The Court of Justice of the EU

An Emerging Global Actor of Refugee Law?

Giulia Vicini

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Abstract

This thesis aims to assess the potential of the CJEU as a global actor of refugee law. In particular, it wonders whether the CJEU interpretation of the 1951 Refugee Convention provisions has a vocation to apply beyond the EU borders. Due to the unprecedented position of the EU Court, which is the first supranational jurisdiction to provide a binding interpretation of the 1951 Refugee Convention provision, the literature is attentively looking at its case law. This thesis argues that the EU court suffers from structural shortcomings that render it unsuitable to interpret the provisions of an international universal agreement such as the Refugee Convention. Due to these shortcomings, the CJEU is indeed developing an autonomous and strongly EU-oriented interpretation of the 1951 Refugee Convention.

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- *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (CJEU Case 26/62, 5 February 1963).
- *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* (CJCE Case C-21 to 24/72, 12 December 1972).
- *Magdalena Vandeweghe and others v. Berufsgenossenschaft für die chemische Industrie* (CJEU Case C-130/73, 27 November 1973).
- *Procédure pénale contre Matteo Peralta* (CJEU Case C-379/92, 4 July 1994).
- *Giloy v Hauptzoüamt Frankfurt am Main-Ost* (CJEU Case C-130/95, 1997).
- *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen* (CJEU Case C-28/95, 1997).
- *Racke GmbH and Co. v. Hauptzollamt Mainz* (CJEU C-162/96, 16 June 1998).
- *Recours judiciaire contre une amende administrative formée par Hans-Jürgen Hartmann* (CJEU Case C-162/98, 12 November 1998).
- *Hermès International v. FHT Marketing Choice BV* (CJEU Case C-53/96, 16 June 1998).
- *Yassin Abdullah Kadi c. Conseil de l'Union européen*, (CFI T-315/01, 21 September 2005).
- *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA* (CJEU C-222/04, 10 January 2006).
- *Gisti v. European Commission* (CJEU C-408/05, Order 6 April 2006).
- *European Parliament v. Council of the European Union* (CJEU Case C-133/06, 6 May 2008).
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- *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi and Dler Jamal v Bundesrepublik Deutschland* (CJEU Cases C-175/08, C-176/08, C-178/08 and C-179/08, 2 March 2010).
- *TNT Express Nederland BV v. AXA Versicherung AG* (CJEU Case C-533/08, 4 May 2010).
- *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal* (CJEU Case C-31/09, 17 June 2010).
- *Bundesrepublik Deutschland v B and D* (CJEU Case C-57/09 and C-101/09, 9 November 2010).
- *Commission v. Ireland* (CJEU Case C-431/10, 7 April 2011).
- *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (CJEU Case C-411/10 and 493/10, 21 December 2011).
- *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change* (CJEU Case C-366/10, 21 December 2011).
- *Bundesrepublik Deutschland v. Y et Z* (CJEU Case C-71/11 and C-99/11, 5 September 2012).

- *Mostafa Abed El Karem El Kott and others v. Bevándorlási és Állampolgársági Hivatal* (CJEU Case C-364/11, 19 December 2012).
- *Minister voor Immigratie en Asiel v. X, Y et Z* (CJEU Case C-199/12 and C-201/12, 11 April 2013).
- *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* (CJEU C-528/11, 30 May 2013).
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- *Saadi v. United Kingdom*, 28 February 2008, Appl. No13229/03.
- *Budina v. Russia*, 18 June 2009, Appl. No 45603/05.
- *M.S.S.* v. *Belgium* e *Greece*, 21 January 2011, Appl. No. 30696/09.
- *Sufi e Elmi v. UK*, 28 June 2011, Appl. No. 8319/07 e 11449/07.
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- *Hirsi Jamaa and others v. Italy*, 23 February 2012, Appl. No 27765/09.
- *Abubeker v. Austria and Italy*, 18 June 2013, Appl. No 73874/11.
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- *Walcott v. The Minister of Citizenship and Immigration*, 2011 FC 415, 5 April 2011.

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1. Introduction and Overview

1.1. Legal Framework

While some problems relating to statelessness and forced migration have been addressed by the international community starting from the end of the 19th Century,[1] a global effort to regulate the status of all refugees was only undertaken in the Post-World War II period. During the conflicts, millions of civilians were forced to flee and find refuge in other countries. Western States, intensively concerned by this phenomenon, sought to find an international agreement in order to manage massive migration flows in the future. A Convention Relating to the Status of Refugees was hence adopted in Geneva the 28 July 1951.[2]

This Convention provides a definition of refugee and a set of rights and duties to which an individual recognized as a refugee is entitled. At the time of drafting the Plenipotentiaries had the European scenario in mind; the convention provisions were essentially meant to solve a European problem[3] with relatively little awareness of the scale that the forced migration phenomenon would reach in the following decades. This has not prevented the Refugee Convention, nor the related Protocol signed in New York in 1967,[4] from being one of the most widely ratified international treaties.[5]

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1 For an overview of the protection instruments adopted and the institutions created before the Second World War see G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd Edition, Oxford: Oxford University Press, 2007), 421-436; J. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950', 33 *International and Comparative Law Quarterly* (1984) 348-380.

2 Geneva Convention Relating to the Status of Refugees (Refugee Convention), 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954).

3 J-F. Durieux, 'The Vanishing refugee: how EU asylum law blurs the specificity of refugee protection', in H. Lambert, J. McAdam, M. Fuellerton (Eds.), *The Global reach of European Refugee Law* (Cambridge University Press, 2013), 225-257, at 225.

4 Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

5 According to the UN Treaty Collection, 145 states are parties to the Refugee Convention, while 146 states are parties to the 1967 Protocol.

Measuring the robustness of the 1951 Refugee Convention, Roos and Zaun note that the considerably high number of ratifications, together with the financial support provided by many of the States party to the United Nations High Commissioner for Refugees (UNHCR), is clear evidence of States' concordance with the Convention norms.[6] Indeed, literature on international norms traditionally identifies concordance as one of the attributes of a robust international norm, i.e. a norm which is highly likely to be observed both at the international and at the domestic level.[7] Nevertheless, a quick glance at the content of the Convention reveals that its provisions seriously lack specificity. Specificity being another fundamental characteristic of a robust international norm, it follows that the degree of compliance with the 1951 Convention is seriously threatened by the fact that the definition of refugee, as well as some of the fundamental rights and duties inherent to the refugee status, are formulated in a rather vague and indeterminate shape. The lack of specificity of its provisions renders the enforcement of the convention particularly arduous.[8] As a result of this, the interpretation of the refugee definition considerably diverges across Contracting States.

The difficulties related to the interpretation and enforcement of the Convention, together with the inadequacy of this instrument to address more recent forced displacement phenomena,[9] led to the adoption of regional protection frameworks. Drawing on the principle that regional approaches better respond to regional problems, the Organization of the African Union (OAU), Latin American States and, more recently, the European Union, have provided themselves with policy and legislative instruments to regulate migration flows and to ensure international protection to all persons in need of it.

These regional protection systems take different forms. In particular, the legislative instruments through which they are established and the level of integration of the 1951 Refugee Convention within their legal framework differ. As for the legal instrument employed, a Convention Governing the Specific Aspects of Refugee Problems in Africa was signed within the OAU in 1969, while some Latin American States adopted a non-binding Declaration on Refugees in Cartagena on the 22 November 1984. The European Union developed a common policy on migration and asylum as an integral part of its regional integration objectives. The European

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6 C. Roos, N. Zaun, 'Norms Matter! The Role of International Norms in EU Policies on Asylum and Immigration', 16 *European Journal of Migration and Law* (2014) 46-68, at 51.

7 See, *inter alia*, T. M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990); J. W. Legro, 'Which norms matter? Revisiting the "failure" of internationalism', 51 *International Organization* (1997) 31-63.

8 E. Drywood, 'Who's In and Who's Out? The Court's Emerging Case Law on the Definition of a Refugee', 51 Common Market Law Review (2014) 1093-1124, at 1118.

9 *Ibid*, at 1119-1120.

asylum system is set forth through secondary legislation having its legal basis in the founding Treaties. All the three systems aim to facilitate the adhesion of States parties to the 1951 Refugee Convention[10] and to enforce the application of its provisions at the domestic level. Simultaneously, the legislative and policy instruments adopted within these regional frameworks intend to fill the gaps left by the Convention. Above all, these instruments broaden the definition of refugee[11] and provide complementary forms of protection;[12] they aim to grant asylum to all persons fleeing armed conflicts and indiscriminate violence who would be otherwise excluded from the strict definition provided by the 1951 Refugee Convention.[13]

As outlined above, the lack of specificity of the Convention negatively impacts on the interpretation and application of its provisions. A peculiar trait of the EU international protection system is that it aims to resolve the problem of diverging interpretations by pursuing the harmonization of EU member states internal asylum legislations. The EU asylum policy, based on the 'full and inclusive application' of the 1951 Refugee Convention,[14] is articulated

[10] The Preamble of the OAU Convention calls upon 'Member States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees'; Similarly, see the Cartagena Declaration, para 2 (a). All the EU member states are already contracting parties to the Convention.

[11] Besides the conventional definition of refugee reproduced in Article 1 (1) of the OAU Convention, the second paragraph of the same provision provides that '[t]he term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'. More explicitly, the Cartagena Declaration (para 3 (3)), reads as follows: 'in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention […] and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.

[12] Contrary to the approaches adopted within the African and inter-American systems, EU law does not recognize the status of refugee to persons fleeing indiscriminate violence. The EU asylum legislation establishes instead a complementary form of protection, called 'subsidiary protection'. Pursuant to Article 2 (f) of the EU Qualification Directive, this protection is accorded to 'a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm […]'. The 2011 Recast Directive has consistently approximated the content of the subsidiary protection to the one of the refugee status. It is nonetheless undeniable that the category of individuals deserving the EU subsidiary protection is far narrower than the one included in the enlarged definitions provided within the African and the inter-America systems. Indeed, according to Article 15 of the EU Qualification Directive, the 'serious harm' that justifies the granting of subsidiary protection consists, exclusively, of '(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

[13] Article 1 A (2) of this convention requires an individual and well-founded risk of persecution motivated by one of the five grounds indicated therein.

[14] Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999.

in a set of secondary law instruments which regulate the reception of asylum seekers (Reception Directive),[15] the procedures for obtaining international protection (Procedures Directive)[16] and the conditions and the content of this protection (Qualification Directive).[17] Furthermore, the system provides 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 (Dublin System).[18] Between 2011 and 2013 a reform has triggered the EU legal instruments on asylum. The reformed legislation finds its legal basis in Article 78 of the Treaty on the Functioning of the European Union (TFUE) and is articulated in the Common European Asylum System (CEAS).[19]

The recent reform was adopted in the framework of the so-called 'second phase'[20] aimed at the harmonization of the EU asylum policy. The recast instruments are now being implemented in the Member States; it is too early to estimate the effects of their application. The term for the transposition of the directives has just expired, the only exception being the Qualification Directive, which had to be transposed by 21 December 2013.[21] Nevertheless, even a superficial reading of the recast provisions dampens any optimism regarding eventual harmonization. In fact the new legislation, reproducing as it does the minimum standards scheme, continues to leave a high margin of discretion to the Member States. Furthermore, it is possible that these instruments will soon be the object of a new reform. In light of the massive influx that has been

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15 Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96-116.

16 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60–95.

17 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9–26. The CEAS is further completed by the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof**,** OJ L 212, 7.8.2001, p. 12–23. This Directive was not triggered by the recent reform.

18 Council Regulation No. 343/2003 of 18 February 2003, OJ L 50, 25.2.2003, p. 1–10 (Dublin II); recently replaced by Regulation No 604/2013 of the European Parliament and of the Council, OJ L 180, 29.6.2013, p. 31–59 (Dublin III). In this task, the Dublin regulation is assisted by the Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180, 29.6.2013, p. 1-30.

19 This provision corresponds to former Article 63 of the Treaty on the European Community.

20 This second phase was originally conceived by the Hague Program, adopted by the European Council in 2004.

21 Article 39 of the Recast Qualification Directive of 2011.

recently affecting the European borders, new asylum and migration agenda are now being discussed by the EU institutions.[22]

Though yet to be completed, the project of harmonization undertaken within the EU has certainly achieved some important goals, particularly with regard to the refugee definition. Indeed, the above mentioned EU Qualification Directive, aimed at harmonizing the standards for the recognition of the refugee status among EU member states, provides a definition of refugee which corresponds to the definition set forth in Article 1 A (2) of the 1951 Geneva Convention. According to Article 2 (c) of the EU Directive

> 'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, […], and to whom Article 12 does not apply.

The Geneva Convention does not elaborate on the different elements composing the refugee definition, such as 'well-founded fear', 'persecution' and the five grounds on which the persecution must be based. Although the literature has extensively addressed these elements, the interpretation of the definition of refugee still raises a number of concerns[23] and, because of the indeterminacy of its formulation, regrettably diverges across national asylum systems. To prevent these divergences, the EU Directive provisions further define the elements composing the refugee definition. For instance, Article 9 provides a definition of 'persecution' and sets forth a non-exhaustive catalogue of acts that may amount to persecution for the purposes of granting refugee status, Article 10 defines the grounds on which persecution must be based and Article 6 lists the actors of persecution.

The lack of specificity of the refugee definition is not the only factor that negatively influences the interpretation and enforcement of the Convention. The problem of diverging interpretations is aggravated by the absence of international authorities entitled to provide a binding interpretation of the Convention provisions; due to this the contracting States benefit from an even higher margin of discretion when applying the 1951 Refugee Convention. The CEAS has

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[22] A European Agenda on Migration was adopted by the EU Commission on the 13th May 2015 in order to address the massive influx registered in the first half of 2015. The program of relocation proposed within the agenda has not yet been implemented. New institutional meeting are scheduled for September and October 2015.

[23] Although Article 38 of the Convention tasks the International Court of Justice with the settlement of any dispute relating to the interpretation or application of the Convention provisions, the contracting states have no interest in having recourse to the Court. No interpretative dispute has been brought to the Court so far and this is very unlikely to happen in the future. The Convention also assigned supervisory tasks to the United Nations High Commissioner for Refugees (UNHCR) pursuant to Article 35. Nonetheless, the guidelines and notes issued by the UN agency do not have binding force though national authorities recognize their legal relevance. On this point see *infra* at 13-15.

partially overcome this problem. Indeed, this system allows the Court of Justice of the European Union (CJEU), through the instrument of the preliminary ruling,[24] to be the first supranational tribunal to interpret the provisions of the Geneva Convention. To date, the CJEU has delivered judgments on the interpretation of religious persecution, [25] of persecution based on conscientious objection,[26] the notion of social group based on sexual orientation[27], and the exclusion clauses set forth by Articles 1 D[28] and 1 F.[29]

In a global context characterized by the difficult enforcement of the 1951 Refugee Convention and strongly divergent interpretations of its provisions at the domestic level, the fact that the CJEU, a supranational judicial body taking binding decisions, is tasked with the interpretation of the refugee definition has clearly deserved great attention in the literature.

1.2. Framework of Analysis, Research Question and Structure

Recent literature of both European Union Law and International Refugee Law has very much focused on the increasing role of the CJEU in implementing a common asylum policy between EU member States. This Court has progressively acquired competence in the field of migration and asylum, starting from the Amsterdam Treaty in 1997. Nevertheless, the first judgments of the CJEU concerning the EU asylum legislation date from only few years ago and are the object of lively doctrinal discussion.

The interest of the literature is easily explained. First of all, the CJUE is the first supranational actor to provide a binding interpretation of the 1951 Geneva Convention relating to the status of refugees. [30] Other international actors involved in the protection of refugees are bereft of effective powers concerning the interpretation of the convention provisions. Some authors have indeed defined the CJEU as the first supranational asylum court.[31] Secondly, although the

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24 Art. 267 TFEU.

25 *Bundesrepublik Deutschland v. Y et Z* (CJEU Cases C-71/11 and C-99/11, 5 September 2012).

26 *Andre Lawrence Shepherd v. Bundesrepublik Deutschland* (CJEU Case C-472/13, 26 February 2015).

27 *Minister voor Immigratie en Asiel v. X, Y et Z* (CJEU Cases C-199/12 and C-201/12, 11 April 2013).

