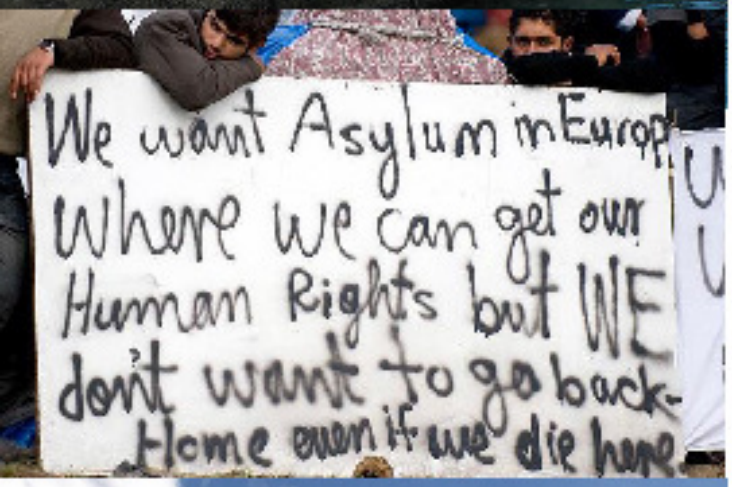

The accession of the EU to the ECHR to strengthen human rights protection within the Common European Asylum System: necessity or merely symbolic?

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List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
BVerfG	Bundesverfassungsgerich
CDDH	Steering Committee for Human Rights (Council of Europe)
CEAS	Common European Asylum System
CFSP	Common Foreign and Security Policy
Charter	Charter of Fundamental Rights of the European Union
EC	European Communities
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECRE	European Council on refugees and Exiles
EEC	European Economic Community
EU	European Union
OJ	Official Journal
STC	Safe Third Country
TCN	Third Country National
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning or the European Union

1. Introduction

A few months ago Europe was shocked by the death of at least 800 refugees drowned in the Mediterranean Sea.[1] It was a harsh confrontation with the consequences of the current migration policies in the EU aimed at strengthening 'fortress Europe'. Regulating migration has always been at mercy of conflicting interests: on the one hand the interest of protecting human rights for reasons of humanity and as required by international law, on the other hand the interest to protect the national sovereignty. The growing influx of asylum seekers has sharpened this contraction. Several years ago the Member States wished to cooperate and try to find a solution for the increasing number of asylum seekers together. They decided to set up a Common European Asylum System (CEAS) aimed to establish a fair and efficient asylum system in two phases. The EU legislature subsequently adopted several Directives and Regulations to serve this aim. However, the twofold goal of the CEAS is rather paradoxical. Efficiency and fairness, in the sense of human rights protection, are often mutually exclusive, which is reflected in the development of the CEAS.

While at the beginning human rights protection had a central place, the legal instruments adopted during the first phase mainly reflect the focus of the Member States on security and efficiency. In the Member States the anti-immigrant sentiment and the focus on safety have not disappeared, which led to only limited improvement of human rights protection within the second phase of legislation. These revised instruments are recently adopted but have already received a lot of criticism with regard to human rights. Especially the well-known Dublin system was criticized. The Dublin system has been set up to determine which Member State is responsible for examining an asylum application. According to this system only one Member State is responsible, the other Member States can send the asylum seeker to the responsible Member State without substantial examination of the application. Hereby, the Member States may rely on the principle of mutual trust which is based on the presumption that all Member States are safe for all asylum seekers. However, according to the criteria of the Dublin system most asylum seekers are send back to their state of entry, which leads to an unequal distribution of asylum seekers amongst the EU Member States.

In this way, the Member States where most asylum seekers enter the EU, such as Greece and Italy, are facing problems in managing the increasing influx of asylum seekers. Everyone has seen pictures of asylum seekers who lost everything waiting for asylum directly sitting next to the tourists celebrating their holidays. These pictures exemplify the overburdened asylum systems in these countries. The heavy burden on the asylum procedures and reception conditions lead to an increased risk on violations of human rights. For example, due to the high number of applications asylum seekers might be detained during a long time. Furthermore, asylum seekers might not be able to achieve their basic needs due to shortage in water, food,

[1] E.g. Bonomolo & Kirchgaessner 2015; Matharu 2015.

clothes and place to stay. It might also lead to procedural shortcomings such as lack of adequate information or legal aid.[2]

The CEAS thus contains a comprehensive set of secondary legislation establishing a certain degree of harmonization, while at the same time it allegedly falls short of human rights protection. The CEAS, therefore, forms an interesting area of law to analyse the human rights protection within the EU.

Due to the risk of human rights violations despite the current EU legislation, judicial protection is of crucial importance to protect the asylum seekers. At European level this protection is provided by the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). However, their protection is fragmentary. The EU originally was set up as an area of economic integration and due to this background human rights protection at EU level as protected by the ECJ is still limited. Besides, there is the ECtHR which as a specialized human rights court guarantees a minimum level of human rights protection. All Member States are also subject to the ECtHR's jurisdiction. The EU itself is, however, not a member of the European Convention of Human Rights (ECHR) and is thus not formally subject to external control by the ECtHR. The intended accession of the EU to the ECHR is regarded as a solution to overcome the limitations and fragmentation of human rights protection at EU level. By means of the accession the EU legislature aims to fully enhance human rights protection within the EU. After years of negotiating the EU finally came to a draft agreement with the Council of Europe on the accession. However, this progress came to an abrupt halt due the opinion 2/13 of the ECJ which adjudicated that the Draft Agreement on the accession was in violation of EU law in several respects. It will be a very difficult to overcome the objections raised by the ECJ. Therefore, it is uncertain if and how this current legislative deadlock will be overcome.

1.1. Research question

Since it is uncertain if and how the accession of the EU to the ECtHR will occur, it is useful to assess whether the accession would actually improve the current human rights protection within the CEAS or whether the protection as intended by the accession is already established in practice. Therefore, the role of the ECtHR and the ECJ as main human rights protectors within the CEAS need to be considered. Given their jurisdictional overlap the interplay between the ECJ and the ECtHR needs to be taken into account to assess whether together they provide for sufficient human rights protection despite their limited competence. The described context has led to the following research question: *how and to what extend are human rights protected within the CEAS and will this protection be strengthened by the accession of the EU to the ECHR considering the interplay between the ECJ and the ECtHR?*

To answer this research question, it is first important to unravel the rather complex multi-layered human rights protection within the EU. Based on this, the first chapter

[2] See the cases ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece* and ECJ 21 December 2011, joined cases 411/10 and C-493/10, *N.S. and Others,* in which Greece was condemned for these reasons.

provides an overview of the protection of asylum seekers and refugees in EU primary law. Thereafter, the second chapter zooms in on the specific context of the European asylum law. Along the lines of the development towards the CEAS it comes to an analysis of the current state of affairs, hereby focussing on the human rights protection.

Then, in the third chapter the role of the ECJ and the ECtHR as protectors of human rights is assessed. Moreover, the gaps in their protection are discussed, leading to the fifth chapter which assesses the accession of the EU to the ECHR as a solution to the fragmentary human rights protection within the EU.

Ultimately, in the sixth chapter the case law of the European Courts concerning the key instruments within the CEAS is scrutinized to see whether within the context of the CEAS the accession of the EU to the ECHR is a necessity or a merely symbolic move.

1.2. Methodology and definitions

The research question will be answered on the basis of an analysis of EU legislation and the case law of the ECJ and the ECtHR. First of all, EU primary law, more specifically the Treaty on the Functioning or the European Union (TFEU), the Treaty on the European Union (TEU), the Charter of Fundamental Rights of the European Union (Charter), and the ECHR will be considered. Moreover, the specific secondary legislation which constitutes the CEAS plays an important role. The four key instruments, which are the Qualification Directive, the Reception Conditions Directive, the Procedures Directive and the Dublin Regulation, will be discussed in detail. Since the research question focusses on the interplay between the Courts, an important method is analysing their case law. Moreover, due regard will be given to the legal literature providing for background information and different views on the topic. In this respect also policy documents of the European Council, the Council of the EU and the European Commission, and reports of international organizations are taken into account.

To be able to provide for an in-depth analysis of the current interplay of the European Courts and the potential effect of the accession hereon, it is necessary to limit the scope of the thesis. It focusses on the consequences of the accession for human rights protection within the CEAS. This thesis does not go into the impact of the accession on human rights protection outside the CEAS. The CEAS consists of several Directives and Regulations of which the four key instruments that according to the Commission lay the foundations for the CEAS, will be scrutinized.[3]

In EU legislation and in the case law of the ECJ is often referred to 'fundamental rights' instead of 'human rights'. It is unclear if and to what extend there is a difference between these two terms. Some legal scholars regard 'fundamental

[3] The Qualification Directive, the Reception Conditions Directive, the Procedures Directive and the Dublin Regulation are as such recognized by the Commission, see COM(2007) 301.

rights' as a term to cover human rights as embodied in international human rights treaties together with constitutional rights originated from national constitutions.[4] This thesis focuses on protection of human rights as an international obligation and for reasons of consistency it only refers to 'human rights'.

Also the terms used in European asylum law need some clarification. In daily life the terms 'migrant', 'asylum seeker' and 'refugee' are often used as being interchangeable. They, however, refer to different concepts. 'Migrant' is the general term for people who move from one region to another, mostly used for people who leave their country to go live abroad. This movement might be voluntarily or because of economic hardship or other problems. The term 'asylum seeker' is used for someone who has left his country in search for international protection. 'Refugee' refers to a person who has been recognized as someone who has fled his or her country and cannot return because of a well-founded fear of persecution due to their race, religion, nationality, membership of a particular social group or political opinion.[5] Refugees, therefore, receive international protection.

Lastly, some words on the principle of non-refoulement. The principle of non-refoulement is one of the most important principles in asylum law and is laid down in several international legal instruments.[6] The exact definition varies between the several legal instruments, but for this thesis a general definition suffices. The principle of non-refoulment prohibits 'the forced direct or indirect removal of an individual to a country or territory where he runs a risk of being subjected to human rights violations'.[7]

[4] White 2011, p.1.
[5] Artikel 1A(2) Geneva Convention.
[6] E.g. article 33 Refugee Convention, article 3 ECHR as interpreted by the ECtHR, article 19 (2) Charter, article 3 Convention against Torture and Article 7 International Covenant Civil and Political Rights.
[7] Wouters 2009, p. 25.

