asylum seeker to appeal or to have his transfer reviewed by questioning the choice of criteria regarding the allocation of responsibility to treat an application under Dublin II – which indicates the country of first entry of the asylum seeker into the EU" as being the responsible one – following the decision on the part of that destination state to assume the responsibility of the asylum seeker's application can *only* be used against the risk of treatment contrary to article 4 of the EU Charter.[280]

III. The evolution of EU secondary law following the *MSS* judgment and the recognition of individual rights[281] under "Dublin III" Regulation 604/2013/EU

Having analysed the case law of the two Courts and the impact of the ECtHR to the CJEU and its limitations, on transfers established under Dublin II it would be necessary to

[276] Case C-394/12, *Shamso Abdullahi v Bundesasylamt,* (Grand Chamber, 10 December 2013)

[277] S. Morgades-Gil, "The Discretion of States in the Dublin II System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU", *op cit,* p. 443.

[278] Case C-394/12, *Shamso Abdullahi v Bundesasylamt,* (Grand Chamber, 10 December 2013), par 60.

[279] Morgades-Gil, criticizes the CJEU for deviating from the ECtHR case law and its doctrine referring to the fact that "besides a serious violation of the right to freedom from torture or inhuman and degrading treatment, a serious risk of violation of other rights in the ECHR could also oblige a member state to activate the sovereignty clause in order to take responsibility for the asylum seeker". S. Morgades-Gil, "The Discretion of States in the Dublin II System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU", *op cit,* p. 442.

[280] *Ibid,* p. 443; Case C-394/12, *Shamso Abdullahi v Bundesasylamt,* (Grand Chamber, 10 December 2013), par. 62.

[281] For an insightful analysis of such evolution which has informed the ensuing argumentation see Constantin Hruschka, Strengthening effective remedies for asylum seekers in the Dublin procedure: from Abdullahi to Ghezelbash and Karim, Case Summary, European Database of Asylum Law - EDAL, 2013,

take into consideration its recast, namely Regulation Dublin III. Although the latter instrument, reaffirms the fact that EU member states are considered as safe countries[282] and there are specific but limited safeguards under article 3 (2)[283] for transfers of third country nationals there is considerable change regarding safeguards at the disposal of asylum seekers, during the review or an appeal to a transfer decision. Paragraph 3 of Article 27 of the said Regulation, on remedies, has as follows:

> For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:
>
> (a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or
>
> (b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or
>
> (c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request…[284]

Member states in the context of Dublin III have three options to provide for individuals following an appeal on their part to a transfer decision. The available options for states which constitute safeguards for the person to be transferred are to be found in complete contrast with what was provided for in article 19 (2)[285] of the Dublin II Regulation. In fact, the equivalent of article 27 on remedies did not at all exist under the Dublin II Regulation[286] whereas under the revised system EU states ought to provide the possibility

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http://www.asylumlawdatabase.eu/en/journal/strengthening-effective-remedies-asylum-seekers-dublin-procedure-abdullahi-ghezelbash-and

[282] In fact, Preamble recital 3 of the recast Regulation is identical to the respective provisions found in the Dublin II Regulation and which have been already referred to above.

[283] Article 3 (2), in line with the CJEU's case law, restricts transfers only in the case "Where it is impossible to transfer an applicant to the Member state primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member state"

[284] Dublin III.

[285] Article 19 (2) of Dublin II had as follows: "The decision referred to in paragraph 1 shall set out the grounds on which it is based. […] This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this."

[286] See Annex II, Correlation table, Dublin III. In fact, according to the correlation table and as confirmed by the CJEU in *Ghezelbash*, the equivalent of Dublin's II article 19 (2) is to be found in article27 (1) of Dublin

of an appeal which will have a suspensive effect under all three available options and will have necessarily to have a court or a tribunal to closely and rigorously examine the appeal following the suspension of the transfer. One cannot fails to notice, having already mentioned above the reluctance of the CJEU – dealing Dublin transfers under the prism of state discretion, the significant impact of the ECtHR case law through the *MSS* judgment upon which one could argue article 27 largely and directly draws from[287]. The latter observation is reinforced by the fact, as argued by Peers, that member states were reluctant and unwilling to raising the standards of protection for asylum seekers within the Dublin system[288]. One could therefore argue that the objective of improving the position and protection of individuals, in the absence of any will for radical reform and in complete contrast to what was provided for under the Dublin II Regulation – has been met and informed by the findings in the *MSS* case.