28 *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal* (CJEU Case C-31/09, 17 June 2010); *Mostafa Abed El Karem El Kott and others v. Bevándorlási és Állampolgársági Hivatal* (CJEU Case C-364/11, 19 December 2012).

29 *Bundesrepublik Deutschland v B and D* (CJEU Cases C-57/09 and C-101/09, 9 November 2010).

30 Among other authors, see E. Drywood, *supra* n 8, at 1121; H. Lambert, 'Introduction: European refugee law and transitional emulation', in H. Lambert, J. McAdam, M. Fuellerton (Eds.), *The Global reach of European Refugee Law* (Cambridge University Press, 2013) 1-24, at 18; J. M. Lehmann, 'Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law – The Case of Germany v Y and Z in the Court of Justice of the European Union', 26 *International Journal of Refugee Law* (2014) 65-81, at 81; R. Bank, 'The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law', 27 *International Journal of Refugee Law* (2015) 213-244, at 213.

31 J. M. Lehmann, *supra* n 30, at 81.

jurisprudence of the CJEU only binds EU Member States, the literature has recently studied the so-called 'global reach' of European Refugee Law, namely the extent to which the European asylum system has been emulated in other regional integration systems.[32] As a consequence of this phenomenon of cross-fertilization, the impact of the jurisprudence of the CJEU is likely to extend beyond the European borders.

Starting from these assumptions, which are thoroughly discussed in the first chapter, this thesis attempts to identify the institutional and substantial weaknesses of the CJEU as a global actor of refugee law in order to assess whether it is advantageous and advisable that the CJEU interpretation of the 1951 Refugee Convention extends its effects beyond the EU borders.

The second chapter argues that some structural circumstances prevent the CJEU from becoming an interpretative authority of international refugee law. This thesis mainly draws on the status of the 1951 Refugee Convention within the EU legal order: it is shown that the CJEU has no competence to directly interpret the provisions of this Convention. Further limits to the capacity of the CJEU as a global interpreter of the Convention are determined by the institutional setting of the EU and, more specifically, by the rules governing the preliminary ruling procedure. Moreover, a scrutiny of the CJEU judgements in the field suggests that the Court has no familiarity with international law and with the general rules on treaty interpretation.

The third chapter engages in a more detailed analysis of the CJEU jurisprudence. This analysis shows that, following the traditional patterns of its legal reasoning, the CJEU is elaborating an autonomous and very EU oriented interpretation of the refugee definition. The notion of persecution elaborated by the CJEU, the cumulative definition of social group and the *sui generis* interpretation of the exclusion clauses negatively affect the protection of refugees. Indeed, through its jurisprudence, the CJEU proposes a narrower interpretation of the refugee definition that shall not be transposed in other regional integration systems. Much more than the outcome of a reasoned interpretation of an international agreement, the CJEU jurisprudence on asylum is the result of a three-way compromise between Member States' interpretative approaches, the need to ensure the EU institutional balance and the protection of individuals.

Thie framework of analysis of this thesis is bound to the CJEU judgments interpreting or indirectly affecting provisions of the 1951 Refugee Convention. The jurisprudence concerning the complementary form of protection set forth in the EU Qualification Directive and the judgments delivered on the other instruments of the CEAS are only incidentally analyzed

[32] See mainly H. Lambert, J. McAdam, M. Fuellerton (Eds.), *The Global reach of European Refugee Law* (Cambridge University Press, 2013).

throughout the work in order to demonstrate the reluctance of the CJEU towards international law.

2. The CJEU: a Unique and Unprecedented Position in the International Refugee Regime

This Chapter discusses the different factors that makes the CJEU a potential global actor in international refugee law. Firstly, the following paragraph addresses the CJEU competences and role within EU law as they progressively emerged from the EU founding Treaties. Secondly, the chapter provides a brief overview of the other international actors involved in refugee protection; the lack of competence and efficiency of these institutions strengthens the role of the CJEU as the first supranational court to provide a binding interpretation of the 1951 Refugee Convention. Thirdly, it is outlined that the position of the CJEU within international refugee law is very much empowered by the role of the EU as a Normative Power. Recent literature on the 'global reach' of European Refugee Law, namely the extent to which the European asylum system has been emulated in other regional integration systems, is analyzed.

2.1. The powers and competence of the CJEU within the CEAS

According to Article 19 of the Treaty on the European Union (TEU), the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'. Being responsible for granting the respect of the rule of law in the EU, the CJEU has given a substantial contribution to the 'constitutionalization' of the EU legal order.[33]

The CJEU growing role and power is certainly a result of the progressive expansion of the scope of EU law from its traditional core of competition and market regulation. The field of migration and asylum was attracted within the EU policy interest starting from the Maastricht

[33] For an interesting overview of the evolution of the CJEU role and case law through the different phases of EU consitutionalization see K. Leanarts, "The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the ECJ", in M. Adams, H. De Waele, J. Meeusen and G. Straetmans (Eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart, 2014).

Treaties. At the time migration and asylum were part of the so-called 'third pillar' of the European Union (cooperation in the field of justice and home affairs) which escaped the scrutiny of the CJEU (at the time European Court of Justice). It was only in 1997, with the entry into force of the Amsterdam Treaty, that the CJEU acquired competence in this field. Indeed, this Treaty 'communitarized' some major areas of the Third Pillar, such as migration and asylum, which then ceased to be addressed by the intergovernmental methods typical of third pillar and entered into full-fledged community law.

The legislative competence in the field of asylum was regulated by Article 63 of the Treaty establishing the European Community (TEC), inserted by the Amsterdam Treaty. This provision bound the EU Council to adopt measures on asylum 'in accordance with [the 1951 Refugee Convention] and other relevant treaties'. The same obligation to respect the 1951 Refugee Convention is imposed on the EU legislature by Article 78 TFEU.[34]

The CJEU exercises its competence in the field of migration and asylum almost exclusively through the instrument of the preliminary ruling. It is provided that the CJEU 'shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'.[35]

It is not surprising that the number of judgments delivered by the CJEU in the field of asylum has consistently increased following the entry into force of the Lisbon Treaty. [36] Indeed, the Lisbon legislation has removed the limitation contained in Article 68(1) TEC, pursuant to which a referral to the CJEU, concerning the validity or interpretation of an EU asylum legislation act, was only possible for 'a court or a tribunal of a Member State against whose decisions there [was] no judicial remedy under national law'. Under the legislative framework established by the Lisbon Treaty, the CJEU has been accorded the same powers it has in other areas of EU law. According to Article 267 TFEU, Member State courts or tribunals before which a question concerning the validity or the interpretation of an act is raised, 'may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon'. This possibility turns into an obligation for courts or tribunals against whose decisions there is no judicial remedy under national law; when a question is raised before them, these jurisdictions 'shall bring the matter before the Court'.

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[34] Articles 63 TEC and 78 TFEU provide the basis for the first and the second phase legislations on asylum, respectively. While the first provision charged the Council with the adoption of minimum standards, pursuant to the amended TFEU, the EU 'shall develop a common policy on asylum […]'. As outlined above, the second phase is aimed at the harmonization of the EU asylum legislation.

[35] Article 267 TFEU (former Article 234 TEC).

[36] E. Drywood, *supra* n 8, at 1094; R. Bank, *supra* n 30, at 220-221. The latter author underlines that a significant increase of judgments has been registered starting from September 2012.

As mentioned above, the EU treaties establish the 1951 Refugee Convention, as well as other relevant treaties, as the yardstick for EU secondary legislation. It follows that the jurisdiction on preliminary rulings implies that the Court interpret, at least indirectly, the Convention provisions. Indeed, Article 267 TFEU 'includes the possibility of a finding that the secondary legislation has to be interpreted in a particular way in order to be in line with the 1951 Convention, or that secondary legislation is not in line with the 1951 Convention at all'.[37] Whether or not the CJEU can directly interpret and apply the 1951 Refugee Convention is a different question. Some scholars optimistically deduce from the combination of Articles 78 and 267 TFEU that the CJEU shall be able to directly interpret the provisions of the Convention in order to ensure compliance with them. According to Roland Bank, 'it is clear that […] the Court's power of review implies a power of interpreting the yardstick itself'.[38] Nevertheless, the CJEU has manifested its reluctance towards directly interpreting the 1951 Convention and, as this thesis argues, international law has marginal relevance in the Court's reasoning.[39]

The experience clearly confirms the preeminent (almost exclusive) role of the preliminary ruling in the CJEU case law concerning EU asylum *acquis*.[40] However, the Court has also delivered one judgment in a procedure for annulment concerning Asylum Procedures Directive provisions on the adoption of the lists of safe third countries[41] and one in an infringement procedure initiated by the EU Commission against Ireland for its failure to transpose the Asylum Procedures Directive.[42] These kinds of proceeding are of little relevance for the EU asylum legislation. An infringement action against a Member State that failed to fulfil its obligations under EU law can be brought by the Commission and other Member States.[43] Member States and EU institutions can also initiate an action to annul a secondary law act adopted by another EU institution.[44] These proceedings cannot be initiated by individuals, except in marginal cases.[45] An individual can only report a Member State's breach of EU law to the Commission, which has full discretion in deciding whether or not to initiate an

37 R. Bank, *supra* n 30, at 221.
38 *Ibid*, at 221.
39 *Infra*, Chapter II.
40 Out of 26 judgments delivered by the CJEU on CEAS provisions, 24 were adopted in preliminary ruling procedures.
41 *European Parliament v. Council of the European Union* (CJEU Case C-133/06, 6 May 2008).
42 *Commission v. Ireland* (CJEU Case C-431/10, 7 April 2011).
43 Articles 258-260 TFEU.
44 Articles 263-264 TFEU.
45 An individual can bring an action for annulment before the General Court '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' (Art. 263 (4) TFEU).

infringement procedure.[46] In principle, the reference to the 1951 Convention contained in Article 78 implies that a secondary law act not in accordance with the Convention can be the object of an annulment procedure and that a Member State acting in breach of the Convention can be brought before the Court for infringement. In reality, this would require that the reference to the Convention made in the Treaties had the effect to provide Convention provision with EU primary law force. This question is further discussed in Chapter II.

2.2. The Inadequacy of Other International Actors

The success of the CJEU also depends on the absence of international actors able to provide a binding interpretation of the Refugee Convention provisions. The Convention gives mandates to two international institutions operating within the UN system: the International Court of Justice (ICJ) and the United Nations High Commissioner for Refugees (UNHCR). Moreover, Regional Human Rights jurisdictions have been playing a fundamental role in the protection of asylum seekers and refugees. The following paragraphs explain why these actors do not succeed in becoming global interpretative authorities of refugee law.

2.1.1. The International Court of Justice (ICJ)

According to Article 38 of the 1951 Refugee Convention, '[a]ny 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 one of the parties to the dispute'. The Refugee Convention gives a mandate to the ICJ to interpret and apply its provisions in case of a dispute between two or more States recognizing its jurisdiction. It is nonetheless uneasy to conceive a situation in which a Contracting State of the 1951 Convention may have an interest to bring another State before the ICJ for a question related to the application or interpretation of this Convention.

One hypothesis is clearly that of an extradition request presented by a Contracting State to another, which has previously granted the refugee status to the individual for which the extradition request is formulated. In such a situation, in case of a refusal by the Contracting

[46] In case *Gisti v. European Commission* (CJEU Case C-408/05, Order 6 April 2006), the Court of Justice confirmed the decision of the General Court not to annul a decision of the Commission refusing to initiate an infringement procedure against Italy despite the complaints moved by GISTI and other NGOs concerning the deportation of asylum seekers to Libya.

State to extradite the individual, the requesting state may refer to the ICJ questions concerning, *inter alia*,[47] provisions of the 1951 Refugee Convention; for instance, these questions may trigger the applicability of Article 1 A (2), which provides an inclusive definition of refugee, and Article 1 F which mentions the commission of serious non-political crime prior to the entry in the country of asylum as a ground for excluding the individual from the refugee status.[48]
Arguably, UNHCR also has competence to promote a recourse to the ICJ by virtue of Article 35 of the Convention. According to the UNHCR Commentary of the 1951 Conventio, pursuant to this provision, UNHCR may 'in given circumstances, ask a Contracting State, whose application of the Convention is not agreeable to [it], and in case of the intervention being unsuccessful, ask the State concerned to bring the matter before the [ICJ] according to Article 38'.[49] Clearly, the UNHCR is merely entitled to a right of asking; no obligation to comply with this request can be imposed on Contracting States.
To date, no questions relating to the application or interpretation of the 1951 Refugee Convention have been brought to the ICJ and it seems unlikely that the ICJ will be confronted with this issue in the future.[50]

2.1.2. The United Nations High Commissioner for Refugees (UNHCR)

The United Nations High Commissioner for Refugees, established by the UN General Assembly in 1950,[51] receives mandate to supervise the 1951 Refugee Convention and the 1967 relating Protocol provisions by Article 35 of the Convention and Article II of the Protocol. Concerning the nature of this institution, it can be argued that UNHCR is a subsidiary organ of the United Nations as referred to by Article 7(2) of the UN Charter.[52] The extent of UNHCR

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47 The questions referred to the Court would certainly involve the interpretation and application of an eventual Extradition Agreement in force between the disputing States.
48 This was the factual situation underlying the *Haya de la Torre* case. A recent case which might have potentially trigger a recourse to the ICJ for questions relating to the 1951 Refugee Convention is the Battisti case. The Italian terrorist, however, was not granted the refugee status by the Brazilian authority but instead a national protection status. It follows that if Italy had brought Brazil before the ICJ to oppose its denial to extradite Battisti, no questions concerning the interpretation 1951 Convention could have been submitted to the Court.
49 UNHCR, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, written by Professor Atle Grahl-Madsen in 1963; re-published by the Department of International Protection in October 1997.
50 H. Lambert, *supra* n 30, at 18.
51 UNGA Resolution 319 (IV) of 3 December 1949. A Statute for the High Commissioner was then adopted by UNGA Resolution 428(V) of 14 December 1950.
52 According to Article 22 of the UN Charter, '[t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions'.

supervisory role, as well as the Contracting States obligations to cooperate with it, have been highly debated in the literature.[53]

The institutional link between the 1951 Convention and UNHCR is weak compared to the one traditionally existing between UN human rights treaties and the relative committees created *ad hoc*, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights established to monitor the 1966 International Covenant on Civil and Political Rights (ICCPR)[54] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[55] respectively. On the one hand, the UNHCR was not created *ad hoc* for the supervision of the 1951 Convention, but prior to and independently from the adoption of this Convention. On the other hand, the High Commissioner has relatively little powers compared to the *ad hoc* committees established to monitor the application of human rights agreements; these committees can also settle disputes between Contracting States and impose sanctions on States acting in breach of treaty provisions. Article 8 of the UNHCR Statute[56] establishes a more generic link with the legislative framework of the refugee regime; this provision confers to the High Commissioner the task to '[promote] the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.[57]

In order to accomplish the tasks conferred to it, UNHCR has adopted a number of guidelines and policy papers on the interpretation of the 1951 Refugee Convention,[58] besides of course undertaking several missions in the field and constant advocacy with national authorities. A further limit to the UNHCR supervisory power is nonetheless determined by the non- binding character of its interpretative doctrine. The legal weight accorded to UNHCR guidelines widely diverges across regional and national asylum systems.[59]

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53 W. Kalin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond' in E. Feller, V. Türk and F. Nicholson (EDs.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003) 614-666; M. Zieck, 'Article 35 of the 1951 Convention/Article II of the 1967 Protocol', in A. Zimmermann (Ed.), *The 1951 Convention relating to the status of refugees and its 1967 protocol* (Oxford: Oxford University Press, 2001) 1467-1510.

54 Article 28 ICCPR.

55 This Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

56 *Supra*, n 51.

57 Article 8 (a) UNHCR Statute.

58 The main instruments developed by UNHCR is the Handbook 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 and the several Guidelines on International Protection. UNHCR constantly updates its interpretative doctrine through the publication of notes and policy papers.

59 S. Juss, 'The UNHCR Handbook and the interface between `soft law' and `hard law' in international refugee law' in S. Juss, C. Harvey (eds.), *Contemporary issues in refugee law* (2013) 31-67.