2. Human Rights and the EU

Despite their absence in the founding treaties, human rights in the current time have a manifest role within the EU legal landscape. At the moment there are three sources of human rights provided for in the treaties: the Charter, the ECHR and the general principles of EU law. This chapter will firstly give an overview of the development and the role of these sources as well as their relation to each other. Secondly, it will focus more specifically on the human rights protection in EU asylum law.

2.1. Development of human rights within the EU

While the protection of human rights within the EU has been slowly developed, the Council of Europe already provided for an independent international treaty protecting human rights since 1950: the ECHR.[8] Currently, all Member States have ratified this treaty as well as several non-EU countries and even some non-European countries. The ECtHR has the task of examining whether the Member States comply with the ECHR. In the beginning of the EU, by then the EEC, human rights did not play a role at all. However, with the further development and growth of the EU, the role of human rights grew accordingly. According to White, the development of human rights within the EU 'is a tale of developing and increasing competences linked to the constitutionalization of the law of what we now call the European Union.'[9] In this way the ECJ also gained an important role in human rights protection. Whereas the tasks of the ECJ and the ECtHR were initially clearly separated, they became more and more intertwined.

This development was mainly driven by the ECJ through the concept of general principles of EU law.[10] The ECJ introduced in *Stauder* human rights as an integral part of the general principles which had to be protected.[11] In later case law the ECJ explained that in protecting human rights it was required to draw inspiration from the common traditions of the Member States and the international treaties, such as the ECHR.[12] Based on the general principles of EU law human rights started to fulfil an increasingly important role within the EU. In 1992 the European legislature affirmed the importance of human rights by including them in the text of the treaty and with the entry into force of the Treaty of Amsterdam they were even recognized as constituting a founding principle of the EU.[13] Currently, article 6 TEU incorporates human rights in a threefold way: it recognizes the Charter as a legally binding source for human rights, it obliges the EU to accede to the ECHR and stipulates that human rights shall constitute general principles of EU law.

[8] Morano-Foadi & Andreadakis 2014, p. 10.
[9] White 2011, p. 101.
[10] Morano-Foadi & Andreadakis 2011a, p. 597.
[11] CJEC 12 November 1969, case 26/69, *Stauder.*
[12] CJEC 17 December 1970, case 11/70, *Internationale Handelsgesellschaft*; CJEC 14 May 1974, case 4/73, *Nold.*
[13] Article F paragraph 1 Amsterdam Treaty; Morano-Foadi & Andreadakis 2014, p. 19.

In 2007 the Charter in its current form was proclaimed, used by the European legislature to make the already existing fundamental rights visible and consolidated.[14] With the entry into force of the Lisbon Treaty the Charter acquired the same legal status as the EU treaties, hereby becoming legally binding for the EU institutions and bodies of the Union and the Member States. The Charter only applies when there is a link with EU law. This follows from article 51(1) Charter which states that the Charter is only binding upon the Member States, when they are implementing EU law.[15] This provision of the Charter was explained by the ECJ which ruled that Member States are implementing EU law, when they act within the scope of EU law.[16] By developing the CEAS the EU created a comprehensive set of asylum instruments in an attempt for harmonization.[17] Therefore, by taking measures and decisions in asylum matters the Member States will often act within the scope of EU law, hereby bound by the Charter.[18]

2.2. Multi-layered protection

From the moment the Charter became binding, it gained a central role within in the protection of fundamental rights. Since the entry into force of the Lisbon Treaty the ECJ refers to the Charter frequently and also the courts of the Member States use it increasingly.[19] Nevertheless, there is no hierarchy between the three legal sources; they have to be seen as parallel co-existing instruments.[20] However, overlap exists in the protection by the ECHR and the Charter. It is important, therefore, that the relation between the legal regimes is regulated, especially in the case of divergent legal norms. The relation between the sources is, however, difficult to define. Before the Lisbon Treaty the situation was much less complicated. The only source for human rights were the general principles of EU law.[21] The ECHR had to be merely regarded as a source for the general principles of EU law together with the national constitutions. After the entry into force of the Lisbon Treaty this situation has been maintained in article 6(3) TEU. At the same time the legislature introduced the obligation for the Union to accede to the ECHR, hereby challenging the current relation of the ECHR and Union law as parallel co-existing instruments. In addition, the new article 6(1) TEU gave the Charter its legal binding force and the same legal value as the treaties.

The Charter should therefore be taken into account when defining the relation between the sources. Relevant in this regard are the articles 52 and 53 Charter. The coherence between the ECHR and the Charter is governed by article 52(3) Charter, which states that the rights ensured in the Charter shall have the same meaning and scope as the corresponding rights in the ECHR. Therefore the legislature must

[14] Kánska 2004, p. 297.
[15] Article 6(1) TEU jo. article 51(1) Charter.
[16] ECJ 26 February 2013, C-617/10, Åkerberg Fransson, para. 20-22.
[17] See more in Chapter 4.
[18] Lavrysen 2012, p. 222.
[19] Besselink 2012, p. 26.
[20] Morano-Foadi & Andreadakis 2014, p. 26.
[21] Weiss 2015.

comply with the ECHR, hereby taking into account the case law of the ECtHR and the ECJ.[22] According to the Presidents of the Courts in their joint communication, this provision indicates that in the case of corresponding rights 'a "parallel interpretation" of the two instruments could prove useful'.[23] The ECHR and the Charter must thus be read in conjunction with each other.[24] In the explanations relating to the Charter the legislature provided for a list indicating the provisions which have a corresponding provision in the ECHR and a list indicating those which have the same meaning but a wider scope.[25] The last sentence of article 52(3) Charter sets an important condition to the parallel interpretation, namely that it 'shall not prevent Union law providing more extensive protection'. In fact, according to article 52(3) Charter the ECHR contains minimum standards of human rights protection in the EU. Hereby the legislature wants to make sure that the autonomy of the Union will not be adversely affected while a minimum level of protection is being safeguarded.[26]

In case of conflict article 53 Charter comes into play, which stipulates that the Charter shall never restrict or adversely affect the human rights and fundamental freedoms protected by Union law and the ECHR, in their respective fields of application. This confirms the function of the ECHR to guarantee the minimum standard of human rights protection. It moreover makes clear that this is not limited to the corresponding rights as article 52(3) Charter seems to suggest.[27] So the ECHR has priority over the Charter if the protection of the Charter goes below its minimum standards. Article 53 Charter is mirrored in article 53 ECHR which confirms that the ECHR will never limit or derogate from the human rights or fundamental freedoms as provided for by its contracting parties.

Even though their prominent role has faded away, the general principles of EU law still remain relevant. They fulfil a supplementary role and can be used if certain fundamental rights can be derived from the national constitutions and/or international treaties, but are not provided for in the Charter.[28] The ECHR, despite its role of providing minimum protection, might serve as a source for the adoption of more far-reaching rights via the general principles of EU law.[29] In certain circumstances the ECJ also uses the general principles as basis to go beyond the limits of EU law. This was the case in the controversial cases *Kücükdeveci*[30] and *Mangold*[31], which both involved a horizontal discrimination situation. The ECJ first considered that the discrimination Directives were not applicable because Directives are not capable of horizontal direct effect. Nevertheless, the ECJ came to review of the contested national law through the general principles of EU law. According to the

[22] Explanations relating to the Charter of Fundamental Rights, OJ 2007, C 303/02, p. 33.
[23] Joint communication from Presidents Costa and Skouris, 24 January 2011.
[24] Gragl 2013, p. 59.
[25] Explanations relating to the Charter of Fundamental Rights, OJ 2007, C 303/02, p. 32.
[26] Ibid, p. 33.
[27] Weiss 2015.
[28] Besselink 2012, p. 13, 14.
[29] Weiss 2015.
[30] ECJ 19 January 2010, case C-555/07, *Kücükdeveci.*
[31] ECJ 22 November 2005, case C-144/04, *Mangold.*

ECJ the general principles form an autonomous ground for judicial review and have horizontal direct effect.[32] The ECJ hereby circumvented its limitations in judicial review.[33]

2.3. Protection of asylum seekers and refugees in primary law

The protection of asylum seekers and refugees can also be characterized as an interplay between several overlapping legal regimes. The main instruments are the 1951 Convention Relating to the Status of Refugees (Geneva Convention), EU law and the ECHR. This thesis will focus on the latter two instruments, but first some words on the Geneva Convention. When discussing fundamental rights within asylum law, one has to start with the Geneva Convention which constitutes the centrepiece of international refugee protection. The importance of this Convention and its protocol for EU asylum law follows from the explicit references made by the treaties. For example, article 78 TFEU states that the CEAS must be in line with the Geneva Convention and its protocol and, further, according to article 18 Charter the right to asylum shall be guaranteed with due respect for the Geneva Convention and its Protocol.