As a final remark regarding the Dublin III Regulation worth noticing, is that rights which have been recognised to individuals in relation to the determination of the responsible state for treating an asylum application under the reformed Dublin system have in fact been also confirmed in the CJEU's case law[289]. In *Karim*, the preliminary question

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III analysed further below. See also Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, (Grand Chamber, 7 June 2016), par. 31.

[287] See *supra* (I) (II). See also paragraph 293 of the same judgment in which the ECtHR reiterates its general principles as developed in its relevant case regarding removal and the risk of treatment contrary to article 3 of the ECHR and which is worth citing in length in order to highlight the similarities with article 27 of the Dublin III Regulation. The references of the ECtHR to its previous case law have been intentionally included on order to illustrate the firm basis upon which the ECtHR draws regarding alleged violation of article 13 in conjunction with article 3 and which can be found, nearly in their entirety, in the relevant provisions of the Dublin III Regulation: "…the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50), as well as a particularly prompt response (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV); it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Čonka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I, and *Gebremedhin [Gaberamadhien]*, cited above, § 66)." *M.S.S. v. Belgium and Greece*, No. 30696/09, (ECHR, 21 January, 2011), par. 293.

[288] Steve Peers, The second phase of the Common European Asylum System: A brave new World – or lipstick on a pig?, Statewatch, 2013, p. 6.
http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf

[289] The first of such cases has been *Ghezelbash* in which the CJEU noticed and highlighted the evolution of the Dublin system which has come about by the Dublin III Regulation and clarified the scope of article 27 (1) the latter being applicable upon all criteria for determining the member state responsible - to be found in Chapter III of the Regulation - and held that: "…the reference in recital 19 of Dublin III to the examination of the application of the regulation in an appeal against a transfer decision for which provision is made in Article

sent to the CJEU concerned the extent to which the right to an effective remedy under article 27 (1)[290] in light of recital 19[291] – provides to an asylum applicant the opportunity to challenge the criteria of Dublin III found in chapter III on the basis of which the individual is to be transferred to another EU member state defined as the responsible one and which has agreed to receive him.[292] In this case the CJEU held that a remedy against a transfer may

> …inter alia concern the examination of the application of that regulation and which may therefore result in a Member state's responsibility being called into question even where there are no systemic deficiencies in the asylum process or in the reception conditions for asylum seekers…[293]

It becomes evident in the *Karim* case that an individual due to his right to an effective remedy, provided for in article 27 (1), can call into question the application on the part of a member state of the Dublin III provisions regarding the allocation of responsibility for treating an asylum request significantly curtailing the discretion of EU member states in that respect while increasing the level of protection available to asylum seekers by means of enabling them to enforce individual rights under Dublin III.

27(1) of the regulation must be understood as being intended to ensure, in particular, that the criteria for determining the Member State responsible laid down in Chapter III of the regulation are correctly applied, including the criterion for determining responsibility set out in Article 12 [Chapter III] of the regulation.". See Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie,* (Grand Chamber, 7 June 2016), par. 44. Furthermore, In paragraphs 30-61 of the said judgment the CJEU directly links in its reasoning of the judgment that such an expansive interpretation of the scope of Article 27 (1) is necessary in view of previous shortcomings and failures of the Dublin system as a means to ensure the effective protection of asylum seekers by the provision of effective remedies within the Dublin III system.

[290] Article 27 (1) 19 of Dublin III has as follows: "The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal".

[291] Recital 19 of Dublin III on effective remedies and legal safeguards in respect of transfers, has as follows: "In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred."