UNHCR powers are further attenuated within the EU international protection system. Contrary to other regional asylum regimes having explicitly acknowledged UNHCR supervisory role,[60] the EU legislation recognizes little relevance to the High Commissioner's activity.[61] UNHCR has undeniably played a decisive role in the drafting of the EU legislation[62] and continues to exercise its influence through *amicus curiae* interventions before the CJEU, the European Court of Human Rights (ECtHR) and national courts. The CJEU has appraised the High Commissioner role in the *Halaf* judgment. In this case, the CJEU was asked whether Article 3(2) of Dublin Regulation was to be interpreted as meaning that, in the procedure for determining the Member State responsible pursuant to the Regulation, Member States are obliged to request UNHCR to present its views, where documents of this Office show that the State identified ad responsible acts in breach of EU asylum legislation.[63] Though acknowledging the particular relevance of UNHCR documents 'in the light of the role conferred on the UNHCR by the Geneva Convention, in consistency with which the rules of [EU] law dealing with asylum must be interpreted',[64] the CJEU held that there is no obligation upon Member States to request UNHCR to present its views during the process of determining the Member State responsible.[65]

Recent literature has been assessing the contemporary capacity of UNHCR and exploring policy and institutional channels to enhance its potential.[66]

2.1.3. Regional Human Rights Jurisdictions

The Inter-American and African Commissions on Human Rights and ECtHR have all developed an extensive jurisprudence on the protection of refugees and asylum seekers. Contrary to the ECHR, which does not explicitly protect the right to asylum, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights have

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60 See Article 8 of the OAU Convention and Recommendation n 2 of the Cartagena Declaration.

61 Marginal references to the UNHCR are contained in the EU Directives. For instance, the Asylum Procedure Directive refers to the UNHCR several times throughout the preamble and provides a specific article on the role of UNHCR in the procedure for granting international protection (Article 29).

62 The influence of the UNHCR in the drafting of EU asylum legislation strongly emerges from the correspondence between the Qualification Directive provisions and UNHCR Handbook and Guidelines.

63 *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* (CJEU Case C-528/11, 30 May 2013) para 25.

64 *Ibid*, para 44.

65 *Ibid*, para 47.

66 *Inter alia*, J. C. Simeon (Ed.), *The UNHCR and the supervision of international refugee law*, (Cambridge: Cambridge University Press, 2013); C. Lewis, *UNHCR and international refugee law: from treaties to innovation*, (London : Routledge, 2012).

enshrined this right in their provisions.[67] The right to asylum has been interpreted in conjunction with the principle of *non-refoulement*[68] and with the right to judicial guarantees and judicial protection[69] by the Inter-American Commission and the African Commission on Human Rights.

The ECtHR has extensively applied Articles 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to an effective remedy) in order to grant substantial protection to asylum seekers. As a matter of fact, the Strasbourg judges recognize the peculiar status of these applicants as members of a "particularly underprivileged and vulnerable population group in need of special protection".[70] Hence, the Court acts in practice as an asylum court[71] despite the lack of a specific legal basis in ECHR provisions.

Clearly, none of these regional human rights jurisdictions is entitled to interpret and apply the 1951 Refugee Convention. Their case law have nonetheless an indirect influence on the interpretation of the provisions of this Convention. Suffice it to mention the principle of *non-refoulement* enshrined in the most relevant universal and regional human rights agreements and having a wider scope than the one set forth by Article 33 of the 1951 Convention.[72] Moreover, the definition of persecution is heavily drawn on human rights law; a breach of core human rights is indeed commonly acknowledged as amounting to persecution for the purposes of granting the refugee status.[73] International human rights jurisprudence may also impact on the interpretation of economic and social rights granted to refugees by the 1951 Refugee Convention.

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67 According to Article 12(3) of the African Charter, '[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions'. Article 22(7) of the American Convention on Human Rights reads as follows: '[e]very person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes'.

68 *Inter alia*, Inter-American Commission, *John Doe et al v. Canada* (Report No. 78/11, 27 July 2011) and African Commission, *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v. Rwanda* (27/89-46/90-49/91-99/9, October 1996).

69 See for instance Inter-American Commission, *Pacheco Tineo Family v. Bolivia* (Series C No. 272, 26 November 2013).

70 ECtHR, *M.S.S.* v. *Belgium* e *Greece*, Appl. No. 30696/09, para 251.

71 M. Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court', 8(2) *European Constitutional Law Review* (2012), 203-245.

72 See infra Chapter 4.

73 See Article 9(1)(a) of the Qualification Directive.

2.3. The Global Reach of EU Asylum Law: Manner's Theory applied to the Case Law of the Court of Justice

Clearly, CJEU case law are only binding upon the 28 Member States of the European Union. The CJEU is providing conclusive interpretative guidelines on the 1951 Refugee Convention provisions to be applied within the EU. Nonetheless, the fact that the EU Court is the only supranational Court to provide a binding interpretation of this Convention 'makes rulings on EU refugee law strikingly potent'.[74] To date, the so-called 'global reach' of EU asylum legislation has been mostly assessed with regard to the emulation of EU procedural guarantees and mechanisms in other regional integration systems. It is too early to assess the global impact of the CJEU recent jurisprudence concerning the provisions of the 1951 Convention.

The potential of the CJEU case law on asylum is further enhanced by the circumstance that, within the 28 EU Member States, there are 10 of the 26 original signatories of the Convention.[75] In addition, the CJEU judgments are translated in all the official languages of the EU, which makes them widely accessible to a number of non-EU jurisdictions.[76]

The nature of refugee law in itself may facilitate the process of emulation of EU interpretation of the Refugee Convention. Indeed, constant dialogue and strong cross-fertilization among national asylum jurisdictions have always characterized this branch of international law. This is to be imputed to the vagueness of the Convention provision, which imposes an extremely high burden on asylum caseworkers.

The EU's status as a global legislator has been widely appraised in areas related to social justice and fundamental rights. According to Manner's theory, the EU normative power lies in its 'ability to project its core values beyond its borders'.[77] This value encompasses consolidation of democracy, rule of law and respect for human rights and fundamental freedoms.

What if the EU did not act as a virtuous example? What if, in asylum cases, the CJEU protected the EU institutional balance more than its core fundamental values? The following Chapters argue that the CJEU often misinterprets the 1951 Refugee Convention provisions and that its

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74 E. Drywood, supra n 8, at 1122.

75 Ibid., at 1122; these countries are: Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands, Sweden, United Kingdom (see Preamble to the Geneva Convention 1951).

76 I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP, 2012) at 121.

77 Schneipers and Sicurelli, 'Normative power Europe: A credible utopia?', 45 *Journal of Common Market Studies* (2007), 435. See I., Manners, 'Normative power Europe: A contradiction in terms?', 40 *Journal of Common Market Studies* (2002) 235-258, at 241.

reasoning is influenced by a number of factors that are likely to compromise refugee protection. Therefore, it does not seem advisable that the CJEU interpretation of the 1951 Refugee Convention is extend beyond the European borders.

3. Structural Limits to the Capacity of the CJEU as a Global Actor of Refugee Law

Having exposed the lucky circumstances which puts the CJEU in unprecedented position as a global interpreter of the 1951 Refugee Convention, it is now time to assess the structural shortcomings that prevent the EU court from becoming a powerful actor of refugee law. This chapter argues that the 1951 Convention status in the EU legal order heavily affects the CJEU jurisdiction to interpret the provisions of this convention. The interpretative powers of the CJEU are further attenuated by the structure of the preliminary ruling procedure making the EU court unsuitable for factual assessments and allowing it to exercise self-restraint. Moreover, as a consequence of the extremely complex interaction between EU and international law, the CJEU manifests reluctance to interpret the 1951 Convention provisions in light of the applicable international standards. Indeed, as it is further argued in chapter 4, the CJEU is developing an autonomous and strongly EU-oriented interpretation of the Convention.

3.1. The Status of the 1951 Refugee Convention in the EU Legal Order

All EU Member States have ratified the 1951 Refugee Convention and are bound by its provisions. Under the EU framework, Member States have to implement the EU Qualification Directive and the other instruments of the CEAS. According to Article 78 TFEU, these instruments must be in line with the Refugee Convention. This clearly amounts to an obligation upon the EU legislator to adopt secondary legislation in accordance with the Convention provisions. Does this also mean that the 1951 Refugee Convention binds the EU institutions in addition to Member States? Does this mean that the Convention has formally become part of the EU legal order?

The extent of the CJEU role in the field of asylum varies according to the answer one decides to give to this question. Indeed, if the Treaty reference to the 1951 Refugee Convention has the effect to elevate its provisions to the level of EU primary law, the CJEU would certainly be in

the position to directly interpret the Convention. In the contrary case, the object of the CJEU interpretation could only be CEAS provisions and the 1951 Convention would merely serve as the parameter of this interpretation.

The question is addressed by a recent case in which the CJEU has declared its incompetence to directly interpret Article 31 of the 1951 Convention.[78] The Court's reasoning in the *Qurbani* judgment is likely to significantly reduce its potential as a global interpretative authority of the 1951 Convention.[79] Drawing on this case law, the following paragraphs attempt to assess the questions whether or not the 1951 Refugee Convention is part of the EU legal order and whether or not the CJEU has competence to directly interpret the provisions of this Convention.

3.1.1. Is the 1951 Refugee Convention Part of the EU Legal Order?

In the above mentioned *Qurbani* case, a German Court (the Higher Regional Court of Bamberg), before which a criminal proceeding for illegal entry was discussed, referred a set of questions to the CJEU concerning the interpretation of Article 31 of the 1951 Refugee Convention.[80] The German and Dutch governments, as well as the European Commission, objected stating that the Court lacked jurisdiction to directly interpret Article 31.[81] This provision is referred to by Article 14(6) of the EU Qualification Directive, entitled 'Revocation of, ending of or refusal to renew refugee status'.[82] The preliminary reference, however, did not contain any mention of EU asylum legislation. The Court was asked to interpret Article 31 of the Convention directly, not to interpret a secondary law norm in accordance with Article 31.

In line with its settled case law, the CJEU established that 'the power, resulting from Article 267 TFEU, to provide interpretations by way of preliminary rulings extends only to rules which are part of EU law'.[83] The Court then exposed the reasons why the 1951 Refugee Convention is not part of the EU legal order.[84]

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78 *Criminal proceedings against Mohammad Ferooz Qurbani* (CJEU Case C-481/13, 17 July 2014).

79 *Contra* R. Bank, *supra* n 30, at 221.

80 *Qurbani*, *supra* n 78, para 16.

81 *Ibid*, para 19.

82 The CJEU assessment concerned Directive 2004/83/EC of 29 April 2004. The provision is reproduced without amendments in the 2011 Recast Directive and reads as follows: 'Persons to whom paragraphs 4 or 5 apply [whose refugee status is revoked] are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State'.

83 *Qurbani*, *supra* n 78, para 21. See also *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA* (CJEU Case C-222/04, 10 January 2006) para 63; *TNT Express Nederland BV v. AXA Versicherung AG*, (CJEU Case C-533/08, 4 May 2010) para 59.

84 *Qurbani*, *supra* n 78, paras 22-25.

Functional Succession Theory

In principle, the CJEU has no jurisdiction to interpret international agreements concluded between Member States and non-member countries.[85] This jurisdiction only exists under particular circumstances: 'where and in so far as the European Union has assumed the powers previously exercised by the Member States in the field to which an international convention not concluded by the European Union applies and, therefore, the provisions of the convention have the effect of binding the European Union'.[86] In this specific case the CJEU acquires jurisdiction to interpret an international agreement.

This mechanism, known as 'functional succession' or 'de facto succession',[87] was elaborated by the CJEU in the well-known case *International Fruit Company*,[88] which concerned the status of the General Agreement on Tariffs and Trade (GATT) within the EU legal order. By virtue of the functional succession theory,[89] an international agreement concluded by all EU Member States is binding upon the EU in so far as the competences initially exercised by Member States under the agreement framework are progressively transferred to the EU. Concerning the GATT, the CJEU has established that '[b]y conferring [their] powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the General Agreement'.[90]

In the *Qurbani* case, the Court excluded that the 1951 Refugee Convention has acquired binding effect *vis-à-vis* the EU as a consequence of the conferral of legislative competence in

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85 *Ibid.*, para 22. See also *TNT Express*, *supra* n 83, para 61; *Magdalena Vandeweghe and others v. Berufsgenossenschaft für die chemische Industrie* (CJEU Case C-130/73, 27 November 1973) para 2; *Recours judiciaire contre une amende administrative formée par Hans-Jürgen Hartmann* (CJEU Case C-162/98, 12 November 1998) para 8.

86 *Qurbani*, *supra* n 78, para 23.

87 See for instance A. Pellet, 'Les sanctions de l'Union européenne', in M. Benlolo Carabot, U. Candaş, E. Cujo (Eds.), *Union européenne et droit international. En l'honneur de Patrick Daillier* (Paris : Pedone, 2012) at 434.

88 *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* (CJCE Case C-21 to 24/72, 12 December 1972).

89 This doctrine seems to be inspired by the international law notion of States succession. This notion has been adapted to the context and the needs of EU law. See P. Pescatore, 'La Cour de justice des Communautés européennes et la Convention européenne des Droits de l'Homme', in F. Matscher, H. Petzold (Eds.), *Protecting Human Rights: The European Dimension/Protection des droits de l'homme: la dimension europeenne, Studies in honour of/Mélanges en l'honneur de Gérard J. Wiarda* (Colonia: Ed. Heymans, 1988) at 450 and, more recently, R Schütze, 'European Law and Member State Agreements – An Ambivalent Relationship', in *Foreign Affairs and the EU Constitution* (Cambridge University Press, 2014) at 127.

90 *International Fruit Company*, *supra* n 88, para 15.

immigration and asylum field.[91] Indeed, Member States have maintained substantial competences in the field of application of the 1951 Convention.

The Court's finding on the Refugee Convention is consistent with its previous case law, pursuant to which the principle of functional succession has an exceptional character and is applied under extremely narrow conditions. Following *International Fruit Company*, the CJEU has excluded the applicability of the functional succession theory to a number of international agreements to which all Member States were parties. For instance, the CJEU has established that the International Convention for the Prevention of Pollution from Ships (MARPOL),[92] the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air[93] and the Chicago Convention on International Civil Aviation do not bind the EU.[94] Assessing the status of these international instruments within EU law, the CJEU has provided more details on the functional succession mechanism: for the EU to be bound by an international agreement, Member States must have fully transferred the powers they previously exercised in the field of application of such agreement to EU institutions. As a consequence of this conferral, the EU must detain an exclusive competence in the field. According to Advocate General Kokott, the substantial difference between the Marpol Convention and the GATT for the purposes of the succession of the EU in Member States obligations lies in the absence of 'exclusive competence under the [Marpol Convention] to lay down rules on the discharge by ships of pollutants into the sea'[95] that.[96] The 'full transfer' criterion has been the object of criticism for its arduous applicability.[97] Moreover, it has been submitted that this restrictive approach to the principle of functional succession leads Member States to be bound by

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91 *Qurbani*, *supra* n 78, para 24.

92 According to the Court, this Convention is not binding upon the EU; see *Procédure pénale contre Matteo Peralta* (CJEU Case C-379/92, 4 July 1994). The reasons why functional succession theory is not applicable to this convention have been further elaborated in case *The Queen, International Association of Independent Tanker Owners (Intertanko) and others v. Secretary of State for Transport* (CJCE Case C-308/06, 3 June 2008).

93 *Irène Bogiatzi , v. Deutscher Luftpool, Société Luxair* (CJEU Case C-301/08, 22 October 2009).

94 *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change* (CJEU Case C-366/10, 21 December 2011).

95 *Intertanko*, *supra* note 92, para 49; *Irène Bogiatzi*, *supra* note 93, para 33; *Air Transport Association of America*, *supra* n 94, para 63.

96 Opinion of AG Kokott in *Intertanko*, 20 November 2007, paras 41-42. It has been argued that the same argument could be applied to the GATT in light of the provisions which maintain some powers in the hands of the Member States, such as the ones related Treaty revision. See J. Wouters, J. Odermatt, T. Ramopoulus, 'Worlds apart? Comparing the approaches of the European Court of Justice and the EU legislature to International Law', in M. Cremona (Eds.), *European Court of Justice and external relations: constitutional challenges* (Oxford: Hart Publishing, 2014) at 294.