The Geneva Convention provided for the first time a single definition of a 'refugee', which is also used as the basis for the definition in EU law.[34] Moreover, it lays down several important principles, such as non-refoulement[35], non-discrimination[36] and minimum standards for the treatment of refugees. These principles and standards remain important, although EU law provides for more extensive protection in many respects. All Member States have ratified the Convention and are therefore bound to it. From the Vienna Convention follows that the obligations of the Member States stemming from international treaties have primacy over EU-legislation.[37] In spite of the fact that the EU may not impede the obligations under the Geneva Convention, automatic compliance is not guaranteed when the Member States are implementing EU law.[38]

However, the practical relevance of the Geneva Convention is limited. First of all, many individuals in need of international protection fall outside the scope of the Convention due to its limited definition of 'refugee'.[39] The status of refugee can only be achieved by proving a fear of persecution on the basis of one of the five grounds mentioned in the Convention.[40] In addition, it lacks clarity about the procedures to be followed for determination of the refugee status. Moreover, the text of the Convention is quite ambiguous leading to various interpretations by the national

[32] ECJ 19 January 2010, case C-555/07, *Kücükdeveci,* para. 53-55.
[33] Mol 2010, p. 293, 294.
[34] Lenart 2012, p. 97; See article 2(d) recast Qualification Directive uses the same definition for refugee, though only directed to TCNs, hereby excluding EU citizens. See more in section 3.4.
[35] Article 33 Geneva Convention.
[36] Article 3 Geneva Convention.
[37] Article 26 jo. 27 Vienna Convention.
[38] Velluti 2014, p. 12.
[39] Mole & Meredith 2010, p. 8.
[40] Article 1A(1) Geneva Convention.

courts. These differences will persist, since there is no institution which provides for clear and binding interpretation, neither does the Convention provide for an enforcement mechanism. The Executive Committee of the UNCHR may provide advice on interpretation of the Convention but this is non-binding.[41]

Some of these gaps are filled by the ECHR. Although the ECHR does not provide for a right to asylum as such, it encompasses several rights which ensure the protection of asylum seekers. The ECHR is not directed specifically to refugees, therefore only providing for indirect protection. This is beneficial to the people searching for protection, but falling outside the strict refugee definition. For those who search rightfully for international protection, the ECHR provides for complementary protection.[42] Several rights of the ECHR are relevant for asylum seekers and serve as a basis for the ECtHR to provide for extensive protection. The most important provision is 3 ECHR which prohibits torture and inhuman or degrading treatment or punishment. The ECtHR regards this provision as implying the principle of non-refoulement. According to the ECtHR 'the decision by a Contracting State to extradite a fugitive may give rise to an issue under art. 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 extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[43] The ECtHR thus recognizes the principle of non-refoulement as enshrined in the Geneva Convention, but extends its protection to asylum seekers who do not have a refugee status.[44]

Other important rights of the ECHR are primarily the right to liberty and security (article 5), the right to a fair trial (article 6), the right to a private and family life (article 8) and the principle of non-discrimination (article 14). Most case law in respect of asylum, however, has been on the violation of article 3 ECHR. According to article 15(2) ECHR no derogations may be made from article 3. This important feature of article 3 ECHR makes it easier to rely on and to prove a violation of it. Unlike Union law the ECHR grants every person the right to individual application at the ECtHR.[45] This right also includes the possible demand of interim measures[46], which is of high relevance to asylum seekers in case of expulsion. Moreover, the Member States are required to provide for judicial protection due to article 13 ECHR which entails the right to an effective remedy.

The Charter is the only one of the aforementioned documents which explicitly includes the right to asylum. According to article 18 Charter 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in

[41] Arimatsu & Samson 2011, p. 5.
[42] Lenart 2012, p. 98.
[43] ECtHR 7 July 1789, no. 1438/88, *Soering v. UK.* This ruling was reaffirmed in e.g. ECtHR 30 October 1991, no. 13163/87, *Vilvarajah and Others v. UK* and ECtHR 15 November 1996, no. 22414/93, *Chahal v. UK*, para. 91.
[44] ECtHR 2 March 2010, no. 61498/08, *Al-Saadoom and Mufdhi v. UK*, para. 140.
[45] Article 34 ECHR.
[46] Rule 39 of the ECtHR Rules of Court.

accordance with the Treaty establishing the European Community'. However, we must question the implications of this provision. It might be argued that this article entails the right to be granted asylum as a subjective and enforceable right which means a positive obligation for the EU and the Member States to guarantee asylum, if the asylum seekers fall within the protection established by international law.[47] This could then be opposed by the argument that article 18 'does not have autonomous legal content'; it only indicates that 'the right to asylum has to be guaranteed within the legal framework of the Geneva Convention and EU law'.[48] Regarded in this way, article 18 does not have direct effect but is conditional on secondary legislation which has to be in line with the international human rights treaties. The Court has until now refused to rule upon this issue. Nevertheless, article 18 is undeniably of relevance. The Charter as binding instrument forms an important source to interpret secondary EU law.[49] Even if article 18 is not to be seen as a subjective and enforceable right, secondary EU law still needs to be interpreted in conformity with this article.

Furthermore, article 19(2) Charter incorporates the case law of the ECtHR on article 3 ECHR, hereby providing for the principle of non-refoulement.[50] Like the ECHR, the Charter does not limit its personal scope to refugees but is directed to every individual. Next to these specific rights for asylum seekers, the Charter also contains other relevant provisions. Obviously, these includes rights corresponding to those in the ECHR, such as the prohibition of torture (article 4), right to a private and family life (article 7), the right of non-discrimination (article 21) and the right to an effective remedy and a fair trial (article 47). Besides, according to article 45(2) Charter the right to move and reside freely within the EU may be granted to TCNs who are legally resident.

In addition to the described rights deriving from primary legislation, the European legislature has strived to set up a CEAS resulting in a comprehensive set of secondary EU law. Due to the adoption of these instruments human rights gained an explicit role in the different aspects of EU asylum law. The next chapter will firstly provide an analysis of the development of the CEAS, after which the main legal instruments of the CEAS will be discussed.

[47] Gil-Bazo 2008, p. 50.
[48] Ippolito & Velluti 2014, p. 159, 160.
[49] ECRE 2014, p. 4, 18.
[50] Explanations relating to the Charter of Fundamental Rights, OJ 2007, C 303/02.

3. Common European Asylum System

3.1. Towards a Common European Asylum System

In the continuing process of establishing a single market without frontiers, there was the willingness to set conditions allowing people to move freely. In this context the Member States felt increasingly the urge to cooperate in matters of migration and asylum to handle the growing number of asylum seekers.[51] Until the entry into force of the Amsterdam Treaty in 1999 some form of cooperation between the Member States had been established in the area of asylum law[52] but afterwards this process accelerated rapidly. The Treaty of Amsterdam transferred asylum and refugee matters from the intergovernmental third pillar to the supranational first pillar. In this way, the Union gained competence in this field.[53] Further still, the area of freedom, security and justice (AFSJ) was introduced in which 'the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.[54] By harmonizing the law on immigration and asylum the legislature wished to contribute to a progressive establishment of an AFSJ.[55]

This led to the Tampere Conclusions, by which the European Council agreed on the establishment of a CEAS. According to these conclusions this should include 'a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection'.[56] By providing for subsidiary protection the Union legislature wishes to fill up the gap in protection due to the limited definition of 'refugee'. Hence, protection is granted to asylum seekers who do not qualify as refugee according to the Geneva Convention, but are otherwise in need of international protection.

The human rights protection plays an important role in the Tampere Conclusions; it firstly affirms that the common asylum and immigration policies aim to establish an open and secure EU, hereby fully and inclusively applying the Geneva Convention, explicitly including the principle of non-refoulement, and other relevant human rights instruments.[57] Moreover the Council expresses the importance of an absolute respect of the right to seek asylum[58], hereby explicitly extending the right to move

[51] Nicholson 2006, p. 506.
[52] In 1997 the Dublin Convention entered into force, providing for some rules on the determination of the responsible Member State.
[53] Sidorenko 2007, p. 20.
[54] Article 3(1) TEU.
[55] Article 61 EC Treaty; Sidorenko 2007, p. 21.
[56] Tampere Conclusions 1999, para. 13.
[57] Ibid, para. 4; article 63 EC Treaty.
[58] Ibid, para. 13.

freely 'enjoyed in conditions of security and justice accessible to all' to third country nationals (TCNs) who justifiably seek access.[59] Finally, the emphasis on the protection of asylum seekers might be exemplified by the fact that this issue is discussed before the issues relating to security.[60]

3.2. First phase

The establishment of the CEAS was divided into two phases whereby the first focused on harmonization on the basis of common minimum standards, leading to the second in which a single asylum procedure and a uniform status for those who are granted asylum throughout the EU had to be established.[61] The Tampere Conclusions were succeeded by a multiannual program in 2004 (The Hague Program) which urged the institutions to complete the first phase. During this first phase several instruments were adopted, among which were the four key instruments of the CEAS: the Qualification Directive[62], the Reception Directive[63], the Asylum Procedures Directive[64] and the Dublin Regulation.[65] Hereby an important step was taken in the development of the CEAS.

However, things were not as rosy as they seem to be. During the period leading to the adoption of these instruments, there was a clear shift in focus. Where human rights protection had an important place within the Tampere Conclusions, the adopted instruments during the first phase mainly reflect the focus of the Member States on security and efficiency. Especially since the terrorist attacks in the USA on 11 September 2001, political considerations of increasing security have predominated the legislative process.[66] In reaction to this catastrophe the Council requested the Commission to issue a paper 'to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments'.[67] In reaction, the Commission issued a working paper in which migration and asylum is linked to security. Though the Commission warned that 'bona fide asylum seekers and refugees should not become victims of the recent

[59] Tampere Conclusions 1999, para. 2, 3; Velluti 2014, p. 16.
[60] Sidorenko 2007, p. 31.
[61] Tampere Conclusions 1999, para. 14, 15.
[62] 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, amended by Directive 2011/95/EU of 13 December 2011 (recast Qualification Directive).
[63] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, amended by Directive 2013/33/EU of 26 June 2013 (recast Reception Conditions Directive).
[64] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, amended by Directive 2013/32/EU of 26 June 2013 (recast Qualification Directive).
[65] Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, amended by Regulation (EU) No. 604/2013 of 26 June 2013 (Dublin III Regulation).
[66] Kosar 2013, p. 88.
[67] Conclusions adopted by the Council (JHA), 20 September 2001, SN 3926/6/01 REV 6, para. 29.

events', the concerns of possibly giving access to terrorists to the EU dominate the paper. The Commission presented a strict pre-entry screening as a way to detect potential terrorist dangers, whereby the exclusion clauses should be applied 'scrupulously and rigorously'.[68] Concerns may be raised from a human rights perspective, especially about respect for the principle of non-refoulement and the risk of arbitrary detention.[69] In addition, the growing anti-immigrant sentiment driven by the number of immigrants has had a large impact on the political agenda.[70] In line with this tendency, in 2002 the main priority of the Council was to manage the migration flows. Taking this as the starting point, a fair balance had to be struck between the protection of human rights and combat illegal immigration.[71]