[292] Case C-155/15, *George Karim v Migrationsverket,* (Grand Chamber, 7 June 2016), par. 13.

[293] *Ibid,* par. 22.

Concluding Remarks

Having endorsed the examination of international protection in Europe through the case law of the two Courts in order to understand how it has evolved to stand as it does today – for instance, regarding the territorial scope of protection – while at the same time analysing numerous facets of its operation as well as its technical "characteristics" as made up by the two Courts and their respective legal orders – such as access to the Courts and the legal effect of their judgments – one can also reach some conclusions regarding its future development. In doing so, all the preceding make up for the narrowly focused examination of case law specifically concentrating upon issues relating to the sexual orientation as a ground for persecution in relation to substantial issues of granting protection and "Dublin transfers" with regard to issues of procedure. The recent case law analysed offers a practical example of how evolution takes and has taken place by highlighting the strengths and weaknesses of each legal order. In addition, while offering an up to date description of the threshold to be reached for protection to be granted regarding persecution on grounds of sexual orientation the current analysis has also portrayed the rights asylum seekers enjoy while being subject to a Dublin transfer. By doing so, they also contribute to reaching conclusions regarding the determinants likely to impact the evolution of the standards and level of protection provided to asylum seekers in Europe.

More specifically, one ought to highlight the significant role played by the ECtHR in extending the territorial scope of protection and for providing as we speak – owing to the fact of being directly accessible to individuals – the most efficient means for asylum seekers to vindicate their rights. This is also proven in practice in the *MSS* case in which the applicant was able to find effective redress while entangled within the essentially inter-state Dublin II transfer procedures. What is more, the CJEU as evinced in the *NS* seems to be generally following and endorsing the ECtHR's case law in this particular case the latter's judgment in *MSS*. The impact the ECtHR bears upon the EU legal order does not only refer to the case law of the CJEU but also includes secondary EU law. The ECtHR has had significant impact upon secondary EU law which endorsed the main points of the *MSS* case as articulated by the ECtHR. Another example would be the impact of the *Hiris Jamaa* case

to the recast of the Frontex Regulation.[294] There seems to be no reason for such scrutiny actually taking place on the part of the ECtHR upon the EU legal order to end.

On the other hand, one cannot ignore the impact the CJEU is supposed to have upon international protection in Europe as its asylum case law expands. The latter has at its disposal an enormous – compared to the ECtHR – body of secondary EU law concerning asylum which it will be called to interpret via the preliminary rulings procedure. The latter, in combination with the *erga omnes* effect of its judgments provide the CJEU the opportunity to further formulate and shape in greater "detail" and to greater extent in sheer numbers – owing to EU member state being bound by its interpretations of EU secondary law – international protection in Europe in a way the ECtHR is neither able nor meant to do so. This should not be a reason for concern as, as proven in the case of persecution on grounds of sexual orientation the CJEU can and did offer, in this particular case, more extensive protection by arguing, contrary to the ECtHR, that one cannot be expected to conceal his sexual orientation in order to avoid persecution. A possible explanation of the aforementioned could be drawn by taking into consideration primary EU law. Owing to Article 78 TFEU, which specifically demands EU secondary law to be interpreted in accordance with the Geneva Convention, the CJEU is much better positioned to take into account the UNHCR and its Guidelines as they evolve; the latter being predestined to contain a more protective approach and positive perspective on asylum seeker's rights and claims. On the other hand, the fact that the ECHR makes no reference to asylum whatsoever seems to make the ECtHR less inclined in comparison to the CJEU to consider the UNHCR Guidelines to which though it must be said it refers to albeit in a selective and unpredictable way as illustrated in the comparison between the *M.E.* and *J.K.* cases.

So far the ECtHR provides more effective protection in practise on an individual level and has been continuously scrutinising EU member states when the latter implement the EU asylum *acquis*, has been informing through its judgments secondary EU law and the CJEU's asylum case law. The CJEU on the other hand has an increased potential to shape it in much more comprehensive way and to a greater extent in the future.

[294] See *supra*, chapter (B); n. 127.

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