97 J. Wouters, J. Odermatt, T. Ramopoulus, *supra* n 96, at 294.

international agreements that the EU is not bound to respect, despite the fact that it often plays a key role in their implementation.[98]

In light of its settled case law, the CJEU has established that the EU is not bound by the 1951 Refugee Convention by reason of the functional succession theory. The Court's statement could hardly be objected to. Indeed, as the Court stated in the *Qurbani* judgment, 'although several pieces of EU legislation have been adopted in the field to which the Geneva Convention applies as part of the implementation of a Common European Asylum System, it is undisputed that the Member States have retained certain powers falling within that field, in particular relating to the subject-matter covered by Article 31 of that convention'.[99] Moreover, it should not passed unnoticed that the CEAS legislative instruments establish common criteria and minimum standards which leave Member States with a high margin of discretion in their application. This excludes the existence of an exclusive competence upon the EU and, as a consequence, the applicability of the functional succession principle to the 1951 Refugee Convention.[100] This has not changed in light of the recent recast of EU asylum legislation. Indeed, though the amendments have significantly contributed to the approximation of national standards, the harmonization process is far from been completed and Member States continue to benefit from discretionary power when they implement the 1951 Refugee Convention. Indeed, the CJEU underlined that Member States retain almost exclusive competence in the field of application of Article 31 of the Convention.[101]

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98 *Ibid*, at 293. According to Pierre Pescatore, Member States cannot transfer to the EU their powers and competences free of the international engagements which conditionned them : 'en assumant, en vertu des traités, certaines compétences et certains pouvoirs précédemment exercés par les États membres, la Communauté [l'Union] a dû reprendre, également, les obligations internationales qui réglaient l'exercice de ces compétences et pouvoirs'; P. Pescatore, *L'ordre juridique des Communautés européennes* (Liège : Presse Universitaire de Liège, 1975) at 147-148. Similarly H. G. Schermers, 'The Eurpean Community Bound by Fundamental Rights', *Common Market Law Review* (2006) at 251-252; *contra* C. Tomuschat, 'Case Note *Yusuf* and *Kadi*', *Common Market Law Review* (2006), at 543. The Court of First Instance decision on the case *Yassin Abdullah Kadi* has clearly endorsed this approach: '[b]y concluding a treaty between them [Member States] could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under [the Charter of the United Nations]'; *Yassin Abdullah Kadi c. Conseil de l'Union européen*, (CFI T-315/01, 21 September 2005). This argument is not maintained by the Court of Justice (*Yassin Abdullah Kadi c. Conseil de l'Union européen* (CJEU Cases C-402/05 and C-415/05, 3 September 2008).

99 *Qurbani*, *supra* n 78, para 24.

100 H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff, 2006) at 79-80. To be applied, the principle of functional succession further requires that Third States parties to the agreement recognize the EU as a partner having replaced Member States in their obligations. According to Hemme Battjes this condition could hardly be fulfilled in the case of the Refugee Convention. For another opinion against the applicability of the functional succession theory to the 1951 Convention see K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International, 2000) at 40 and 41.

101 *Qurbani*, *supra* n 78, para 4.

Customary International Law

Besides the functional succession theory, an international agreement to which the EU is not a contracting party can also enter the EU legal order through the customary character of its provisions. The CJEU has indeed established that customary international law is fully part of the EU legal order.[102] Since a customary rule comes to existence in international law and binds the States of the international community, this rule is also binding upon the EU.[103]

Few of the provisions of the 1951 Refugee Convention could be identified as having a customary character under international law. Article 38 of the International Court of Justice Statute, which outlines the sources that the Court shall apply in order to settle international disputes, defines customary law as 'evidence of a general practice accepted as law'. It is common ground that this definition applies to the principle of *non-refoulement* enshrined in Article 33 of the 1951 Refugee Convention.[104] Nonetheless, the definition of international customary law is clearly not applicable to most of the provisions of the Refugee Convention. This is undoubtedly the case of Article 31, which grants refugees with immunity for their unlawful entry or residence in the country of asylum.

The reference to the Convention in EU primary law

Apart from the ECHR, 'no international treaty had been accorded a [role comparable to the 1951 Convention] in European law'.[105]

Article 78 TFEU imposes an obligation on EU institutions to act in accordance with the 1951 Refugee Convention when they adopt a common asylum policy. Article 18 EUCFR provides that the Convention shall be respected when granting access to the fundamental right of asylum

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102 *A. Racke GmbH and Co. v. Hauptzollamt Mainz* (CJEU Case C-162/96, 16 June 1998), para 46: the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.

103 On the status of international customary law in the EU legal order see J. Kuijper, 'Customary International Law, Decisions of International Organisations and other Techniques for Ensuring Respect for International Legal Rules in European Community Law', in J. Wouters, A. Nollkaemper, E. De Wet (Eds.), *The Europeanisation of International Law: the Status of International Law in the EU and its Member States* (The Hague, T.M.C. Asser Press, 2008) 87-106; A. Giannelli, 'Customary International Law in the European Union', E. Cannizzaro, P. Palchetti, R. Wessel (Eds.), *International Law as Law of the European Union* (Martinus Nijhoff, 2012).

104 See G. Goodwin-Gill, *The Refugee in International Law (3rd Edition)* (Oxford: Clarendon Press, 2007) at 167; J.C. Hataway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 26 and, more recently, G. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', 23 (3) *International Journal of Refugee Law* (2011) 443-457, at 444.

105 R. Bank, *supra* n 30, at 214.

therein.[106] A number of EU secondary law provisions also refer to this international instrument. The Preamble of the four main instruments of the CEAS reads as follows:

> The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of 31 January 1967 ('the Protocol'), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.[107]

The fundamental role of the 1951 Refugee Convention within the EU immigration and asylum policy framework is further confirmed by the Schengen Borders Code.[108] The provisions of this Code apply without prejudice to 'the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*'.[109]

It clearly emerges from these several references to the 1951 Convention that the EU has intended to commit its institutions to adopt an asylum legislation respectful of the Convention provisions.

A number of scholars have argued that the provisions of the Convention became part of the EU legal order by reason of references to the 1951 Convention made within EU primary law.[110] However, in the *Qurbani* judgment, the CJEU denied the existence of a link between Articles 78 TFEU and 18 of the EU Charter of Fundamental Rights (EUCFR) and its jurisdiction to interpret the 1951 Refugee Convention. According to the Court,

> '[t]he fact that Article 78 TFEU provides that the common policy on asylum must be in accordance with the Geneva Convention and that Article 18 of the Charter of Fundamental Rights of the European Union makes clear that the right to asylum is to be guaranteed with due respect for that convention and the Protocol

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106 According to some scholars, this provision offers lower guarantees compared to Article 78 TFEU. See F. De Vittor, 'Institutions européennes et protection des migrants et réfugiés', in S. Millet-Devalle, *L'Union européenne et la protection des migrants et des réfugiés* (Paris : Pedone, 2010) 41-62.

107 See Recital 3 common to the EU Qualification Directive, the Asylum Procedure Directive, the Reception Directive and the Dublin Regulation.

108 Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105, 13.4.2006, p. 1–32.

109 *Ibid*, Article 3.

110 H. Battjes, *supra* n 100, at 101; K. Hailbronner, *supra* n 100, at 40; K. Lenaerts, P. Van Nuffel, *Constitutional Law of the European Union (2nd Edition)* (London: Thomson Sweet & Maxwell, 2005) at 740. For a slightly different approach see G. S. Goodwin-Gill, 'The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam', in E. Guid, C. Harlow (Eds), *Implementing Amsterdam* (Oxford: Hart Publishing, 2001) at 143. The author argues that, although the apparent width of the engagement contracted by the EU by virtue of Article 78 TFEU, this provision, and the bound imposed therein, only concerns the definition of refugee provided by Article 1 of the Refugee Convention and the principle of *non-refoulement* enshrined in Article 33 and does not extend to other aspects related to the treatment of refugee.

> relating to the status of refugees of 31 January 1967 is not such as to call into question the finding […] that the Court does not have jurisdiction'. [111]

As mentioned above, the reasoning of the Court is based on the finding that its jurisdiction on preliminary ruling pursuant to Article 267 TFEU is limited to EU provisions. The Court can interpret a rule only if this rule is part of the EU legal order. If the reference contained in Articles 78 TFEU and 18 EUCFR had the effect of incorporating the Refugee Convention within the EU legal order, the CJEU would then have jurisdiction to interpret its provisions. The EU treaties establish the 1951 Refugee Convention as the yardstick for EU secondary legislation. As a consequence, the 1951 Convention shall be interpreted by the Court in order to assess the to what extent EU asylum legislation conforms with the Treaties. The Court has nonetheless stated that its jurisdiction does not extend to the direct interpretation of the convention provisions in cases where the preliminary reference does not contain any mention of EU secondary law provisions.

An interpretation of Article 78 TFEU which denies its relation with the CJEU jurisdiction to interpret the 1951 Refugee Convention deprives this Treaty provision of its content and purpose. Indeed, Article 78 TFEU has the value of a 'self-imposed limitation'.[112] In order to ensure that this limitation is observed, the CJEU should have full jurisdiction to interpret the 1951 Refugee Convention. However, as the *Qurbani* judgment clearly shows, the CJEU does not share this point of view.

3.1.2. The Interest to a Uniform Interpretation of EU law and the CJEU Jurisdiction

As a general principle, the CJEU has provided that

> the fact that one or more acts of European Union law may have the object or effect of incorporating into European Union law certain provisions that are set out in an international agreement which the European Union has not itself approved is not sufficient for it to be incumbent upon the Court to review the legality of the act or acts of European Union law in the light of that agreement.[113]

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111 *Qurbani*, *supra* n 78, para 25.

112 K. Hailbronner, *supra* n 100, at 11. According to the author, the CJEU jurisdiction concerning the compatibility with the 1951 Refugee Convention only extends to EU institutions acts and not to Member States acts, upon which the Court could only exercise an indirect control (*ibid*, at 43). See also, by the same author, *EU immigration and asylum law: commentary on EU regulations and directives* (Oxford: Hart, 2010) at 12.

113 *Air Transport Association of America*, *supra* n 95, para 63; *Intertanko*, *supra* n 94, para 50.

The rule articulated by the Court cannot apply to the EU directives and regulations adopted on the basis of Article 78 TFEU. As a matter of fact, this provision clearly binds the EU legislature to comply with the 1951 Refugee Convention when adopting secondary legislation on asylum. As argued above, this obligation necessarily triggers the CJEU jurisdiction on the compatibility of the CEAS instruments with the provisions of the Refugee Convention. Indeed, concerning the field of application of the 1951 Convention, the Court has found that 'it is clearly in the interests of the European Union that, in order to forestall future differences of interpretation, the provisions of that international agreement which have been taken over by national law and by EU law should be given a uniform interpretation, irrespective of the circumstances in which they are to apply'.[114]

According to this principle, the CJEU aims to avoid divergent interpretations. Indeed, the interest to uniform interpretation subsists not only when an international law rule is reproduced in EU secondary legislation but also when this rule is applicable through a reference contained in a CEAS provision. This is the approach taken by the Court in two cases concerning Article 1 D of the 1951 Convention, referred to it by a Hungarian Court.[115] In these cases, the Court declared its jurisdiction to interpret Article 1 D of the Convention even if this provision was only partially reproduced in Article 12(1)(a) of the EU Qualification Directive (2004/83/CE). As a matter of fact, this article made reference to the Convention provision without integrally reproducing its text.[116]

Nevertheless, according to the CJEU, the interest to a uniform interpretation does not operate when a provision of the 1951 Convention is neither reproduced nor referred to by EU asylum legislation. In the *Qurbani* judgment, the Court highlighted the difference between the preliminary questions referred to it by the German Court and the ones referred by the Hungarian Court concerning Article 1 D. Whilst the latter concerned the interpretation of a EU Directive provision making reference to a specific article of the Convention, the former did not contain any mention of EU provision and implied a direct interpretation of the Convention. Indeed, the Court was asked to directly interpret Article 31 of the 1951 Convention.

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114 *Qurbani*, *supra* n 78, para 26; *Bundesrepublik Deutschland v. B and D*, *supra* note 31, para 71; AG Mengozzi seems to acknowledge the existence of this interest in its Opinion on the case (para 43).

115 *Bolbol*, *supra* n 28; *El Kott*, *supra* n 28.

116 According to Article 12(1)(a) of the Directive, 'A third country national or a stateless person is excluded from being a refugee, if: he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive'.

This difference led the CJEU to declare its lack of jurisdiction in the *Qurbani* case. Nevertheless, by virtue of this parallelism with the Hungarian cases, the Court seems to have left the door open to a future preliminary ruling concerning Article 31. The Court will certainly recognize its jurisdiction to assess a preliminary question concerning an EU provision that contains a reference to Article 31. At least three instruments of the CEAS contain such a reference. The Court only mentioned Article 14(6) of the EU Qualification Directive. According to this provision, Article 31 of the Convention is applicable to those refugees whose status may be revoked (or its renewal refused) because there are reasonable grounds for regarding him/her as a danger to the security of the Member State in which he/she is present or because, having been convicted by a final judgement of a particularly serious crime, he/she constitutes a danger to the community of that Member State. Moreover, the Preambles of the Reception Directive [117] and of the Dublin Regulation [118] provide that '[t]he detention of applicants [for international protection] should be applied […] in accordance with the international legal obligations of the Member States and with Article 31'.

Concerning Article 14 of the Qualification Directive, the CJEU noted that nothing in the preliminary questions referred to it suggested that this provision was relevant to the case in the main proceeding.[119] The same is true for the Preambles of the Reception Directive and the Dublin Regulation, which are in all events bereft of direct effect. In fact the case in the main proceeding did not concern a revocation of (or a refusal to renew) the refugee status, nor it did deal with the administrative detention of an asylum seeker. On the one hand, the Court left the door open for future preliminary rulings concerning Article 31, on the other national courts were warned that, pursuant to Article 267 TFEU, any provision that is referred to the Court for interpretation must be relevant to the main proceeding.

As a consequence, the CJEU would have jurisdiction to interpret Article 31 of the 1951 Convention only in case of a revocation of the refugee status or of administrative detention of an applicant for international protection. This represents one of the limits of the preliminary ruling procedure, which are further addressed in the following section.

According to the Court's reasoning, the EU interest to a uniform interpretation does not provide it with jurisdiction to interpret provisions of the 1951 Refugee Convention which are not reproduced nor referred to by EU secondary legislation. In the *Hermès* judgment, dating 1998, the Court nonetheless established that

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117 Recital 15 of the Reception Directive.

118 Recital 20 of the Dublin Regulation.

119 *Qurbani*, *supra* n 78, para 28.

> where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply[120]

This judgment concerned the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[121], to which the EU is a contracting party. The referring court asked the CJEU to interpret Article 50 of the Agreement, concerning provisional measures applicable to both European and national trade mark. According to the Court, the double value of this provision justifies an EU interest to uniform interpretation.

Although the EU is not party to the 1951 Refugee Convention, there is a risk of divergent interpretation of the Convention provisions at the national and European level. As a consequence, the EU, which is bound to respect the Refugee Convention by virtue of Article 78 TFEU, has an interest in ensuring a uniform interpretation of the provisions of the Convention.

Moreover, a review and interpretation of Convention provisions must be possible for assessing conformity of EU legislation, and its application, with the convention. It follows that the CJEU should declare its jurisdiction on a preliminary ruling questioning the conformity of an EU secondary law provision with the Convention or asking the Court how to apply this provision in line with the Convention.

3.2. Limits and Potential of the Preliminary Ruling Procedure

The reluctance of national jurisdictions to submit preliminary questions to the CJEU has certainly decreased following the entry into force of the Lisbon Treaty. As noted above, the amended Article 267 TFEU imposes upon last instance courts an obligation to refer to the CJEU the questions raised before them. These courts, however, can still escape the obligation stemming from this treaty provision by applying the so called 'acte clair' doctrine, which allows national jurisdictions to abstain from submitting a question for preliminary ruling if the answer

120 *Hermès International v. FHT Marketing Choice BV* (CJEU Case C-53/96, 16 June 1998) para 32. Similarly, *Giloy v Hauptzoüamt Frankfurt am Main-Ost* (CJEU Case C-130/95, 1997) para 28 and *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen* (CJEU Case C-28/95, 1997), para 34.