All in all, the tendency was to build and strengthen 'fortress Europe', rather than protecting the people searching for safe place behind its walls. This resulted in resistance among the Member States to give up their national law and practices for harmonization. Since the Directives had to be adopted by a unanimity voting procedure within the Council, this resulted in cumbersome legislative processes. To reach agreement the minimum standards were lowered, hereby leaving much room for the Member State to uphold their domestic standards.[72] In a critical report Amnesty International warns for 'the real risk of that EU instruments will end up as "empty boxes", leaving the most critical elements of the CEAS at Member States' discretion'.[73]

In the Hague Program the goal to establish a CEAS is reiterated. Positively, the establishment of a uniform status is extended to those who are granted subsidiary protection. However no reference is made anymore to the *validity throughout the Union* of the uniform status for those who are granted asylum or subsidiary protection.[74] Moreover, with regard to the protection of the rights and freedoms of individuals, the explicit inclusion of TCNs as in the Tampere Conclusion was no longer to be found in the Hague Program.[75] Finally, despite the fact that compliance with the Geneva Convention was still required, the Hague Program did not explicitly set the obligation to comply with the principle of non-refoulement.[76]

3.3. Second phase

The start of the second phase was marked by evaluating the first phase, as required by the Hague Program. In 2006 the evaluation process was initiated by the Commission resulting in a comprehensive analysis of the results of harmonization and eventually leading to a policy plan on asylum and amendment proposals for the

[68] COM/2001/0743.
[69] Nicholson 2006, p. 522.
[70] Espinoza & Moraes 2012, p. 162, 163.
[71] Seville European Council, Presidency Conclusions, 21-22 June 2002, para. 27, 28.
[72] Report EP Committee 2004, para. 76, 77.
[73] Amnesty International 2003, p. 8.
[74] Compare Tampere Conclusions 1999, para. 15 and European Council and the Hague Programme 2005. para. 1.3. See Sidorenko 2007, p. 204, 205.
[75] Velluti 2014, p. 16.
[76] Compare Tampere para. 13 and the Hague Program para. 1.3; See Sidorenko 2007, p. 204, 205.

existing Directives and Regulations.[77] An important message spread by the Commission was that the second phase should aim to achieve a 'higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States'.[78] Besides the Commission, the ECtHR also played an important role in the revision of the CEAS. The gaps in human rights protection were revealed by its case law, in which human rights were violated, for instance by not respecting the principle of non-refoulement or due to inadequate reception conditions.[79] Moreover, the recent flow of migrants from North Africa to Southern Europe intensified the call for solidarity.

Several important factors to realize the desired changes were given by the Treaty of Lisbon. This primarily led to significant institutional changes. By abolishing the pillar system, it made matters falling under the AFSJ subject to the ordinary legislative process, meaning quality majority voting in the Council and to full jurisdiction of the ECJ. The role of the ECJ was also strengthened by the fact that the right to refer preliminary questions was extended to all national courts instead of only the highest national courts. Since then the amount of preliminary references increased in number and in variety of subjects, hereby providing the ECJ the opportunity to a consistent application of EU asylum law.[80] Furthermore it incorporated the objective of the second phase to establish a uniform status of asylum and common procedures, therefore going beyond the minimum harmonization as required in the Treaty of Amsterdam.[81] Finally, as observed, the Charter became binding by the Treaty of Lisbon, including the right to asylum and the principle of non-refoulement.

In 2009, the same year as the Lisbon Treaty entered into force, the subsequent multi-annual program took place. In the Stockholm Program the European Council defined the priorities in the area of justice and home affairs for the years 2010-2014. The main focus is on the rights of EU citizens, but also explicitly refers to the protection of non-EU citizens.[82] Moreover, it draws attention to the existing differences between the Member States and re-emphasizes the importance of establishing a higher degree of harmonization through the establishment of the CEAS. This should not only be based on the Geneva Convention, but according to the Council the EU should also accede to the Geneva Convention and its Protocol.[83]

At first glance, the Stockholm Program seemed to take up the line as set out by the Tampere Conclusions regarding its wording of justice and human rights for all.[84] Moreover, it is emphasized that the establishment of the CEAS should remain a key objective for the EU in order to achieve a higher degree of harmonization.[85] However, the program received a lot of criticism, mainly because it lacked specific

[77] COM(2008)360; COM(2011)319.
[78] COM(2007) 301.
[79] Toscano 2013, p. 11, 12.
[80] Velluti 2014, p. 22.
[81] Article 78 (2) TFEU.
[82] Stockholm Programme 2010, para. 1.1.
[83] Ibid. pp. 6.2.1.
[84] Velluti 2014, p. 17.
[85] Stockholm Programme 2010, para. 6.1.

policy directions.[86] Despite the entry into force of the Lisbon Treaty which could have been used as an impetus for defining clear political lines to guide further harmonization, the program resulted in a lengthy document including various topics reflecting the different interests of the Member States.[87] Hence, the ultimate goal of a common asylum system was clearly put forward but no specific policy direction or practical guidance was given on the way to achieve this.

Despite the newly introduced majority voting, the negotiations progressed rather slowly, therefore, the deadline of 2012 was not reached. Nevertheless, all recast instruments are currently adopted and they have all entered into force since 21 July 2015. The long process of negotiating led to some positive development in the protection of human rights, however, some issues still remain unaddressed leading to the question whether the recast instruments are fully complying with international law. In the following sections the four main asylum instruments will be shortly discussed, drawing attention to the most important changes broad by the recast legislation and the remaining gaps and inconsistencies.

3.4. Secondary legislation

As previously mentioned the legislature strives for harmonization by setting up a fair and efficient CEAS, hereby trying to prevent secondary movements of TCNs while ensuring the human rights of TCNs are respected. To achieve these aims the recast Directives and Regulations are used to increase the level of harmonization. In this subsection these legal instruments will be discussed more in detail, but first some general remarks on their scope and application. Though the second phase was intended to realize a single asylum procedure with common standards and a uniform status for those who are granted asylum throughout the Union, the CEAS mainly consists of Directives. Obviously, this is not the right instrument to achieve full harmonization since it allows for the adoption of divergent national legislation. This is confirmed by the fact that in the preambles of the relevant Directives it is stated that they provide for minimum standards. Next, it is important to realize that the revised Directives and Regulations do not extend the personal scope to 'all persons' but refer instead to only TCNs and stateless persons. This means that EU citizens can never achieve a refugee status in another Member State which is not in line with international human rights, especially the non-discrimination principle of article 3 of the Geneva Convention.[88] Also the geographic scope of the recast Directives is limited in scope. Ireland and the UK negotiated an opt-out of the recast asylum Directives and remain bound by the former Directives.[89]

[86] Toscano 2013, p. 13.
[87] Pascouau 2014, p. 8.
[88] The numbers of EU nationals seeking asylum outside Europe show that there is a need for protection among them, Stern 2014, p. 15.
[89] They did opt in to the Dublin III Regulation and the Recast Eurodac Regulation.

3.4.1. Qualification Directive

The Qualification Directive lies at the heart of European Asylum law, since it sets out the standards as to who qualifies as beneficiary of international protection.[90] Together with the Temporary Protection Directive, it can provide for four statuses: applicant, refugee and beneficiary of subsidiary or temporary protection. Since it is based upon these statuses whether or not an asylum seeker can stay and enjoy international protection, it is important to have uniform rules to provide the asylum seekers the same chances to be granted asylum and the same protection throughout the Member States. This also helps to limit the secondary movement of asylum seekers between the Member States. Therefore the Qualification Directive has a two-fold purpose: defining the criteria for the qualification of asylum seekers and providing for a minimum level of benefits to the individuals owning one of the aforementioned statuses.[91]

According to the European Council on refugees and Exiles (ECRE), the recast Directive 'represents a significant improvement in the compliance of EU law standards with international human rights and refugee law obligations and the case law of the ECJ and ECtHR'. It raises the level of protection and increases the degree of harmonization. General changes on the qualification have been made, such as the broadening of the notion 'family members' and making it easier in some respects to qualify for a refugee status; for example, by including gender identity as a ground for protection.[92] Another important improvement is the removal of the differences in protection between refugees and the beneficiaries of subsidiary protection. Under the former Qualification Directive refugees were better protected than beneficiaries of subsidiary protection, which is no longer the case under the recast Directive.[93]

Nevertheless, the Qualification Directive has been criticized for containing vague definitions, gaps and too much room for derogation, hereby failing to achieve the necessary level of harmonization.[94] Therefore, the described improvements may be limited in effect. For instance, the differences in protection between refugees and beneficiaries of subsidiary protection are mostly abolished, but the recast Directive does not give a clear definition of subsidiary protection.[95] Hence, it remains uncertain who can rely on these rights, leaving it up to the Member States to decide on. The recast Directive also lacks a clear definition to determine whether a non-state actor qualifies as actor of protection. It therefore remains questionable if the non-state actor can indeed provide the needed protection. [96] Due to these remaining ambiguities and gaps the recast Directive does not ensure that the Member Stated will implement them in line with the international obligations.

[90] Eaton 2012, p. 766.
[91] Preamble of Directive 2004/83/EC, para 12.
[92] Peers 2013, p.3.
[93] Toscano 2013, p. 18.
[94] Ippolito & Velluti 2014, p. 41.
[95] Article 15(c) Directive 2011/95/EU.
[96] Ippolito & Velluti 2014, p. 44.

3.4.2. Reception Conditions Directive

The Reception Conditions Directive sets the conditions that have to be granted by the Member States to asylum seekers who have lodged an application for international protection according to the Qualification Directive. It ensures that applicants have access to housing, food, employment, education and health care. To prevent the asylum seeker from divergent treatment in the various Member States and to avoid secondary movement, harmonization of these conditions is essential.[97] However, this Directive is further accused of lacking the necessary harmonization due to a wide margin of discretion for the Member States 'notably in regard to access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons'.[98] For instance, the Directive leaves it up to the Member States to set conditions for granting access to the labour market with the only limitation that they have to ensure that applicants have effective access.[99] This gives much room to the Member States to impose additional limitations to asylum seekers who already have been granted access to the labour market. Indeed, the majority Member States require asylum seekers to apply for a working permit.[100] It is the question whether many asylum seekers can overcome this extra burden and access the labour market.