121 The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

to the question is clear and settled. It is quite telling that, despite the considerable increase of referrals starting from 2012, to date some of the Member States most intensively concerned by applications for international protection are yet to submit to the CJEU preliminary rulings concerning the CEAS instruments.[122]

The preliminary ruling procedure is not aimed at solving individual cases but rather at answering abstract legal questions that the referring courts consider essential to settle the main proceeding. The CJEU assessment is limited to the specific questions referred to it and the facts relevant for the legal assessment are often omitted or lack details in the material submitted by the referring courts. This allows the Court to exercise a self-restraint attitude that limits its potential as a global interpreter of refugee law even further. Indeed, the Court has often avoided to assessing challenging issues concerning the EU asylum policies by relying on the shortcomings of the preliminary ruling procedure. For instance, in the *Halaf* case the Court failed to take an opportunity to assess the question concerning the highly debated content of Article 18 EUCFR. According to the Court, there was no need to examine the content and scope of this Charter provision, which made the object of the second question submitted to it, since the first question concerning the humanitarian clause set forth by the Dublin Regulation had positively been assessed.[123] The Court made this statement notwithstanding the fact that the referring court had not formulated the questions in a hierarchical order and had not indicated the second question as subsidiary. The caution exercised by the CJEU in asylum cases further emerges by the language of the judgments: the Court tends to formulate its assessment in vague and non-conclusive terms leaving a high margin of discretion to national jurisdiction, with whom the responsibility to settle the case lies.

3.3. International Law in the CJEU Legal Reasoning

Asylum policy is one of the fields in which the CJEU attitude of applying and interpreting EU law as a self-contained regime is more evident. Since the first judgments of the CJEU,[124] the relationship between EU law and international law has been highly problematic.[125] The CJUE

122 Suffice it to think to Italy and Spain.

123 *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhansite pri Ministerskia savet* (CJEU Case C-528/11, 30 May 2013).

124 In the leading case *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (CJEU Case 26/62, 5 February 1963), the Court defined the Community as 'a new legal order of international law'.

125 For an analysis of this complex interaction see, inter alia, C. Timmermans, 'The EU and Public International Law', 4 *European Foreign Affairs Review* (1999) at 181 and, more recently, E. Cannizzaro, 'The

has manifested a high level of distrust towards applying international law in areas fully or partially regulated by EU law. This attitude clearly emerges from the CJEU judgments on the CEAS instruments. Although both the Treaties and EU secondary law on asylum conferred a powerful role to international refugee law, the CJUE makes very little reference to the Refugee Convention and to other relevant international agreements.[126] Moreover, the CJEU has proven not to be familiar with international law instruments on interpretation and often misinterprets international law rules at the expenses of refugee protection.

3.3.1. The CJEU Reluctance to Interpret the 1951 Refugee Convention In Light of International Law

Despite the exceptional role accorded to the 1951 Geneva Convention in the Treaties, its practical relevance in the CJEU case law is rather marginal. As argued by Roland Bank, 'the 1951 Convention hardly play any visible role in the judgment of the Court'.[127] As a matter of standard practice, the CJEU judgements formally recognize the role of the Convention as the yardstick of EU secondary legislation and as 'the cornerstone of the international legal regime'.[128]

This notwithstanding, the CJEU does not engage in a thorough interpretation of the 1951 Convention in asylum cases. Indeed, references to Convention provisions can hardly be found in the Court's reasoning. Even in the few cases where the Court has referred to the Convention,[129] the Convention provisions referred to are not analyzed and are certainly not analyzed in light of the applicable international law norms.

Given that the 1951 Refugee Convention is an international agreement, its provisions shall be interpreted using the general rule on treaty interpretation, as codified by Articles 31 and 32 of the 1969 Vienna Convention on the Law of the Treaties (VCLT). The CJEU has a controversial relationship with the VCLT, as is evident from its case law. The Court is reluctant to have recourse to the VCLT provisions when interpreting international agreements. Moreover, when

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Neo-Monism of the European Legal Order', in E. Cannizzaro, P. Palchetti and R. Wessel (Eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff Publishers, 2011) at 35.

126 According to Article 78 TFEU, the EU asylum policy must be in accordance with the 1951 Refugee Convention, the 1967 related Protocol and 'other relevant treaties'.

127 R. Bank, *supra* n 30, at 225.

128 See, for instance, *B and D, supra* n 29, paras 77-78; *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi and Dler Jamal v Bundesrepublik Deutschland* (CJEU Cases C-175/08, C-176/08, C-178/08 and C-179/08, 2 March 2010) paras 52-57.

129 In the *Bolbol* and *El Kott* cases (*supra* n 28), for example, a reference to the Convention was unavoidable in so far as the Qualification Directive contains an explicit reference to the criteria for exclusion established by Article 1 D of the Convention.

such provisions are used, the CJEU interpretation is not necessarily in line with the international practice and the reference to the VCLT seems to primarily serve EU interests.[130]

Article 31 (1) VCLT provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. According to the second paragraph of this provision, the context of treaty provisions 'shall comprise, in addition to the text, including its preamble and annexes: […] (b) [a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. An interpretation of the 1951 Refugee Convention in line with the general rule on treaty interpretation should take account of the wording of its provisions and of its preamble. Moreover, the CJEU should refer to UNHCR doctrine and guidelines by virtue of Article 31 (2) (b), which sanctions the relevance of instruments related to the treaty. In addition, pursuant to Article 32 VCLT, the Court may have recourse to 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' when the meaning of the Convention provision remains unclear.

Despite the interpretative guidelines provided by the VCLT, the CJEU makes no reference to the Preamble or to the preparatory work of the 1951 Convention; nor does the Court refer to UNHCR guidelines, save for some sporadic mentions of UNHCR written and oral interventions in pending proceedings.

Advocate Generals show a different and certainly more positive attitude towards international law. Nevertheless, the 1951 Convention 'is of extremely varied relevance in [AG] opinions'[131] and this seems 'rather related to individual style than to a systematic approach'.[132] In particular AG Sharpston and Mengozzi have engaged in thorough and circumstantiated analyses of Convention provisions. AG Sharpston has widely referred to and analyzed the 1951 Convention provisions in her opinions.[133] In the case *B and D*, AG Mengozzi has assessed the questions relating to provisions of the Qualification Directive in light of the application of the 1951 Refugee Convention and, to this end, has referred to the UNHCR Handbook and Guidelines on International Protection[134] and has made recourse to the history of the Convention.[135]

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130 See *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* (CJEU Case C-386/08, 25 February 2010), in which the Court interpreted and applied Article 34 VCLT entitled 'General rule regarding third States'.

131 R. Bank, *supra* n 30, at 225.

132 *Ibid*, at 227.

133 AG Sharpston Opinion in cases *Bolbol* (*supra* n 28), *El Kott* (*supra* n 28) and *X, Y and Z* (*supra* n 27).

134 AG Megozzi Opinion in case *B and D* (*supra* n 29) para 43.

135 *Ibid*, para 46.

3.3.2. The CJEU lack of familiarity with international law

The interpretation of the 1951 Convention provisions and, as a logical consequence, of the provisions of the Qualification Directive reproducing Convention provisions often calls into play other branches of international law. Indeed, some of the elements that compose the refugee definition traditionally belong to international criminal law, international human rights law and international humanitarian law. Moreover, the core principle for the protection of asylum seekers and refugees, the principle of *non-refoulement*, is enshrined in both refugee and human rights law. This crosscutting attitude of refugee law becomes even sharper under the EU framework. Indeed, when defining elements of the refugee definition, such as persecution, the Qualification Directive makes implicit or explicit reference to international human rights law, international criminal law and international humanitarian law. However, as argued above, the CJEU is rather reluctant to apply international standards and tends to adapt international law rule to the EU needs. The tendency of the Court is to interpret EU provisions in the sense of a self-contained regime. This contributes to the development of an autonomous and EU-oriented definition of refugee that cannot be transposed in other regional integration systems.[136]
One of the most challenging elements of the refugee definition is the notion of persecution. Article 9 of the Qualification Directive defines persecutory acts as those acts

> '(a) sufficiently serious by their 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 [ECHR]' or '(b) as an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)'.

It is difficult to understand why a regional human rights convention, such as the ECHR, should play a conclusive role in the assessment of the notion of persecution when this notion is used in a Convention and a Protocol ratified by 146 States from all the regions of the world.[137] The core rights set forth by Article 15(2)[138] are different and narrower than the ones provided by the

136 *Infra*, Chapter 4.

137 J. L. Lehmann, *supra* n 30, at 79. According to this author, the reference to the ECHR 'diregards that the 1951 Convention is a global instrument'.

138 This provision reads as follows: 'No derogation from Article 2 (right to life), except in respect of deaths resulting from lawful acts of war, or from Articles 3 (prohibition of torture and other inhuman and degrading treatment), 4 (paragraph 1) (prohibition of slavery and forced labor) and 7 (*nulla poena sine lege* principle) shall be made'. This is a limitation imposed to Contracting States intending to adopt measures to derogate from its obligations in time of war or other public emergency threatening the life of the nation in application of Article 15 (1) ECHR.

International Covenant on Civil and Political Rights (ICCPR)[139] and by other regional human rights conventions.[140] This clearly impacts on the interpretation of the refugee definition. It is worth mentioning that Article 4(2) ICCPR indicates the right to freedom of thought, conscience and religion as a right from which no derogation can be made by Contracting States, neither in time of war or public emergency. Using the ICCPR instead of the ECHR as its framework of reference, the CJEU would have come to different conclusions in cases involving the freedom of religion and the freedom of conscience. Indeed, in case *Y and Z* concerning two applicants who belong to the Muslim Ahmadis minority in Pakistan, the Court held that 'not all interference with the right to freedom of religion […] is capable of constituting an "act of persecution" within the meaning of [Article 9] of the Directive' and that 'there may be an act of persecution as a result of interference with the external manifestation of that freedom'. For determining whether this is the case, 'the competent authorities must ascertain, in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment'.[141] The freedom of thought not appearing within the list of core rights provided by Article 15(2) ECHR, the CJEU excluded that any interference with this right amounts to persecution.

Moreover, in the *Shepherd* case,[142] involving the conscientious objection of a US soldier who deserted after having served in Iraq for two years, the CJEU failed to assess whether the interference with the right to freedom of conscience of the applicant in itself amounted to persecution. Conversely, the Court focused exclusively on the applicability of Article 9 (2) (e) of the Qualification Directive and narrowed the notion of persecution even further through a questionable interpretation of international law rules on *jus ad bellum* and *jus in bello*. Article 9(2) sets forth a non-exhaustive catalogue of acts that may amount to persecution for the purposes of granting refugee status. Letter (e) refers to the 'prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)' of the

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139 According to Article 4 (2) ICCPR, no derogation may be made from the right to life (Article 6), the prohibition of torture and other inhuman and degrading treatment (Article 7), the prohibition of slavery and servitude (Article 8 (1) and (2)), the prohibition of prison for debts (Article 11), the principle *nulla poena sine lege* (Article 15), the right to be recognized as a person everywhere before the law (Article 16), the right to freedom of thought, conscience and religion (Article 18).

140 See the American Convention on Human Rights, Article 27 (2). The African Charter on Human and People's Rights does not provide the possibility for Contracting States to derogate from the rights therein in time of war or public emergency.

141 *Y and Z*, *supra* n 25, paras 72 and 81.

142 *Shepherd*, *supra* n 26.

Qualification Directive. The latter provision, corresponding to Article 1(F) of the 1951 Convention, excludes a person from refugee status when there are serious reasons for considering that he or she has committed 'a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments' or acts contrary to the purposes and principles of the UN Charter.[143] Article 9(2)(e) of the Qualification Directive certainly protects partial conscientious objection motivated by a potential breach of *jus in bello* through reference to war crimes.[144] The Court was asked to establish whether the protection stemming from this provision was precluded by, *inter alia*, the 'the fact that the deployment of the troops and/or the occupation is sanctioned by the international community or is based on a mandate from the UN Security Council'.[145] The Court acknowledged that these circumstances do not automatically exclude that acts contrary to the principles of the UN Charter will be committed during military operations.[146] Nonetheless, according to the Court of Justice, these elements should be taken into account as evidence against the potential perpetration of war crimes during the conflict.

The Court of Justice maintained that 'an armed intervention engaged upon on the basis of a resolution adopted by the Security Council offers, in principle, every guarantee that no war crimes will be committed and that the same applies, in principle, to an operation which gives rise to an international consensus'.[147] The reasoning of the Court leaves room for doubt. First, the UN collective security system has been facing a legal and political crisis in recent decades. This crisis is liable to make the assessment whether a conflict is carried out on the basis of a Security Council mandate extremely difficult. It should be noted that this crisis was aggravated by the military intervention in Iraq in 2003, which was relevant to the main proceeding.[148] The legality of this military intervention has been widely debated in the literature.[149] Advocate General Sharpston acknowledged that a number of Security Council resolutions have been

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143 For the sake of completeness, it must be noted that Art. 12(b) Qualification Directive further includes 'serious non-political crime outside the country of refuge prior to his or her admission as a refugee'. This paragraph was irrelevant to the main proceedings.

144 As a matter of fact, these crimes are defined by Art. 8 ICC Statute, as grave breaches of the Geneva Conventions and serious violations of the laws and customs applicable in armed conflict.

145 *Shepherd, supra* n 26, para 21.

146 *Ibid*, para 41.

147 *Ibid*, para 41.

148 See, by way of example, L. Condorelli, 'Le Conseil de sécurité entre légitime défense autorisée et sécurité collective remplacée: remarques au sujet de la Résolution 1546 du 8 juin 2004', in Société française pour le Droit international, *Les métamorphoses de la sécurité collective: Droit, pratique et enjeux stratégiques (Journées d'étude de Tunis)* (Editions A. Pedone, 2005) at 231; J. Brunnée and S.J. Toope, 'The Use of Force: International Law After Iraq', 53 *International and Comparative Law Quarterly* (2004) at 785.

149 For instance, S. Murphy, 'Assessing the Legality of Invading Iraq', 92 *Georgetown Law Journal* (2004) 173; V. Lowe, 'The Iraq Crisis: What Now?', 52 *International and Comparative Law Quarterly* (2003) 859; J.M. Sorel, 'L'Onu et l'Irak : le vil plomb ne s'est pas transformé en or pur', 108 *Revue Générale de Droit Public* (2004) 845.

adopted since the invasion of Iraq.[150] It would, nonetheless, be incautious to conclude that this conflict, which was initiated by the United States and the United Kingdom, who are defined as occupying powers by the Security Council,[151] has been subsequently endorsed within the framework of the UN Charter. Second, as pointed out by Advocate General Sharpston, 'even when a conflict is preceded by a [Security Council] resolution authorizing the use of force in certain circumstances and under certain conditions, that cannot mean that "by definition" war crimes cannot and will not be committed'.[152] Concerning the CJEU statement according to which the existence of international consensus on the military intervention is likely to exclude the possibility that war crimes will be perpetrated, this is far from being persuasive. On the one hand, 'sanctioned by the international community' represents an 'undefined expression',[153] which would make it difficult, in practice, to prove the existence of such an international consensus;[154] on the other, even where sufficient evidence in this sense exists, an international consensus concerning the legitimacy of the military intervention (*jus ad bellum*) is unlikely to offer proper guarantees that violations of *jus in bello* will not be committed in the heat of the conflict. Consequently, in defining the body of evidence to support the national authorities in their assessment, the Court has consistently heightened the burden of proof on asylum seekers. The applicant would face serious difficulties in proving the likelihood of his or her involvement in war crimes in cases where the conflict was commenced on the basis of a Security Council resolution or is sanctioned by the international community or when his or her national legal system criminalizes and effectively prosecutes these crimes. The Court, though excluding that these elements are alone conclusive, allowed for the formulation of a relative presumption according to which war crimes are unlikely to be committed when these elements are present. As a result, an asylum seeker holds the heavy onus to override this presumption in order to support his or her claim and this is due to a bad and incautious interpretation of international law rules.

Another case in which a questionable interpretation of international law has led the CJEU to raise the burden of proof on asylum seekers by narrowing the refugee definition is *Salahaddin*

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150 AG Sharpston Opinion in the case. For the most significant see SC Res. 1511 (2003); SC Res. 1546 (2004).

151 See for instance SC Res. 1483 (2003).

152 AG Opinion, para 70.

153 AG Sharpston noted that defining the scope of the directive by reference to an undefined expression does not help to take matters forward. See AG Opinion, para 70.

154 The same ambivalence characterizes UNHCR Handbook, para 71. Indeed, this provision has been incorrectly interpreted by some national jurisdictions as requiring violations of *jus in bello* rather than implying considerations on the legality of a conflict. See P. Mathew, 'Draft Dodger/Deserter or Dissenter? Conscientious Objection as Grounds for Refugee Status', in Juss and Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing, 2013) at 177, 184.

Abdulla. This case concerned the cessation clause provided by Article 11 of the Qualification Directive, partially corresponding to Article 1 C of the 1951 Refugee Convention. In particular, the referring court submitted to the CJEU questions relating to the cause of cessation set forth by Article 11 (1)(e) consisting in ceased circumstances in the country of origin. The Court held that the presence of international actors, as defined in Article 7 of the Qualification Directive, plays a significant role in the assessment of the change of circumstances in the applicant's country of origin. Actors of protection may comprise international organizations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory.[155] On the contrary, under the international law framework, the presence of international organizations or multinational forces in the territory of a State is a clear sign of that State's failure to protect its citizens.

Conversely, a reasonable approach to international law rules is taken by the Court concerning the assessment of the exclusion clause in *B and D* case. As mentioned above, Article 12 (2) of the Qualification Directive, corresponding to Article 1 (F) of the 1951 Convention, excludes a person from refugee status when there are serious reasons for considering that he or she has committed (a) a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments; (b) a serious non-political crime; (c) acts contrary to the purposes and principles of the UN Charter. The CJEU reasonably argued that neither the individual's mere membership in a terrorist group included on a list such as that in the Annex to the Council Framework Decision on combating terrorism,[156] nor the individual's intentional participation in the activities of a terrorist group within the meaning of Article 2 (2) (b) of the Council Framework Decision, represents a conclusive element allowing it to conclude that an applicant for the refugee status necessarily and automatically falls within the grounds for exclusion in Article 12(2)(b) or (c).

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155 '[F]or the purposes of assessing a change of circumstances, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7(1) of the Directive have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status'; *Salahadin Abdulla*, *supra* n 128, para 76.

156 Council Framework Decision 2002/475/JHA of 13 June 2002.

In conclusion, the CJEU's (intentional or unintentional) lack of familiarity with international law negatively impacts on the Court's interpretation of the 1951 Refugee Convention[157] and leads to the development of an autonomous and EU-oriented definition of refugee.[158]

[157] In the *Diakite* judgment (*Aboubacar Diakite v. Commissaire general aux réfugiés et aux apatrides* (CJEU Case C-285/12, 30 January 2014)) the CJEU reinterpreted the notion of internal armed conflict. In this case the CJEU EU-oriented approach to international law did not affect but instead enhance the protection of refugees under the Qualification Directive. This judgment nonetheless escapes the scope of analysis of this thesis as it concerns the interpretation of the requirements for being granted subsidiary protection and does not involve the application of the 1951 Convention provisions. For a comprehensive analysis of the case see C. Bauloz, 'The Definition of Internal Armed Conflict in Asylum Law: The 2014 *Diakite* Judgment of the EU Court of Justice', 12 *International Journal of Criminal Justice* (2014) 835-846.

[158] This argument is further developed in Chapter 5.

4. A EU-Oriented interpretation of the Refugee Convention

The existence of structural limits to the CJEU role as a global interpreter of refugee law clearly influences its jurisprudence. The CJEU assessment on international protection cases is affected by a number of factors primarily related to the need of preserving the EU legal order, also by taking account of Member States interpretative policies. All EU Member States were indeed contracting parties of the 1951 Refugee Convention prior to the entry into force of EU asylum legislation. Some of them had already developed an extensive jurisprudence on the interpretation of the Convention provisions. Tough not explicitly referring to Member States internal jurisprudence, the CJEU assessment is often oriented by the need of striking a balance between different national interpretative policies; the EU Court adopts 'a fairly safe and consensus-based approach in light of the various possible conclusions it could reach on [the 1951 Convention] provisions'.[159] Moreover, as the judge of the EU, the CJEU main task is to preserve the EU legal order and protect EU fundamental principles. When the functioning of the EU legal order is threatened, the CJEU tendency to address EU law as a self-contained regime emerges stronger. A clear example provided by this Chapter is the elaboration by the Court of an autonomous and less protective principle of *non-refoulement* that applies to intra-EU removals in order to protect the EU principle of mutual trust.

4.1. The CJEU Re-Interpreting the Refugee Definition

According to Article 1(A)2 of the 1951 Refugee Convention, the term 'refugee' shall apply to any person who

> 'owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing

159 E. Drywood, *supra* n 8, at 1124.

to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

Articles 1 C, D, E and F provide the so-called cessation and exclusion clauses, defining the situations in which the refugee status shall cease and the conditions under which an individual is not in need or does not deserve protection.

As mentioned above, the 1951 Convention does not elaborate on the defining elements of the notion of refugee, such as persecution and the different grounds on which persecution must be based. The EU Qualification Directive reproduces the Convention refugee definition in Article 2(d). Moreover, in order to harmonise the interpretation of the refugee definition among Member States, the Directive provisions provide further guidelines for interpreting these defining elements.

The EU qualification Directive is largely drawn on UNHCR doctrine. This clearly emerges from the high degree of correspondence between the Directive provisions and the UNHCR Handbook.[160] Yet, some of the interpretative guidelines provided by the Directive do not take account of (and in worst cases are incompatible with) the High Commissioner interpretative doctrine. For instance, the EU Directive interpretation of 'membership of a particular social group' differs from that provided by UNHCR. These incompatibilities are not corrected by the CJEU that seems instead to acknowledge them in its judgments. Moreover, the CJEU itself provides interpretative guidelines which are contrary to UNHCR doctrine and unreasonable in light of applicable international standards in some of the areas left uncovered by the Directive.

4.1.1. Redefining Persecution

As stated by the UNHCR, '[t]here is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success'.[161] UNHCR traditionally draws on Article 33 of the 1951 Refugee Convention to define persecution as 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group'. The High Commissioner admits that other serious violations of human rights may amount to persecution.

160 See *supra*, n.62.
161 UNHCR Handbook, *supra* n 58, para 51.

The link with human rights is indissoluble in the definition of persecution provided by Article 9(1) of the Qualification Directive, according to which acts are persecutory when they are

> '(a) sufficiently serious by their 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 [ECHR]' or '(b) as an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)'.

As mentioned above, the reference to the ECHR is not justified as it may lead EU Member States to develop a definition of persecution exclusively based on their regional legislative framework although the 1951 Convention is a universal agreement widely ratified by States from all regions of the World. Furthermore, the establishment of a strict link with core human rights in itself may be dangerous for the elaboration of the definition of persecution.

In case *Y and Z*, concerning two applicants belonging to the Muslim Ahmadis minority in Pakistan, the CJEU, bearing in mind that the Qualification Directive 'must be interpreted in a manner consistent with the fundamental rights and principles recognized, in particular, by the [EUCFR]' identified the rights of this Charter corresponding to the ones listed in Article 15(2) of the ECHR.[162] According to the CJEU, the Qualification Directive refers to these rights 'by way of guidance' in order to determine whether an act amounts to persecution.[163]

To date, the CJEU was faced with three preliminary rulings involving questions on the notion of persecution. In two of these cases it was the applicants' right to freedom of thought, conscience and religion to be threatened. Indeed, *Y and Z* and *Shepherd*[164] concerned religious persecution and persecution faced by conscientious objectors, respectively. The right to freedom of thought, conscience and religion is enshrined in Article 9 ECHR, to which Article 10 EUCFR corresponds. It is not a core human rights pursuant to Article 15(2) and limitations to its exercise are allowed pursuant to Article 52(1) EUCFR.[165] Clearly, such limitations do not amount to persecution.[166] In accordance with Article 9(1)(b) of the Qualification Directive, the 'gravity' of this act must be 'equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR'. National authorities must conduct their assessment in light of the individual circumstances of the applicant and must ascertain 'whether that person, as a result of exercising that freedom in his

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162 *Y and Z*, *supra* n 25, paras 7-8.
163 *Ibid*, para 57.
164 *Shepherd*, *supra* n 26.
165 *Y and Z*. supra n 25, para 7.
166 Ibid, para 60.

country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment'.[167]

In light of the above, the Court concluded that not any interference with the right to freedom of religion amounts to persecution.[168] 'On the contrary, it is apparent from the wording of Article 9(1) of the Directive that there must be a "severe violation" of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution'.[169] National authorities must conduct their assessment in light of the personal circumstances of the applicant.

Both the judgment and AG Opinion on the case widely refers to ECtHR case law. 'From the perspective of religious freedom the interpretation given by the Court in *Y and Z* reinforces the commitment of the EU in the respect, promotion and protection of European fundamental rights standards of religion freedom'.[170] From the perspective of determining the refugee status, however, the CJEU reasoning leaves room for doubt. Indeed, the focus on subjective gravity and on violations of human rights protected by the ECHR can result in an excessively narrow notion of persecution.[171]

In the *Shepherd* case, concerning the conscientious objection of a US soldier, the CJEU endorsed an even less protective approach. The Court did not assess whether the denial of the applicant's right to partial conscientious objection in itself amounts to persecution. A human rights approach to the notion of persecution would have required a preliminary identification of the rights at stake. As the breach of the right to freedom of religion in the *Y and Z* case, the breach of the right to freedom of thought would have deserved deep consideration. Had the Court taken into account the applicant's personal circumstances in *Shepherd* as it did in *Y and Z*, it may have come to a different conclusion.[172] The CJEU assessment in this case was strongly influenced by the circumstance that Article 9(2) of the Qualification Directive, providing a non-

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167 Ibid, para 72.

168 Ibid, para 58.

169 Ibid, para 59.

170 A. Araùjo, 'The Qualification for Being a Refugee under EU Law: Religion as a Reason for Persecution' 16 *European Journal of Migration and Law* (2014) 535-558, at 558. Other scholars have endorsed a positive appraisal of this judgment; see L. Leboeuf and E. Tsourdi, 'Towards a Re-definition of Persecution? Assessing the Potential Impact of Y and Z', 13 *Human Rights Law Review* (2013) 402–415 and J. Jones, 'Y and Z: A salutary Farewell to the Core/Margin Reasoning in Claims of Persecution', 18 *Judicial Review* (2013) 34–41.

171 J. H. Lehmann, supra n 30, at 79. According to the author 'the ECHR places legal obligations additional to and different from those contained in the 1951 Convention'.

172 Indeed, as pointed out by the Federal Court in Canada, members of the US military service publicly opposed to the war in Iraq are likely to be subjected to different treatment before a martial court and suffer harsher punishment because of their opinion. *Kimberly Elaine Rivera et al. v. The Minister of Citizenship and Immigration*, 2009 FC 814, 10 August 2009; *Walcott v. The Minister of Citizenship and Immigration*, 2011 FC 415, 5 April 2011.

exhaustive list of persecutory acts, contains a specific reference to persecution based on conscientious objection in letter (e).

A human rights approach was instead endorsed by the CJEU, leading to questionable outcomes, in the *X, Y and Z* judgment concerning persecution based on sexual orientation.[173] The Court identified the fundamental rights it considered to be 'specifically linked to the sexual orientation of [the applicants]' as 'the right to respect for private and family life, which is protected by Article 8 of the ECHR, to which Article 7 of the Charter corresponds, read together, where necessary, with Article 14 ECHR, on which Article 21(1) of the Charter is based'.[174] These rights are not among those rights from which no derogation is possible pursuant to Article 15(2) ECHR. In light of this, the Court concluded that 'the mere existence of legislation criminalizing 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'.[175] A severe term of imprisonment for homosexual acts can instead amount to persecution 'provided that it is actually applied in the country of origin'.[176] X, Y and Z is one of those cases in which the CJEU stroke a balance among Member States national jurisprudence and adopted the interpretative approach which was likely to encounter the higher consensus of Member States although not being the most protective. Indeed, settled Italian case law considers that the requirements for an application based on sexual orientation to obtain international protection are satisfied by the mere existence of a legislation penalizing homosexuality in the country of origin.[177] The CJEU has instead adopted an interpretation which is more diffused among Member States and is largely drawn on UK jurisprudence.[178]

The CJEU assessment seems instead extremely reasonable concerning the irrelevance of distinguishing 'core areas of basic rights'. In Y and Z the Court put an end to the interpretative approach adopted in German case law prior to the entry into force of the Qualification Directive, according to which there could be 'persecution relevant for the purposes of the right of asylum

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173 For the plurality of issues it addresses, this case has been largely appraised in the literature. See, *inter alia*, M. den Heijer, 'Persecution for reason of sexual orientation: X,Y and Z', 51 *Common Market Law Review* (2014) 1217-1234; M. Afroukh, 'Demandeurs d'asile homosexuels : une protection à éclipses?' *Revue des Affaires Européens* (2014) 845-853.

174 *X, Y and Z*, supra n 27, para 54.

175 Ibid, para 55.

176 Ibid, para 56.

177 Corte di Cassazione, Sentenza n. 1598/2012, 20 September 2012. This approach has been recently reconfirmed by the same Court (Sentenza n. 4522/2015, 5 March 2015).

178 *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UK, [2010] UKSC 31, Supreme Court, 7 July 2010.

only where there was interference with the "core areas" of religious freedom, but not where there were restrictions on the public practice of faith'.[179] The CJEU did not endorse this distinction between 'forum internum' and 'forum externum', which it considered to be incompatible with the definition of religion set forth by Article 10(1)(b) of the Qualification Directive. According to the Court, the Directive definition of religion 'which encompasses all its constituent components, be they public or private, collective or individual'. It follows that '[a]cts which may constitute a 'severe violation' within the meaning of Article 9(1)(a) of the Directive include serious acts which interfere with the applicant's freedom not only to practice his faith in private circles but also to live that faith publicly'.[180] The Court took an analogous approach concerning sexual orientation in case *X, Y and Z*.[181]

Accordingly, in light of the inclusive content of the right to freedom of thought, conscience and religion, the CJEU has answered negatively to the questions referred to it by the referring courts in both *X and Z* and *X, Y and Z* which concerned the possibility for the applicant to avoid persecution by abstaining from religious practices or exercising restraint as an element to be considered in the assessment of his/her claim for refugee status. The Court held that the fact that the applicant could avoid persecution by abstaining from religious practice or concealing its sexual orientation id irrelevant for the assessment[182] and that national authorities 'cannot reasonably expect' the applicants to do it.[183]

One of the major achievement of the Qualification Directive in complying with UNHCR doctrine is the inclusion of non-State actors among the 'actors of persecution' enlisted by Article 6. This provision has finally put an end to German and French interpretative practice which limited the granting of the refugee status to applicants who feared threats emanating by State actors or otherwise supported and tolerated by State authorities.[184] The indication of 'actors of protection' in Article 7 represents instead a potential threat to the effectiveness of international protection in so far as the CJEU endorses a too strict interpretation of this provisions, as happened in case *Salahadin Abdulla*.[185]

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179 *Y and Z*, supra n 25, para 42. The German referring Court considered that 'the restrictions on Ahmadis in Pakistan, which concern the practice of their faith in public, do not constitute interference with those "core areas"'.

180 Ibid, para 63.

181 *X, Y and Z*, supra n 27, para 78.

182 *Y and Z*, supra n 25, para 79; *X, Y and Z*, supra n 27, para 75.

183 *Y and Z*, supra n 25, para 80; *X, Y and Z*, supra n 27, para 76.

184 For French case law see Commission des Recours des Réfugiés (Appeals Board), 3 April 1979, *Duman* and Conseil d'Etat, 27 May 1983, 42.074, *Dankha*. For Germany, Federal Administrative Court, 18 March 1986, 9 C 4.88; Federal Constitutional Court, 10 July 1989, BVerfGE 80, 315; Federal Administrative Court, 12 June 1990, 9 C 37.89.

185 Supra, n 128.

4.1.2. Redefining Social Group

One of the most problematic provision of the Qualification Directive in terms of compliance with UNHCR doctrine is Article 10 (1)(d) defining the notion of 'particular social group'. UNHCR identified two dominant approaches in national judicial practices: the so called 'protected characteristics' approach, which draws on the common characteristics shared by the members of the group, and an alternative approach based on the external perception of the group by the society. According to the High Commissioner, 'it is appropriate to adopt a single standard that incorporates both [these] approaches'. Accordingly, UNHCR defines a particular social group as

> 'a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which 4 is otherwise fundamental to identity, conscience or the exercise of one's human rights'.[186]

In UNHCR view this defining approaches are clearly alternative. Conversely, the Qualification Directive requires the cumulative presence of both common characteristics and an external perception of the group. Indeed, according to Article 10(1)(d)

> 'a group shall be considered to form a particular social group where in particular: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and* that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society'.