The adoption of the recast Directive brought improvement in some respects. In line with the recast Qualification Directive, its scope was broadened by including applicants for subsidiary protection next to refugees and by extending the definition of 'family members'. The standards regarding the access to employment and health care were also raised.[101] Significant changes were made relating to the most controversial aspect of the Directive - the detention of asylum seekers.[102] The UNCHR takes as a general principle that detention of asylum seekers is only a measure of last resort and gives several alternatives for detention.[103] Furthermore, in other international instruments, immigration detention is severely restricted and set procedural safeguards. Nevertheless, detention of asylum seekers is increasingly common practice among Member States and is often based on the basis of the immigrant being illegal on EU territory.[104] The original Reception Directive remained rather silent on this issue but the recast introduces several rules on detention.[105] It states that detention for the sole reason that the asylum seeker has applied for asylum is not allowed and subsequently provides for a limited list of grounds for detention. Member States must ensure rules concerning alternatives to detention.[106] Furthermore, detention shall last as short as possible and not longer than the

[97] Preamble of Directive 2013/33/EU.
[98] COM(2007) 745, p. 10.
[99] Article 15 2013/33/EU.
[100] COM(2007) 745, p. 8.
[101] Peers 2013, p. 4.
[102] Velluti 2014, p. 65.
[103] UNCHR 2012, para. 14.
[104] Costello 2012a, p. 258.
[105] Peers 2013, p. 5.
[106] Article 8 Directive 2013/33/EU.

grounds for detention are applicable.[107] In addition, procedural rules such as speedy judicial review and legal aid are now incorporated.

However also these provision leave much room for different interpretations and can, therefore, be easily undermined. For instance, detention must be as short as possible, but no time limit is given. Moreover, the list of grounds for detention is rather long and gives wide definitions, which may lead to disproportionate detention.[108] These examples represent the changes made by the recast Directive: in theory they might cause significant improvements but in practice the effect is only limited due to the lack of clear restrictions and the remaining gaps in protection.[109]

3.4.3. Procedures Directive

The standards to guarantee access to a fair and efficient asylum system are set by the Procedures Directive. Procedural rules are indispensable to ensure an effective exercise of the rights granted to individuals. Since these rules are traditionally developed and governed purely within the national legal context, depending on the specific national circumstances and legal system, there was a great variety in national practices.[110] This made the adoption of this Directive particularly difficult and a laborious process.[111] The result of this process was a shallow written piece of legislation clearly showing the resistance of the Member States to give up their national practices. It has been widely criticized for setting only low minimum standards and leaving much discretion to the Member States.[112] Several Member States have been condemned by the ECtHR for violating the right to an effective remedy and the principle of non-refoulement because of procedural shortcomings.[113]

In reaction to these criticisms, many changes to this general legal regime have been made by the recast Procedures Directive, hereby significantly raising the level of protection and reducing the level of discretion.[114] Among others, improvements were made regarding the rules on the applications and appeals, including specific time limits, as well as standards on accelerated procedures. Moreover the number of exceptions and the degree of complexity were reduced. However, despite these positive developments, some points of critique still remain. For example, the recast Directive still contains the much contested 'Safe Third Country'-principle (STC) as a ground of inadmissibility of an application.[115] Due to this principle, a Member State can send an applicant to a third country with which the applicant has a connection,

[107] Article 9(1) Directive 2013/33/EU.
[108] Toscano 2013, p. 24.
[109] Velluti 2014, p. 68.
[110] Ackers 2005, p. 2.
[111] Reneman 2014, p. 6.
[112] COM(2009) 554, para. 1.1.; UNCHR 2010.
[113] See e.g. ECtHR 28 March 2013, no. 2964/12, *IK v. Austria*; ECtHR 11 October 2011, no. 46390/10, *Auad v. Bulgaria*; ECtHR 23 June 2011, no. 20493/07, *Diallo v. Czech Republic*; ECtHR 2 February 2012, no. 9152/09, *IM v. France.*
[114] See for a list of the changes: Peers 2013, p. 11-15.
[115] Article 33(2)(b) Directive 2013/32/EU.

relying on a presumption of safety.[116] This presumption prevents the Member State for assessing the application substantively.

This system challenges important principles of human rights protection, such as individualized determinations, fair procedures and the principle of non-refoulement.[117] Notwithstanding the continuous criticisms and the call for removal of the STC-principle[118], the Recast Directive upholds this principle.[119] Therefore, the risk of violation of the for mentioned principles continues to exist. The creation of a common European list of safe countries has been brought to a halt due to European Parliament[120], despite states are still allowed to have their own lists.[121] The recast Direct did try to limit the risk of human rights violation by introducing some new safeguards concerning the designation of safe countries.[122] However, considering the difficulty of determining the safety, the possibly rapid change of the human right situation and the different interpretation of the Member States the system can still easily lead to errors and subjective designations.[123]

3.4.4. Dublin Regulation

The rules to determine the Member State responsible for examining an asylum application are laid down in the well-known Dublin Regulation. Currently, the Dublin III Regulation is applicable, the most recent revision of the legislative series regulating this issue. The key principle of the Dublin-system is that an asylum application has to be examined only once and was already agreed upon in reaching the Schengen Agreement.[124] This principle relies on concept of mutual trust allowing the Member States to send asylum seekers back to the responsible Member States relying on the presumption that all Member States are 'safe' for all asylum seekers. The Dublin Regulation provides criteria to designate the responsible Member State and stipulates that in case it is not possible to determine the responsible Member State, the country of first application is responsible.[125]

This system has been highly criticized already from the early beginning. In recent times, particularly the southern European countries express a call for burden sharing and criticize the Dublin rules for moving the responsibility from the western and northern countries to themselves. This skew distribution also triggers criticism from a human rights perspective, since the overburdening of the southern Member States lead to significant failings in protecting the asylum seekers.[126] Moreover the chance to be granted a refugee status varies enormously from Member State to Member

[116] Article 36, 38 and 39 Directive 2013/32/EU.
[117] O'Nions 2014, p. 119. Costello 2005, p. 47.
[118] ECRE 2011, p. 30.
[119] Ippolito & Velluti 2014, p.54.
[120] ECJ 6 May 2008, C-133/06, *European Parliament v. European Union*.
[121] Article 37(1) Directive 2013/32/EU.
[122] E.g. article 37 (2) and (3), 39 Directive 2013/32/EU.
[123] Costello 2005, p. 66.
[124] Gil-Bazo, 2007, p. 173.
[125] Article 3(2) Regulation 604/2013.
[126] E.g. ECJ 21 December 2011, C-411/10, *N.S and M.E. and others.*

State.[127] Furthermore an increasing number of asylum seekers is detained whilst waiting to be transferred to another Member State to deal with their application.[128] All in all, the focus of the Dublin Regulation is clearly maintaining the transfer system trying to prevent secondary movement rather than a fair system for determining protection needs.[129]

Notwithstanding the fierce critics, the Dublin III Regulation did not radically change the Dublin system by chancing the substantive rules. It did improve the procedural rights, among others by introducing the right to a personal review, the rights to an effective remedy, guarantees for minors as well as expanding the right to information.[130] Importantly, it also introduces a provision on detention. Article 28 prohibits detention for the sole reason of being subject to the Dublin procedure and provides for several important legal safeguards.

The Dublin III Regulation also codifies important case law of the ECtHR and the ECJ by extending the sovereignty clause of article 3(2). If it is not possible to transfer the asylum seeker to the responsible Member State 'because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment', the determining Member State becomes responsible.[131] In line with this clause the Commission proposed a mechanism of suspension of transfers. This mechanism would allow to temporarily suspend transfers toward the Member States which are faced with an exceptionally heavy pressure on their reception capacities, asylum system or infrastructure.[132] This proposal also gave the Commission the possibility to suspend transfers in case the level of protection would not be in conformity with EU law.

Disappointingly, this proposal was rejected by the Council and instead an early warning mechanism was adopted. This mechanism provides for a constant monitoring of the national asylum system. In case of substantiated risk of particular pressure on or problems in the functioning of the asylum system, Member States can adopt a preventive action plan or a crisis management plan to remedy the deficiencies, either on their own or the Commissions initiative.[133] The fact that even the proposal of a suspension mechanism was rejected shows the reluctance to fundamentally change the Dublin system. As Peers sharply expressed 'the Commission's proposal to suspend the application of the system in such cases would not have fixed the underlying illness, but only treated the symptoms – but even that

[127] O'Nions 2014, p. 106.
[128] ECRE 2013, p. 82; Jesuit Refugee Service Europe 2014.
[129] O'Nions 2014, p. 108.
[130] Peers 2014a.
[131] This paragraph codifies the cases ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece* and ECJ 21 December 2011, joined cases 411/10 and C-493/10, *N.S. and Others.* For an analysis of these cases see section 7.2.
[132] COM(2008) 820, p. 19.
[133] Article 33 Regulation 664/2013.

proposal was rejected by the Council'.[134] Hence, the recast Regulation certainly did not take away the risk of violating human rights caused by the Dublin system.

3.5. Future Steps

Since the recast package was only recently adopted, it remains to be seen how it will work out in practice and what the subsequent steps are. Certainly, the Common European Asylum is of high political importance. For the first time the Commission included 'managing migration' as a priority on its political agenda.[135] According to the President 'this is first of all a humanitarian imperative'[136] and must be reached by focusing on solidarity, fully implementing the common asylum system and removing the national differences. On 15 May this year the European Commission introduced the European Agenda on Migration. It consists of four pillars: reducing the incentives for irregular migration, saving lives and securing external borders, a strong common asylum policy and a new policy on legal migration to decline Europe as an attractive destination for migrants.