Despite its incompatibility with UNHCR interpretative guidelines,[187] this validity of this provision has not been questioned by the CJEU which has instead apply and interpret it in case

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186 UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, para 11.

187 'To avoid any protection gaps, UNHCR therefore recommends that Member States reconcile the two approaches to permit alternative, rather than cumulative, application of the two concepts'. See *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, at 23; *UNHCR had recommended that the EU amend Article 10(1)(d) in the Recast Directive, see UNHCR Annotated Comments on the Qualification Directive and UNHCR, UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010. This EU legislature has nevertheless maintained the provision untouched.

X, Y and Z. Although it is undeniable that the EU Qualification Directive has made significant steps towards the recognition of particular group such as women in particular situations and homosexuals,[188] which still remain controversial in the judicial practices of non-EU States, the cumulative requirement set forth in Article 10(1)(d) has led the Court to restrict the notion of social group.

According to the second part of Article 10(1)(d), '[d]epending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation'. According to the Court, this provision supports the finding that 'it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it'.[189] However, according to the Court, whether such a group satisfies the second requirement related to the external perception of the group depends on the situation in the country of origin. To come to this conclusion, the Court ignored that the second part of Article 10(1)(d) makes no explicit distinction between the two requirements.[190] The Court acknowledged 'that the existence of criminal laws […] which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different'.[191]

4.1.1. Redefining Exclusion Clauses

Among the exclusion clauses provided by the 1951 Refugee Convention, Article 1 D refers to 'persons who are at present receiving from organs or agencies of the United Nations other than the [UNHCR] protection or assistance'. This provision goes on by stating that '[w]hen such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention'. Accordingly, Article 12(1)(a) of the Qualification Directive reads as follows:

> '[a] third-country national or a stateless person is excluded from being a refugee if: he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely

188 See the second part of Article 10(1)(d) and Recital 30 of the Directive.
189 *X,Y and Z*, supra n 27, para 46.
190 Ibid, para 46.
191 Ibid, para 47.

settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall ipso facto be entitled to the benefits of this Directive'.

The Budapest Municipal Court referred two preliminary rulings to the CJEU concerning the interpretation of this provision.[192] Article 1 D of the Convention mainly concerns Palestinian refugees who benefit from the protection of the United Nations Working and Relief Agency (UNWRA). According to the CJEU, having regard to the particular situation of Palestinian refugees, the States signatories to the Geneva Convention deliberately decided in 1951 to afford them the special treatment provided for in Article 1D of the convention, to which Article 12(1)(a) of Directive 2004/83 refers'.[193] The Court considers that UNWRA is not one of the organs or agencies of the UN to which Article 1 D refers to[194] but is, at present, the only such organ or agency.[195]

The Court held that Article 1 D of the 1951 Convention being an exclusion clause, it must be constructed narrowly. Accordingly, the CJEU has reasonably excluded that 'only those Palestinians who became refugees as a result of the 1948 conflict who were receiving protection or assistance from UNRWA at the time when the original version of the Geneva Convention was concluded in 1951 are covered by Article 1D of that convention, and therefore, by Article 12(1)(a) of the Directive'.[196]

The finding of the CJEU is less convincing concerning the requirement of being physically present in the UNWRA area operation. According to the Court, 'voluntary departure from UNRWA's area of operations and, therefore, voluntary renunciation of the assistance provided by that agency' is not a ground for excluding the application of the exclusion clause set forth in Article 1 D of the 1951 Convention and 12(1)(a) of the Qualification Directive;[197] the CJEU held that the words 'for any reason' which in the second sentence of these provisions indicates that mean that the reason for which assistance has ceased may 'be attributable to circumstances which have forced the person concerned to leave the UNRWA area of operations as they are beyond that person's control'.[198] The CJEU interpretation is incompatible with the traditional interpretation of this exclusion clause; there is no evidence which may lead to interpret the wording 'for any reason' as not encompassing a voluntary departure of the Palestinian refugee

192 *Bolbol*, supra n 28; *El Kott*, supra n 28.
193 *El Kott*, supra n 28, para 80.
194 This was the approach originally taken in *Bolbol* (supra n 28, para 44).
195 *El Kott*, supra n 28, para 48. Similarly, see AG Bot Opinion in this case at footnote 6.
196 *Bolbol*, supra n 28, para 47.
197 *El Kott*, supra n 28, para 51.
198 *El Kott*, supra n 28, para 58

from the UNWRA area of operation.[199] The CJEU unreasonable increase the burden of proof on asylum seekers. Indeed, Palestinian refugee having left the UNWRA operation area must demonstrate that they departure was not voluntary but they were forced to flee.

4.2. The CJEU Reshaping the Principle of *Non-Refoulement*

As mentioned above, international refugee law shares one of its key principle, the principle of *non-refoulement*, with international human rights law. Indeed, the majority of international human rights agreements directly[200] or indirectly[201] proclaim such principle.

The principle of *non-refoulement* stemming from human rights agreements, as elaborated by human rights universal and regional jurisdictions, has an absolute character and offers an additional protection against indirect *refoulement*, i.e. against the expulsion to the territory of a State from which there is the risk that the person would be further expelled and exposed to inhuman or degrading treatment in a third country.

The principle of *non-refoulement* enshrined in human rights law is far more protective than that provided by Article 33 of the 1951 Refugee Convention. Firstly, the application of this provision only protects the 'refugee' from being returned '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'. It is not contended that such protection equally extends to asylum seekers. Nevertheless, the need for the threat to be motivated by one of the conventional grounds considerably diminishes the extent of the protection against expulsion. Secondly, unlike Article 3 ECHR, Article 33 does not proclaim an absolute principle of *non-refoulement*. The same provision provides an exception to its application in the second paragraph: '[t]he benefit of the present provision may not, however, be claimed by a refugee

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199 See *UNHCR Observations in the case C-364/11 El Kott and Others regarding the interpretation of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive*. Atle Grahl-Madsen also endorsed this interpretation; see *The Status of Refugees in International Law* (Leyden: Sijthoff 1966), at 265.

200 See for instance, Article 3 of the 1984 Convention Against Torture, Article 22(8) of the American Convention on Human Rights. For a comprehensive overview, see K. Wouters, *International legal standards for the protection from refoulement - a legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia, 2009).

201 Where the principle of *non-refoulement* is not explicitly protected, it is inferred from the prohibition of torture and other inhuman and degrading treatment. Indeed, the ECtHR constantly infers this principle from Article 3 ECHR. Interestingly, in the CJEU case law, the principle of *non-refoulement* is implicitly deduced from article 4 EUCFR (prohibition of torture) although the same charter explicitly proclaims this principle in Article 19. One might well wonder why the Court is so reticent concerning the applicability of this Charter provision.

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'.

Clearly, asylum seekers and refugees are entitled to enjoy the most protective principle of *non-refoulement*. Indeed according to human rights law, this principle represents a fundamental right inherent to all human beings. The applicability of the most protective guarantee stemming from human rights agreements to asylum seekers and refugees is provided by the same 1951 Refugee Convention at Article 5.[202]

This section appraises a recent jurisprudence of the CJEU which tends to reshape and reduce the extent of the principle of *non-refoulement* for intra-EU removals. This interpretative approach is clearly in breach of human rights law. In particular, the section focuses on the incompatibility with ECtHR jurisprudence. The ECHR and the case ECtHR are recognized a special significance within the EU legal order. ….

4.2.1. The principle of non-refoulement *in the jurisprudence of the ECtHR*

The ECtHR has elaborated an extensive jurisprudence on the principle of *non-refoulement*. According to the well-known formula elaborated by the Court, the decision by a Contracting State to expel an individual "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 expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country".[203] The principle of *non-refoulement* deriving from Article 3 has an absolute character[204] and offers an additional protection against indirect *refoulement,*[205] i.e. against the expulsion to the territory of a State from which there is the risk that the person would be further expelled and exposed to inhuman or degrading treatment in a third country.

The principle of *non-refoulement* elaborated by the Strasbourg Court extends its effect to the field of application of the EU Dublin Regulation establishing the criteria and mechanisms for

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202 According to this provision, '[n]othing in [the] Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'.

203 *Soering v. United Kingdom*, 7 July 1989, Appl. No 14038/88, para 91; *Cruz Varas v. Sweden*, 20 March 1991, Appl. No 15576/89, para 69; *Vilvarajah v. United Kingdom*, 30 October 1991, Appl. No 13163/87, para. 103; *Ahmed v. Austria*, 17 December 1996, Appl. No 25964/94, para 39.

204 *Saadi v. Italy*, 28 February 2008, Appl. No 37201/06, para 127.

205 *T.I. v. UK*, 7 March 2000, Appl. No 43844/98; for a more recent judgment see *Hirsi Jamaa and others v. Italy*, 23 February 2012, Appl. No 27765/09, para 146.

determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The Grand Chamber of the ECtHR, in *M.S.S. v. Belgium and Greece*,[206] has partially 'dismantled'[207] the competence-sharing system created by the Dublin II Regulation. Belgium has been condemned for violation of Articles 3 and 13 of the Convention. By returning the applicant to Greece in application of the Regulation, Belgium exposed him to widespread inhuman and degrading treatments caused by the insufficiency of the Greek reception system. Moreover, the applicant faced the risk of being further repatriated from Greece to his country of origin, given the documented practice of the Greek authorities to return asylum seekers without granting them access to a fair asylum procedure.[208] According to the Court, Belgium thus violated the principle of *non-refoulement* both directly and indirectly.

Interestingly, in this case the Court departed from its statements in *Bosphorus*,[209] according to which the Dublin Regulation could have escaped from Strasbourg judicial review. By returning the applicant to Greece, Belgium had acted in accordance with a European Union Regulation. In principle, this could suffice for the equivalent protection presumption to apply and hence to exclude the competence of the ECtHR. Nonetheless, Article 3, § 2 of the Dublin II Regulation[210] provided a 'sovereignty clause' according to which 'each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in [the] Regulation'. According to the Strasbourg Court, the discretion left to the States, which may refrain from transferring the applicants, renders the *Bosphorus* presumption inapplicable to the case of Dublin transferals. Such transferals, in fact, do not strictly fall within the State international legal obligations.[211]

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206 *M.S.S. v. Belgium and Greece*, 21 January 2011, Appl. No 30696/09.

207 V. Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece', 14 *European Journal of Migration and Law* (2012) 1-31.

208 The findings of the Court concerning the Greek international protection system have been recently reconfirmed in *Sharifi and others v. Italy*, 21 October 2014, Appl. No 16643/09.

209 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, Appl. No. 45036/98, paras 152-165. The Netherlands, third intervening State in *M.S.*, objected to the competence of the Court on the basis of the equivalent protection principle (para 330 of the judgment).

210 This provision corresponds to what is today Article 17(1) of the Dublin III Regulation.

211 *M.S.S*, supra n 206, para 339-340. Similarly, *Tarakhel v. Switzerland*, 4 November 2014, Appl. No 29217/12 para 88-91.

4.2.2. The principle of non-refoulement *in the jurisprudence of the CJEU*

The EU Dublin regulation is based on the principle of mutual trust between the EU Member States. According to the CJEU, this principle is fundamentally important in EU Law, as it allows the creation and the maintenance of an area without internal borders.[212] This mutual trust principle requires the Member States to assume that all other Member States respect EU law and particularly the fundamental rights recognized by EU law. The CJEU agrees with the ECtHR that this presumption must be relative. Nonetheless, it has set a higher threshold to rebut the compliance presumption in order to protect the EU principle of mutual trust.

As a matter of fact, the Court of Justice of the European Union reacted to the 'external' evaluation of the Dublin Regulation by the ECtHR a few months after the *M.S.S.* judgment. In the case *N.S.*,[213] the CJEU takes note of the principles laid down in *M.S.S.*[214] and follows the path traced by the Strasbourg Court by claiming that the presumption of compliance with the fundamental rights of the European Union, on which the Dublin Regulation is based, cannot be absolute.[215] An absolute presumption would be incompatible with the law of the European Union[216] and with the obligation to interpret the Dublin Regulation in accordance with fundamental rights.[217] In fact, according to the CJEU, Article 4 of the EU Charter of Fundamental Rights[218] 'must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision'.[219]

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212 *Opinion 2/2013 on the accession of European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms* (CJEU, 18 December 2014) para 191.

213 *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (CJEU Case C-411/10 and 493/10, 21 December 2011).

214 Ibid, paras 88-90.

215 Ibid, para 104.

216 Ibid, para 105.

217 Ibid, para 99.

218 This provision proclaims the prohibition of torture and other inhuman and degrading treatments. According to Article 52(3) of the Charter, the Luxembourg Court confers to such provision the same meaning and scope of Article 3 ECHR.

219 *N.S.*, supra n 213, para 106 (emphasis added).

As an institution of the European Union, the Luxembourg Court obviously aims to preserve the functioning of the Dublin system. According to the CJEU, not any infringements of the European asylum legislation can overcome the presumption of compliance underlying the Dublin Regulation.[220] Only the presence of major operational problems[221] can impede the regular implementation of the competence-sharing system. The threshold established by the Court is reached when the State responsible suffers from 'systemic flaws in the asylum procedure and reception conditions for asylum […], resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State'.[222]

The subsequent case law of the CJEU progressively complicated the dialogue with the ECtHR. According to the EU Court's judgment in *Abdullahi*, the asylum seeker can challenge the identification of the Member State competent, resulting from the criteria set forth by the Regulation, only 'by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State'.[223] Therefore, the assessment of the applicant's individual risk is neither necessary nor sufficient to rebut the mutual trust presumption and to suspend the transferals under the Dublin Regulation.[224] The CJEU has established 'a high barrier against the setting aside of the principle of mutual trust'[225] in order to ensure the capability of the Regulation to serve its primary objectives, which is 'to organize responsibilities among the Member States, ensure speed in the processing of asylum applications[226] and prevent forum shopping[227]'.[228]

In a number of decisions preceding the *Tarakhel* judgment, the ECtHR acknowledged and indeed seemed to approve the "systemic failures" criterion. The Court of Strasbourg, in fact,

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220 *N.S.*, supra n 213, para 85: 'if the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union'.

221 Ibid, para 81.

222 Ibid, para 86.

223 *Abdullahi v. Bundesasylamt* (CJEU C-394/12, 10 December 2013) para 62.

224 'As the exceptional situation as described in N.S. does not relate to the characteristics of an individual asylum seeker, Member States are obliged to take exceptional situations into account on a general basis and not as a matter of evidence provided within the context of assessing the admissibility of an individual application'. AG Jääskinen Opinion in case, *Puid* (CJEU Case C-4/11).

225 Ibid, para 62.

226 Recital 4 of the Dublin II Regulation. See also *K* (CJEU Case C-245/11, 2012) para 48.

227 AG Trstenjak Opinion in *N.S.* (supra n 213) para 94.

228 AG Jääskinen Opinion in *Puid* (supra n 224) para 62.

has declared manifestly ill-founded (in a rather systematic way[229]) the applications of asylum seekers who had been repatriated or were about to be repatriated to Italy by virtue of the Dublin Regulation. Though taking into account, in principle, the individual circumstances of the applicants, the Court rejected their applications with a stereotyped formula which borrows the terms used by the CJEU: 'while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings […], *it has not been shown to disclose a systemic failure* to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in *M.S.S. v. Belgium and Greece*'.[230]

In this complicated judicial dialogue, the *Tarakhel* judgment has definitely shed light on the position of the Court of Strasbourg. The latter Court has refused to acknowledge the systematic failures criterion by instead emphasizing the relevance of the applicant's individual situation. The *Tarakhel* judgment concerned a family of Afghan nationals who had lodged a protection claim in Switzerland. This State, which is bound by the Regulation by virtue of a bilateral agreement with the EU,[231] intended to repatriate the applicants in Italy, where they had been firstly identified.[232] The Court acknowledged that the situation in Italy was rather different to the one found in Greece in the case *M.S.S.*[233] The Italian protection system, unlike the Greek one,[234] did not present systemic failures. This difference led the Court to adopt a different approach.[235] In the absence of generalized and documented violations, the ECtHR has deemed it necessary to assess the individual risk that the applicants would face if expelled to Italy, the State competent under the Dublin Regulation. As a matter of fact, it has been acknowledged

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229 M. Marchegiani, 'Il sistema di Dublino ancora al centro del confronto tra Corti in Europa: carenze sistemiche, problemi connessi alle «capacità attuali del sistema di accoglienza» e rilievo delle garanzie individuali nella sentenza Il sistema Dublino ancora al centro del confronto tra Corti in Europa' 2 *Ordine Internazionale e Diritti Umani* (2014) at 1113.