The Migration Agenda was launched shortly after Europe was still shocked by the death of 900 refugees drowned in the Mediterranean Sea. The loss of lives of many migrants has convinced the Commission to take immediate action of which the imperative is to protect the duty to protect those in need.[137] Therefore, the Commission proposes a ten point plan for immediate action. This among others includes: raising the capacities and assets for the Frontex joint-operations Triton and Poseidon to increase the search and rescue efforts for saving lives at sea, supporting common EU actions to target criminal smuggling networks, immediate action to tackle migration already in the country of origin and of transit and resettlement of 20.000 displaced persons in need of protection fairly divided among the Member States. In light of the forgoing subsection, specific attention needs to be drawn to the proposal of the Commission for a temporary distribution mechanism under article 78(3) TFEU. According to the Commission, in case of a sudden mass influx of migrants a fair distribution of persons in clear need of international protection among the Member States needs to be ensured. This temporary emergency system should succeeded by a permanent system of sharing responsibilities to deal with mass influxes. This introduction of a quota system meets with the call for solidarity and burden sharing and would help to alleviate the problems of the countries with over-burdened asylum systems. However, even before the Commission officially launched the EU Migration Agenda Member States criticized the idea of a refugee quota system.[138] Indeed, after the Commission put forward its Migration Agenda, several Member States rejected its plans.[139] Recently, the Member States agreed

[134] Peers 2013, p. 8.
[135] European Commission 2015.
[136] European Commission 2014, p. 9.
[137] COM(2015) 240 final, p. 2.
[138] Euractiv 2015.
[139] Alexe 2015; Millis 2015.

upon voluntary quotas, but the level of commitment varies. Hungary for example is very reluctant and stated that it will not accept any extra migrants.[140]

This again shows that political progress in asylum matters appears to be very difficult. There is still a long way to go in realizing a single asylum procedure and a uniform status for those who are granted asylum throughout the Union, hereby ensuring full human rights protection. The second phase certainly brought several significant changes, but is also characterized by leaving sensitive issues undecided. Due to the remaining ambiguities, gaps and inconsistencies, the role of the Courts is still of crucial importance. The next chapter will take a closer look on their role in protecting human rights within the EU in general. Subsequently, the intended accession of the EU to the ECHR as a way to improve EU human rights protection and the reaction of the ECJ on this proposal of the Union legislature will be discussed.

[140] Harris 2015.

4. Role of the Courts

As it has been shown in the first chapter the enhanced role of human rights within the EU made the ECJ and the ECtHR partners in protecting human rights. They both have been trying to fill in the human rights gap within the EU, hereby step by step extending their competences. Scheeck clearly illustrates this process: 'the ECJ reaches far beyond the shores of its legal order and fishes for inspiration in the ECHR(…), the ECourtHR throws out its nets way further than it was ever meant to in order to pull in the EU and close the human rights gap'.[141] The partnership is not self-evident, since the rationales behind the Courts are of a different nature. Whereas the ECtHR is specialized in human rights protection and focuses on safeguarding a minimum level of protection among the contracting parties to the ECHR, the ECJ is first and foremost an important actor in promoting EU integration, hereby focusing on economic integration. Even though the ECJ has currently an important role in the protection of human rights, this protection has still to be regarded in the light of European integration. This is confirmed by the statement of the President of the ECJ at the FIDE conference of 2014 in which he states: 'The Court is not a human rights court. It is the Supreme Court of the European Union'.[142] Nevertheless, both courts are important protectors of the human rights and are often confronted with the same questions. Both have tried to find a way to find way to deal with the overlapping jurisdiction.

4.1. The ECJ's perspective

The ECJ did not become an important human rights actor solely by extending its competences on its own motion.[143] It was being pressed by the national constitutional courts to do so. The national courts did not unconditionally accept the ECJ's supremacy over human rights as protected by their own constitutions because of the EU human rights deficit.[144] Appointing the ECtHR as the ultimate human rights protector was no option for the ECJ, since by that time not all Member States had ratified the ECHR.[145] Moreover, and more importantly, by accepting external review the ECJ would have set itself aside as exclusive interpreter of EU law hereby risking to subject the EU to another legal order.[146]

In this context the ECJ recognized the general principles of EU law, which it subsequently used as a basis to refer to individual articles of the ECHR and to the case law of the ECtHR in its decisions.[147] Nevertheless, it is important to realize that

[141] Scheeck 2005, p. 848.
[142] Besselink 2014.
[143] See CJEEC 4 February 1959, case 1/58, *Stork*, in which the ECJ refused to take into account human rights.
[144] See BVerfG 29 May 1974, BvL 52/71, *Solange I*; Corte Costituzionale 27 December 1973, 183/73, *Frontini.*
[145] Council of Europe CETS no. 005, 2015.
[146] Gragl 2013, p. 52.
[147] In the period 1974-1998, 2001-2003 the ECJ referred more than 130 times to the ECHR, see Morano-Foadi & Andreadakis 2011b, p. 1073.

the ECJ never uses and is also not competent to use the ECHR as a primary source of EU law.[148] It only refers to the ECHR as a 'source of inspiration' and applies the ECtHR's case law 'by analogy'.[149] This allows the ECJ to freely interpret the ECHR and to make selective use of it. The ECJ uses the Convention for its own purposes and as basis for far-reaching judgments. For example, the ECJ has used human rights to substantiate the fundamental freedoms.[150] It went even further in the case *Schmidberger.* Even though the ECJ considers the human rights equal to the fundamental freedoms, it has in this case favoured human rights over the fundamental freedoms.[151] This confirms that the ECJ really has chosen the path of embracing human rights as part of EU law, since based on these rights it might even set aside the fundamental freedoms which form the basis of the EU.

So on the basis of a rather detailed analysis of the ECHR the ECJ gives judgments with far-reaching consequences for the national legal orders. This is problematic because in this way the Member States might be confronted with diverging use by the Courts of the same provisions. In the first place the protection provided for by the ECJ is not the minimum as interpreted by the ECtHR.[152] Moreover, the Courts interpret the ECHR in different contexts and sometimes in different ways.[153] An example follows from the *Hoechst* judgment where the ECJ decided that article 8 and 9 ECHR do not apply to business companies[154], whereas the ECtHR a few years later decided that they do.[155] Positively, such divergences happen only rarely and the ECJ also readjusted its case law to bring it line with the ECtHR's case law.[156] In this way the ECJ in the case *Roquette Frères* recalled its decision in *Hoechst* and stated that the subsequent case law of the ECtHR should be taken into account in deciding upon this case.[157]

4.1.1. The Charter as primary source

The Charter brought a new dimension in human rights protection by the ECJ. Since the entry into force of the Lisbon Treaty the ECJ has referred directly to the Charter as a source for human rights.[158] The ECJ referred for first time to the binding force of the Charter in *Kücükdeveci*[159], since then the ECJ refers to the Charter regularly.[160]

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[148] Article 6(3) TEU stipulates that the ECHR shall constitute the general principles of EU law.
[149] Scheeck 2005, p. 853.
[150] See for example ECJ 11 July 2002, C-60/00, *Carpenter v. Secretary of State,* para. 40-46; ECJ 25 March 2004, C-71/02, *Karner GmbH v. Troostwijk GmbH*, para. 50-53.
[151] ECJ 12 June 2003, C-112/00, *Schmidberger v. Austria*; see also ECJ 24 October 2004, C-36/02, *Omega Spielhallen*, where the ECJ used human rights as justification ground for a breach of a fundamental freedom.
[152] Gragl 2013, p. 57; Morano-Foadi & Andreakalis 2013, p. 37.
[153] Scheeck 2005, p. 854.
[154] CJEC 21 September 1989, cases 46/87 and 227/88, *Hoechst.*
[155] ECtHR 16 December 1992, no. 13710/88, *Niemietz v. Germany.*
[156] Scheeck 2005, p. 855.
[157] ECJ 22 October 2002, C-94/00, *Roquette Frères.*
[158] Morano-Foadi and Andreadakis, 2011b, p.598.
[159] ECJ 10 January 2010, C-555/07, *Kücükdeveci.*
[160] From the entry into force of the Lisbon Treaty at 1 December 2009 to early 2011 the ECJ cited the Charter in some thirty judgments, Joint communication from Presidents Costa and Skouris, 24 January 2011, para. 1.

The Charter rapidly has become the primary source of human rights for the ECJ as it takes this document as the starting point for its judgments.[161] The *Volker & Schecke* case shows that the ECJ sometimes explicitly prefers the Charter over the Convention.[162] In this case the Court first points out that the preliminary question essentially refers to the Convention but then states that the Regulation in question must be assessed in light of the Charter.[163] In the case *Scarlett Extended* the ECJ went even further.[164] Even though the preliminary question referred to the ECHR, the ECJ decided the case by only applying the Charter. From article 52(3) Charter follows that the Charter may offer more extended protection than the ECHR. Indeed, in the case *DEB* the ECJ has used it as a basis for providing more protection than the ECtHR had offered on the basis of the ECtHR.[165] The Charter provides the ECJ a separate legal source and it seems that in this way the Court can avoid diverging interpretation based on the same legal provisions. Its interpretations based on the Charter can, however, still be problematical. The Charter is based upon the ECHR and contains several corresponding rights which has to be interpreted in line with the ECHR according to article 52(3) Charter. In this way the ECJ may indirectly interpret the ECHR which might cause problems, especially when it has interpreted the ECHR differently or below the minimum level of the ECHR. Even though the ECJ takes into account the interpretation of the ECtHR, the risk of diverging interpretation has not disappeared.[166]

Explanatory in this regard is the case *Melloni.*[167] In this case Melloni was convicted in absentia in Italy while he was present in Spain. Subsequently, Spain transferred him to Italy following a European Arrest Warrant issued against him. Melloni claimed that his right to a fair trial was violated because according to the Spanish constitution conviction in absentia was forbidden.[168] The ECJ first considered that the conviction in absentia was not in violation with article 47 and 48(2) Charter. According to the ECJ this interpretation is in line with article 6 ECHR.[169] The subsequent question was whether article 53 Charter allowed Spain to have higher standards than provided for in the Charter. The ECJ ruled that in a case where it concerns a fully harmonized area of EU law a Member State is not allowed to provide for higher standards. In such case the ECJ prioritizes the primacy, unity and effectiveness of EU law over extensive human rights protection. Interestingly, the ECJ on the same day of its ruling in *Melloni* in the case *Åkerberg Fransson* explicitly recalls that it is not allowed to interpret the ECHR as long as the EU has not acceded the ECHR.[170] But in the way the ECJ argues in *Melloni* it indirectly makes its interpretation of the ECHR binding upon the Member States and sets this interpretation as maximum standard.[171]

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[161] Joint communication from Presidents Costa and Skouris, 24 January 2011, para 1.
[162] ECJ 9 November 2010, Joined Cases C-92/09 and C-93/09, *Volker&Schecke.*
[163] Ibid , para. 44-46.
[164] ECJ 24 November 2011, C-70/10, *Scarlet Extended.*
[165] ECJ 22 December 2010, C-279/09, *DEB*, para. 35, 46, 47.
[166] CDL (2003) 59, p. 4, 5.
[167] ECJ 26 February 2013, C-399/11, *Melloni.*
[168] Ibid, para. 18.
[169] Ibid, para. 49, 50.
[170] ECJ 26 February 2013, C-617/10, *Åkerberg Fransson*, para. 44.
[171] Weiler 2013, p. 472, 473.