230 *Mohammed Hussein and others v. the Netherlands and Italy*, para 78 (emphasis added). See further *Abubeker v. Austria and Italy*, 18 June 2013, Appl. No 73874/11; *Halimi v. Austria and Italy*, 18 June 2013, Appl. No 53852/11; *Miruts Hagos v. The Netherlands and Italy*, 27 August 2013, Appl. No 9053/10; *Mohammed and others v. the Netherlands and Italy*, 27 August 2013, Appl. No 40524/10; *Hussein Diirshi and others v. the Netherlands and Italy*, 10 September 2013, Appl. No 2314/10.

231 Association agreement of 26 October 2004 between the Swiss Confederation and the European Community regarding criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ L 53 of 27 February 2008).

232 Italy was therefore the State responsible by virtue of Article 10(1) of the Dublin II Regulation.

233 *Tarakhel*, supra n 211, para 114: 'the current situation in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment […] where the Court noted in particular that there were fewer than 1,000 places in reception centers to accommodate tens of thousands of asylum seekers and that the conditions of the most extreme poverty described by the applicant existed on a large scale'.

234 Ibid, para 114.

235 Ibid, para 59.

that 'while the structure and overall situation of the reception arrangements in Italy cannot […] in themselves act as a bar to all removals of asylum seekers to that country, the data and information [considered] nevertheless raise serious doubts as to the current capacities of the system'.[236] Accordingly, in the Court's view, 'the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded'.[237]

According to the well-established case-law of the ECtHR, 'to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim'.[238] While not implying an obligation to provide the asylum seeker with a house[239] or financial assistance,[240] the obligation of a contracting State under Article 3 ECHR is engaged 'in respect of treatment where an applicant, who [is] wholly dependent on State support, [finds] herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity'.[241]

The applicants claimed that, during their stay in Italy (ten days before leaving for the Netherlands and hence to Switzerland), they were hosted in a reception center with poor hygiene conditions and without any privacy. Because of the specific situation of the applicants, a family with minor children,[242] the Court found that Switzerland would have acted in breach of Article 3 of the Convention by repatriating them to Italy without obtaining assurances from the Italian authorities that on their arrival they would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together.[243]

A more recent decision[244] has confirmed that the individual situation of the applicants and not the general situation in Italy was the basis of the ECtHR findings in *Tarakhel*.

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236 Ibid, para 115.

237 Ibid, para 120.

238 Ibid, para 94.

239 C*hapman v. the United Kingdom* [GC], Appl. No. 27238/95, para 99.

240 *Müslim v. Turkey*, 26 April 2005, Appl. No 53566/99, para 85.

241 *M.S.S.*, supra n 206, para 252-253; *Budina v. Russia*, 18 June 2009, Appl. No 45603/05.

242 'The Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant […]. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status'. See *Tarakhel*, supra n 211, para 99; *Popov v. France*, 19 January 2012, Appl. Nos 39472/07 and 39474/07, para 91.

243 Ibid, para 120.

244 *A.M.E. v. the Netherlands*, 5 February 2015, Appl. No 51428/10. The Court has in fact declared manifestly unfounded the application of an adult 'able young man with no dependents' (para 34). According to the Court, the

In its *Tarakhel* judgment, the ECtHR clarified that between the regular and lawful implementation of the Dublin Regulation and the collapse of a national system there are a number of circumstances that might compromise asylum seekers' rights and that should therefore impact on the application of the Regulation.[245] Member States shall take into due account all these circumstances in order to implement the Regulation in accordance with the ECHR as well as the EUCFR.

4.2.3. An attempt to reconcile the two diverging approaches

According to the EU Court of Justice, the European Convention on Human Rights has a "special significance" within the EU legal order.[246] This special significance has been codified by Article 6 of the Treaty on the European Union (TUE), according to which "fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". Moreover, Articles 52 and 53 of the EU Charter of Fundamental Rights regulate the articulation of this Charter with the ECHR. Article 52(3) provides that the Charter provisions corresponding to ECHR provisions must be given the same meaning and scope of the rights laid down by the Convention, without preventing EU law from granting extensive protection. According to Article 53, 'nothing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized [by, inter alia, the ECHR]'.

Article 4 EUCFR prohibits torture and other inhuman and degrading treatment and hence corresponds to Article 3 of the European Convention on Human Rights.[247] According to Article 52 § 3 of the EU Charter, the CJEU has interpreted this provision as implicitly stating the principle of *non-refoulement*. Nevertheless, in Luxembourg jurisprudence, Article 4 EUCFR seems to have a narrower meaning and scope than Article 3 ECHR. As a matter of fact, according to the CJEU, Article 4 is to be interpreted as meaning that the Member States may

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applicant has not established that, if returned to Italy, he would face 'a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3' (para 36). This decision has explicitly acknowledged the principles laid down in *Tarakhel* but has come to a different conclusion in light of the individual situation of the applicant (paras 28 and 35).

245 S. Peers, 'Tarakhel v Switzerland: Another nail in the coffin of the Dublin system?' (2014) *EU Law Analysis*, 4 November 2014.

246 *ERT* (CJEU Case C-260/89) para 41; *Kadi and Al Barakaat*, supra n 98, para 283.

247 See Explanations relating to article 4 and article 52 para 3 of the Charter of Fundamental Rights. Nonetheless, it should not passed unnoticed that the EU Charter explicitly proclaims the principle of *non-refoulement* in Article 19, also corresponding to article 3 ECHR according to the Explanations. One might well wonder why the Court is so reticent concerning the applicability of this Charter provision.

not transfer an asylum seeker if they cannot be unaware of the systemic deficiencies in the protection system of the State responsible. Therefore, the Member States must consider the general situation in the receiving country to assess whether the repatriation of the asylum seeker is incompatible with the principle of *non-refoulement* proclaimed by Article 4 of the EU Charter. Conversely, according to the ECtHR jurisprudence, the individual circumstances of the applicants must be duly considered in assessing a potential violation of Article 3.[248] The applicant's individual situation can be disregarded only if there is a generalized risk determined by widespread and systemic violations. As the Court has stated in *M.S.S.*,[249] in such exceptional circumstances, it is implicitly proved that the applicant would be individually affected by a large-scale risk of inhuman and degrading treatment.[250]

An interpretation in accordance with Article 52 § 3 of the EU Charter of Fundamental Rights would consider the "systemic failures" criterion[251] adopted by the CJUE not as a threshold under which there is no potential violation of Article 4 but rather as a condition that might exempt the asylum seeker from proving his/her individual risk.[252] In light of the case law of the EU Court, the scope of Article 4 of the EU Charter, proclaiming the prohibition of torture, is instead narrower than that of Article 3 ECHR in so far as the application of the former provision is not triggered in the presence of an individual risk. Moreover, the high threshold established by the CJEU to rebut the mutual trust principle, which is based on Article 4 of the Charter, may affect human rights and fundamental freedoms as recognized by the Convention, in breach of Article 53 of the EU Charter. As a matter of fact, the repatriation of the Tarakhel family to Italy, perfectly compatible with Article 4 EUCFR as interpreted by the CJEU, would have amounted to a breach of Article 3 ECHR. The CJEU seems to have created a new principle of *non-refoulement* which only applies to intra-EU removals which is clearly different and less protective than the one inferred by the ECtHR from Article 3 of the Convention.

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248 *M.S.S.*, supra n 206, para 219.

249 *M.S.S.*, supra n 206, para 359.

250 The adoption of this approach in asylum seekers' claims extends beyond the field of application of the Dublin Regulation; see, for instance, *Sufi e Elmi v. UK*, 28 June 2011, Appl. No. 8319/07 e 11449/07, para 293; and *Saadi*, para 132.

251 For an analysis of the genesis and the rationale of this criterion (whose scope extends beyond the implementation of the Dublin system) vis-à-vis the mutual trust principle, see A. Von Bogdandy, A. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51(1) *Common Market Law Review* (2014). 59-96.

252 C. Costello, 'Dublin-case NS/ME: Finally, an end to blind trust across the EU?' 2 *A&MR* (2012) at 89. This interpretation is adopted by the UK Supreme Court in *EM (Eritrea)*, 19 February 2014: "[v]iolation of Article 3 does not require (or, at least, does not necessarily require) that the complained of conditions said to constitute inhuman or degrading conditions are the product of systemic shortcomings" (para 42). This judgment has strongly influenced the ECtHR decision in *Tarakhel* (see para 104 of this judgment).

A *revirement* in the EU Court jurisprudence is therefore sorely needed in order to ensure an interpretation of Article 4 of the EU Charter compatible with the clauses set forth by Articles 52 and 53 of the same Charter and to prevent further litigation.[253] Nevertheless, a spontaneous 'adjustment'[254] in the jurisprudence of the CJEU seems to be highly unlikely in light of the recent statements of the CJEU in the Opinion 2/2013, concerning the accession of the EU to the European Convention on Human Rights. Interestingly, this Opinion was delivered only few days after the *Tarakhel* judgment of the ECtHR. From it, clearly emerges that the CJEU hardly tolerates external interferences in its field of competence, especially when these interferences are deemed to threaten the primacy and autonomy of EU law. The Opinion clearly excludes the possibility for Member States to 'check whether [another] Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'.[255] This clearly offers a justification to the approach adopted by the CJEU in *Abdullahi*, which excludes the relevance of the individual risk faced by an applicant.

Insofar as the *Bosphorus* equivalent protection presumption is not applicable to Dublin removals, the Member State acting in accordance with this newly created principle of *non-refoulement* remains exposed to ECtHR scrutiny. However, through an alternative reading of the *Tarakhel* judgment, it seems indeed that the ECtHR, as it did in *M.S.S.*, is suggesting to the EU an interpretation of the Dublin Regulation which would be capable of ensuring the compatibility of its implementation with the ECHR, without sacrificing the mutual trust presumption. According to the ECtHR, the content of States obligation varies depending on the seriousness of this risk. This interpretation may be able to reconcile the diverging approaches of the two European courts.

As mentioned above, the Strasbourg Court claims that, though not acting as a bar to all removals of asylum seekers to Italy, the conditions of the Italian protection system might entail the risk of inhuman and degrading treatments for the applicants.[256] Hence, the circumstance that the Italian system, unlike the Greek one, does not suffer from systemic deficiencies undoubtedly excludes an automatic suspension of the "Dublin returns" to Italy but, at the same time, is likely to alter the regular application of the Regulation. The lesser seriousness of the shortcomings in the Italian reception system allows for the formulation of a "softer obligation": no examination

253 G. Goodwin-Gill, 'Budeserepublik Deutschland v. Kaveh Puid (E.C.J.) [notes]', 53(2) *International Legal Materials* (2014) at 91.

254 C. Vial, 'La méthode d'ajustement de la Cour de justice de l'Union européenne : quand indépendance rime avec équivalence', in C. Picheral, L., Coutron (Eds.), *Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme* (Bruylant, 2012) 93-111.

255 *Opinion 2/2013*, supra n 212, para 192.

256 *Tarakhel*, supra n 211, para 120.

of the asylum claim or exercise of the sovereignty clause is demanded in this case. Nonetheless, the transfer to Italy is conditional: "it is […] incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together".[257]

According to the ECtHR, such assurances must consist of "individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together". The Court considered insufficient the intent expressed by the Italian authorities to allocate the family in an ERF funded reception center in Bologna.[258] This approach is consistent with the previous case law of the Court. In particular, in the *M.S.S.* judgment the ECtHR denied the validity of agreements formulated in vague and stereotyped terms without mentioning individual guaranties based on the applicant's situation.[259]

The key question is whether this 'soft' obligation to obtain diplomatic assurances is compatible with the principle of mutual trust. As the CJEU has recently claimed in its opinion on the EU accession to the European Convention on Human Rights, 'when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that […], save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'.[260] Therefore, one may well argue that the request for diplomatic assurances, if automatized, might be in breach of the mutual trust principle.[261] Nevertheless, when diplomatic assurances are requested and obtained, the application of the Dublin Regulation is only conditional and not impeded, as it might be in presence of systemic failures. Moreover, the exchange of assurances might be seen as an enforcement of the principle of cooperation which underlies the Dublin Regulation.[262]

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257 Ibid, para 120.

258 *Ibid*, para 121.

259 *M.S.S.*, supra n 206, para 354. Moreover, in this judgment the Court argued that, in order to be reliable and to produce effects, the assurances must be obtained before the repatriation of the asylum seeker is disposed (and not only previous to its execution).

260 *Opinion 2/2013*, supra n 212, para 192. The risk that, following the accession, the respect of the ECHR would demand a systematic check of other Member States compliance with fundamental rights makes the Court concluding that "accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law" (para 194).

261 See also AG Jääskinen Opinion in *Puid*, supra n 24, para 62: "the principle of mutual trust may not be placed under question through systematic examination, in each procedure entailing an application for asylum, of the compliance of other Member States with their obligations under the Common European Asylum System".

262 M. Marchegiani, supra n 229, para 1114.

The EU would certainly feel more comfortable to undertake a jurisprudential shift aimed at granting the respect of Articles 52 and 53 of the Charter if this shift did not put the mutual trust principle in danger. Indeed, imposing on Member States the 'soft' obligation to obtain diplomatic assurances, in cases in which an asylum seeker would face an individual risk upon return to an EU Member State, is a small price to pay in order to save the implementation of EU asylum policy from the ECtHR scrutiny.

5. Concluding Remarks

The aim of this thesis was to assess the potential of the CJEU as a global actor of refugee law. In particular, this thesis wondered whether or not the CJEU interpretation of the 1951 Refugee Convention provisions has a vocation to be applied beyond the EU borders. The role and competences of this Court have substantially grown following the entry into force of the Lisbon Treaty. Due to the unprecedented position of the EU Court, which is the first supranational jurisdiction to provide a binding interpretation of the 1951 Refugee Convention provision, the literature is attentively looking at its case law, which are quickly growing in number. The expectation of some scholars is that the interpretative guidelines provided by the CJEU will be referred to by asylum jurisdictions over the world and served as parameters for their interpretation.

Having these expectations in mind, this thesis has assessed the several weaknesses of the CJEU as a global interpreter of the 1951 Refugee Convention. It is argued that this court suffers from structural shortcomings that render it unsuitable to interpret the provisions of an international agreement such as the Refugee Convention. Indeed, although the role of this Convention and of other relevant treaties as the yardstick for interpreting and applying EU asylum legislation is explicitly acknowledged by the Court, the practical relevance of the provisions of this Convention in the CJEU assessment is rather marginal. The status of this Convention within the EU legal order has been recently questioned by the CJEU. The Court tends to exercise a self-restraint attitude and often avoids to assess key questions relating to asylum law. In addition, by reason of the controversial relationship between EU law and international law, the CJEU gives proof of reluctance towards using international standards to interpret the Refugee Convention provisions. As it commonly does in other areas of EU law, the CJEU addresses EU asylum legislation as a self-contained law regime.

The Court's assessment in asylum cases is influenced by a set of factors, ranging from the protection of the EU institutional setting and principles to the need of balancing Member States

approaches. The protection of fundamental rights often succumbs to these factors; for instance, the need to preserve the EU principle of mutual trust has led the CJEU to reshape the core principle of *non-refoulement*, reducing its scope for intra-EU removals. This seriously compromises refugee protection.

Because of the reluctance toward international law and the influence exercised by the above mentioned factors, the CJEU has been developing an autonomous interpretation of the 1951 Convention provisions. This thesis argues that this interpretation is not entirely in line with international standards, and in particular with the UNHCR doctrine. The CJEU is far from representing a virtuous example as the only international interpreter of the 1951 Refugee Convention. Moreover, its interpretation is strongly oriented by EU needs and principles, which should instead be of marginal relevance when interpreting a universal treaty widely ratified by States all over the world. This leads to the only conclusion that the CJEU has not global vocation and cannot successfully be exported beyond the EU borders.

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