The *Melloni* judgment leaves us with several questions. What if the ECJ in such situation interprets the ECHR wrongly or below the minimum standards? The ECtHR would not be able to review the interpretation of the ECJ but would this lead to the situation where the Member States have to follow a wrongful interpretation of the ECJ? And if an individual would lodge an appeal against the interpretation of the ECJ before the ECtHR, would the ECtHR rule upon this case? These questions remain unanswered. Nevertheless, over the years the ECtHR has developed certain doctrines in this regard in reaction to legal questions related to its relation with the EU.

4.2. The ECtHR's perspective

For its part, the ECtHR saw itself confronted with the special characteristics of the EU legal order. Union law has supremacy over national law and requires Member States to fully comply with their obligations flowing from EU law and the case law of the ECJ. Since the EU is no party to the ECHR, the ECtHR lacks jurisdiction to review Union law. This might lead to the situation where an EU Member State is confronted with the obligation to enact EU law which is in violation with the ECHR. The ECtHR, therefore, had to find a way to review the actions of the contracting parties without directly meddling in the EU legal order. Over the years the ECHR has gradually established certain doctrines regulating this issue.[172]

4.2.1. Reticent position towards the EU

In the first case where the ECtHR was confronted with an application against the then European Communities (EC) it exercised restraint. The application was directed to the EC as well as to the Member States collectively and individually.[173] The then European Commission of Human Rights held the application inadmissible, stating that the matter fell outside its jurisdiction ratione personae because the EC was no contracting party to the ECHR.[174] On the alleged responsibility of the Member States jointly, it considered that the concept 'Member States jointly' was not defined and in so far the application was in fact directed to the Council of the EC it falls outside its jurisdiction.[175] Since France had not yet accepted the right of individual petition under the ECHR and the other Member States did not exercise jurisdiction, the European Commission of Human Rights did not get to answer the question if the Member States could be individually held responsible for act carried out by an EC institution.[176]

In the case *M&Co v. Germany* the ECtHR had to further clarify its position.[177] In this case it had to rule on the question whether Germany was to be held responsible for

[172] Scheeck 2005, p. 857.
[173] ECHR, 10 July 1978, no. 8030/77, *Condfedération Française Démoncratique du Travail v. the European Communities, alternatively: their member states' a) jointly and b) severally*.
[174] Ibid, para. 3.
[175] Ibid. para. 4.
[176] Ibid. para. 5-7.
[177] ECtHR 9 February 1990, no. 13258/87, *M&Co v. Federal Republic of Germany.*

an act which was exclusively based on an EU Regulation. The ECtHR decided that the Member States remain responsible for their acts under the Convention, even when they are implementing EU law. Nevertheless, according to the ECtHR transfer of powers to international organizations is not prohibited as long as that organization provides for equivalent protection. Therefore, it reasoned that the claim was unfounded ratione materiae, since 'it would be contrary to the very idea of transferring powers to an international organisation to hold the member States responsible for examining, in each individual case before issuing a writ of execution for a judgment of the European Court of Justice whether […] the Convention was respected'.[178]

Nonetheless, the ECtHR seemed to adapt the habit to monitor EU acts in an increasingly detailed manner before declaring the application inadmissible.[179] Moreover, the acknowledgement of the EU's autonomous system of human rights protection did not prevent the ECtHR from examining national acts implementing EU law where the Member States had a certain, though minimal, margin of discretion.[180] In the *Matthews v. UK* the ECtHR went even further and for the first time condemned a Member State for a breach of the ECHR brought about by EU law.[181] This case concerned the question whether the UK could be held responsible for the fact that the residents of Gibraltar were not allowed to vote in the elections to the EP. The decision of the UK was based on the Direct Elections Act which is to be considered as EU primary law. The ECtHR emphasizes the fact that primary law is not reviewed by the ECJ and, furthermore, states that the Member States freely decide upon the establishment of primary law. Consequently, the Member States are responsible ratione materiae under the ECHR.[182] By means of primary law the Member States filled in their discretionary power and, therefore, the ECtHR could review their act even though it was caused by an obligation in the EC Treaty. The ECtHR hereby took an important step in filling gaps in the EU human rights protection hereby getting more intrusive towards the EU.[183] It, however, remained unclear how the ECtHR would decide upon a case where the Member States had no discretionary power left.[184]

4.2.2. Landmark case Bosphorus v. Ireland

This question was answered in the landmark case *Bosphorus v. Ireland*.[185] In this case an EC Regulation was adopted in the context of international sanctions against Yugoslavia. On the basis of this Regulation Ireland impounded an aircraft of the Turkish airline company Bosphorus Airways for reasons that it was leased by a Yugoslavian airline company. The Turkish company claimed that its right to respect

[178] ECtHR 9 February 1990, no. 13258/87, *M&Co v. Federal Republic of Germany*, second-to-last paragraph.
[179] Gragl 2013, p. 67.
[180] ECtHR 28 September 1995, no. 14570/89, *Procola v. Luxembourg*; ECtHR 15 November 1996, no. 17862/91, *Cantoni v. France*.
[181] Scheeck 2005, p. 860.
[182] ECtHR 18 February 1999, no. 24833/94, *Matthews v. UK*, para. 33.
[183] Christoffersen & Madsen 2011, p. 166, 167.
[184] Kuhnert 2006, p. 182, 183.
[185] ECtHR 30 June 2005, no. 45036/98, *Bosphorus* v. Ireland.

for property and its freedom to pursue a commercial activity were violated. Before the ECtHR got to decide on this case, it came before the ECJ by means of preliminary questions.[186] According the ECJ Ireland acted appropriate and proportional in line with the EC Regulation which was justified by the general interest to stop the war and massive human right violations.[187]
The applicant then turned to the ECtHR, which took this opportunity to deliberately rule upon the relation between the ECHR and EU law. The ECtHR explicitly distinguishes the situation where a margin of discretion is left to the Member States and where the Member States have no discretion at all. The ECtHR upholds its ruling from the previous cases by stating that in case the Member States exercise some discretionary power, they remain fully responsible under the ECHR.[188]

In this case, however, the ECtHR considered that no discretion was left to the Member State.[189] The Irish government, therefore, saw itself confronted with an unsolvable dilemma. On the one hand it was bound to an obligation flowing from the EC Regulation; on the other hand it had to respect its obligations under the ECHR. In attempt to solve this problem the ECtHR came up with a creative solution. First it recalled its rulings from *CFDT*, *M&Co* and *Matthews* by stating that under the ECHR it is not prohibited for the contracting parties to transfer their powers to international organizations and that these organizations cannot be hold responsible as long as they did not accede to the ECHR. However, the Convention rights need to be secured and, therefore, the Member States remain responsible for all acts and omissions after such a transfer. Then, to solve the conflict between these opposed principles - namely the autonomy to transfer powers to international organizations and the human rights protection under the ECHR - the ECtHR introduced the 'equivalent protection'-doctrine. This doctrine means that when a Member State implements EU law without having any discretion, compliance with its obligations is presumed as long as the EU 'is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides'.[190] The protection provided for does not have to be identical but has to be comparable to the protection of the ECHR.[191] However, the presumption of equivalence is not final and will be reviewed if any relevant change in human rights protection is made. Furthermore, importantly, the ECtHR leaves open the possibility to rebut the presumption of equivalent protection in case the protection of the ECHR within the legal order of the international organization is 'manifestly deficient'.[192]

Despite the different route, the ECtHR came to the same outcome as the ECJ; it decided that based on the *Bosphorus* doctrine Ireland was presumed to have acted

[186] ECJ 30 July 1996, C-84/95, *Bosphorus.*
[187] Ibid.
[188] ECtHR 30 June 2005, no. 45036/98, *Bosphorus v. Ireland*, para. 157.
[189] Ibid, para. 148.
[190] Ibid, para. 155.
[191] Ibid.
[192] Ibid, para. 156.

in line with the ECHR.[193] This shows the privileged status of the Member States under the ECHR, all the more because the presumption can only be rebutted in exceptional cases. Nevertheless, it is clear that the EU does not enjoy total immunity from review by the ECtHR.[194] Even though only exercised in exceptional cases, the Court can in principle scrutinize every aspect of Union law. The position of the Court regarding EU law is strengthened by the fact the *Bosphorus* presumption can be rebutted on a case-by-case analysis. Contrary to the Solange-approach[195] whereby the German constitutional court might refuse to rule upon a case where the ECJ made a grave error in human rights protection based on the argument that the ECJ did not fail to protect human rights more generally, the ECtHR can condemn a Member State because the protection of human rights in that particular case was manifestly deficient.[196] The ECtHR, however, shows itself unwilling to declare the human rights protection in the EU manifestly deficient and up till now in none of its cases the *Bosphorus* presumption has been rebutted.[197]

4.2.3. Circumventing Bophorus – performing indirect review

Notwithstanding the *Bosphorus* presumption, subsequent case law shows that the ECtHR does not refrain from indirect review of Union law.[198] It remains, however, rather unpredictable in what way the ECtHR performs this indirect review. This is exemplified by the case law regarding the preliminary ruling procedure. In *Connolly* ECtHR had clarified that it could only review contested measures if they qualify as state act.[199] The question was whether this would also cover a refusal to refer questions. This seemed to be an internal issue of EU law,[200] since it is based upon the CILFIT-ruling of the ECJ that Member States can refuse to refer questions.[201] The ECtHR, nevertheless, saw itself competent to rule upon this issue and considered that the refusal to refer preliminary questions may infringe the fairness of proceedings, if it is insufficiently reasoned or arbitrary.[202] In line with this ruling the Court found violation of article 6 ECtHR in the case *Dhabi v Italy* because the Italian judge did not give reasons for its refusal to refer preliminary questions.[203] Hereby the ECtHR took the opportunity to more or less take over the role of the ECJ, since the latter is not able to provide for judicial protection to individuals when it has not been

[193] ECtHR 30 June 2005, no. 45036/98, *Bosphorus v. Ireland*, para. 165.
[194] Scheeck 2005, p. 863.
[195] BVerfG 22 October 1986, Az. 2 BvR 197/83. In this case the German constitutional court decided that it would no longer review specific EU acts as long as the level of protection of fundamental rights at EU level was substantially in line with the protections afforded by the German constitution.
[196] Halberstam 2015, p. 31.
[197] See the cases ECtHR 10 October 2006, no. 16931/04, *Coopérative des Agriculteurs de Mayenne v. France*; ECtHR 12 May 2009, no 10750/03, *Gasparini v. Italy and Belgium*, ECtHR 3 April 2012, no. 37937/07, *Kokkelvisserij v. the Netherlands* in which the ECtHR discussed the alleged existence of a manifest deficiency.
[198] Tzevelekos 2014, p. 18.
[199] ECtHR 9 December 2008, No.73274/01, *Connolly v. 15 Member States of the EU.*
[200] Ryngaert 2014, p. 4.
[201] CJEEC 6 October 1982, C-283/81, *Cilfit*, para 21. In this case the CJEEC ruled that in case of an 'acte clair' or an 'acte éclairé' the national court does not have to refer preliminary questions.
[202] ECtHR 20 September 2011, no. 3989/07, no. 38353/07, *Ullens de Schooten and Rezabek v. Belgium*, para. 59, 61.
[203] ECtHR 8 April 2014, no. 17120/09, *Dhabi v. Italy*, para. 33, 34.

asked a preliminary question. Nevertheless, in this case the ECtHR does not fully review the decision of the national court, it merely checks whether the national court has provided for a reasoned decision and declares itself incompetent to review the decision substantively.[204]

Surprisingly, the ECtHR took a different route in the case *Michaud v. France*. This case also concerned the situation where the national court had refused to refer preliminary questions. However, instead of only checking whether the national court provided for a reasoned decision, the ECtHR decided to substantively review the French implementing acts. It distinguished the case from the *Bosphorus* case by considering that this case was about Directives, where in the *Bosphorus* case the Court was concerned with a Regulation. Directives leave it up to the Member States to choose on how achieve the result as required by the Directives and, therefore, they leave a margin of discretion to the Member States.[205] Of more importance according to the Court is the second distinction, namely that contrary to *Bosphorus* in this case the ECJ had not been able to examine the legal issue. For these reasons the Court decided that the *Bosphorus* presumption did not apply[206] and reviewed the French law implementing EU law. Eventually, the ECtHR decided that France did not violate article 8 ECHR because the interference was proportionate.[207]

Also in the case *M.S.S. v. Belgium and Greece* the ECtHR applied the *Bosphorus* presumption restrictively.[208] In this case the Court found a violation of the Convention by Belgium because it had sent back an asylum seeker to Greece, hereby exposing him to degrading treatment. The ECtHR referred to the *Bosphorus* case but circumvented the *Bosphorus* presumption by stating that even though Belgium was acting on the basis of an EU Regulation, it could still exercise discretion due to the sovereignty clause. This clause gives the Member States the possibility to examine an application, even if it is not its responsibility. Belgium, therefore, could have refrained from transferring the asylum seeker and thus the challenged measure was not a direct obligation under EU law.[209] Contrary to its decision in *Michaud v. France* it appears from this case that the distinction between Directives and Regulations is not decisive, but that the competence of the ECtHR depends on whether there is actual discretion left for the Member States.

The aforementioned case law makes clear that the ECtHR is not afraid to step in where it considers the EU to fall short of human rights protection. It never directly reviews EU law but as to the words of Gragl it 'proved to be very shrewd in holding a Member State responsible under the Convention without interfering with the Union's legal order'. Even after its ruling in the *Bosphorus* case the ECtHR found several ways to avoid the application of the *Bosphorus* presumption and continues to

[204] ECtHR 20 September 2011, no. 3989/07, no. 38353/07, *Ullens de Schooten and Rezabek v. Belgium*, para. 66. See C. Ryngaert 2014, para. 66.
[205] ECtHR 6 December 2012, no. 12323/11, *Michaud v. France*, para. 113.
[206] Ibid, para. 114, 115.
[207] Ibid, para. 131, 132.
[208] ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*. This case is discussed more detailed in section 7.2.
[209] Ibid, para. 339, 340.

indirectly review EU law. The ECtHR is, however, not consequent in the way it comes to indirect review and on how it performs it. This way, it is still the question how the ECtHR would deal with a case like *Melloni*. At first sight one would think that the *Bosphorus* ruling will be applied, since no discretion is left for the Member States. However, in *Melloni* the ECJ through the Charter actually interprets the ECHR. It is the ECJ's interpretation of the EHCR which is binding upon the Member States and which prohibits the Member States to provide more protection than the Charter. It remains to be seen whether the *Bosphorus* doctrine also applies in such a case.[210]

From the foregoing follows that the ECtHR has become very dexterous in performing indirect review of EU law. At the same time the ECJ is continuously expanding its human rights protection. Recently, it uses the Charter as primary legal basis, hereby using the opportunity to base its far reaching judgments upon a separate EU legal document. Both courts try to extend their jurisdiction while avoiding direct interference in each other legal territories. At the same time they are vigilant in protecting their own territory. This interplay makes it hard to predict how the ECtHR will rule upon a human rights issue linked to EU law and whether it will uphold its own standards if the case also touches upon the jurisdiction of the ECJ. Moreover, despite the existence of two courts protecting the human rights at European level, unfortunately, gaps in the EU protective system still remain.

4.3. Gaps in the EU judicial protection of human rights

Despite the fact the ECtHR sometimes finds ways to indirectly review the acts of EU institutions, it is clear that it cannot perform direct review. The ECJ certainly is competent to review acts of the EU institutions but this depends on the cases brought forward by the Member States, the institutions or individuals. In this respect the individual *locus standi* before the ECJ is very much restricted. According to article 263, paragraph 4, TFEU individuals can only institute proceedings where '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'. The ECJ clarified that 'regulatory acts' cannot be legislative measures.[211] Due to this provision individuals cannot challenge acts which affect the human rights of a large group; neither can it challenge measures directly stemming from an EU regulatory act.[212] Even though before the ECtHR all individuals have legal standing, the ECtHR does not fill this gap. In such cases it applies the *Bosphorus* presumption and, therefore, refuses to assess the specific facts of the case. In the *Bosphorus* case the ECtHR took into account the, in words of the ECJ, 'complete system of legal remedies and procedures'.[213] It considered the notions of supremacy of Community law, (in)direct effect, state liability and above all and the preliminary ruling procedures by article 267 TFEU.[214] Together these procedures form a system that provides for human rights protection which is according to the ECtHR to be

[210] Morijn 2015.
[211] ECJ 3 October 2013, C-583/11, *Inuit*, para. 59-61.
[212] Ahmed 2014, p. 115.
[213] ECJ 25 July 2002, C-50/00, *UPA*, para. 42.
[214] ECtHR 30 June 2005, no. 45036/98, *Bosphorus v. Ireland*, para. 163, 164.

considered as equivalent to the ECHR. However, the human rights gap is not really filled given the fact that the preliminary procedure provides only for indirect review by the ECJ and its effectiveness depends very much on the national judges.[215]

Moreover, the ECJ's jurisdiction is limited to EU law according to article 19 TEU. This is not surprising, since it is the court of the EU. It, however, has especially consequences for TCNs, since many EU rights are directed to EU citizens. For instance, TCNs do not enjoy the right of free movement.[216] Article 45(2) Charter does state that the right to free movement may be granted to TCNs who are legally resident but unlike EU citizens they do not enjoy the unconditional right to free movement. Also the application of the Charter is limited; it only applies to the situations where Member States are implementing EU law. Sometimes the ECJ interprets this criterion very broadly and declares itself competent quite easily.[217] However, in some cases the ECJ suddenly takes a very formalistic approach and as a consequence it does not consider itself competent to apply the Charter.

The recent case *Willems* provides a clear example. In this case the ECJ had to rule upon the storage of data under the Regulation 2252/2004. The ECJ ruled that the Regulation was not applicable because the data which had to be collected under the Regulation was used for other purposes than mentioned in the Regulation.[218] It, therefore did not find a link with EU law and thus the Charter could not be applied.[219] However, the national judge also referred to the Privacy Directive which was at stake either. One would expect the ECJ to assess the compatibility of the data storage with the Privacy Directive. This would provide for the link with EU law and allow the ECJ to apply the Charter. The ECJ, however, did not apply the Privacy Directive at all. Reason for this might be found in the way the referring judge had formulated its questions in a restrictive way by only asking for an interpretation of Regulation 2252/2004.[220] Positively, the ECtHR is competent to rule upon issues falling outside the scope of EU law and provides in this respect a solution for the limited competence of the ECJ.

Furthermore, the treaties do not constitute a legal basis for the ECJ to review primary law. The ECtHR found a solution for this gap in judicial protection in the *Matthews* case, in which it decided that in the case of primary EU law the Member States are directly responsible under the ECHR. However, the gap due to the limited jurisdiction of the ECJ in the areas of Common Foreign and Security Policy (CFSP) is not filled by the ECtHR. According to article 275 TFEU the ECJ may not review measures of the CFSP, even though these measures might follow from EU

[215] See ECJ 11 June 2015, C-98/14, *Berlington Hungary,* para. 48; ECJ 3 May 2012, C-620/10, *Kastrati*, para. 37, 38.
[216] See article 21 TFEU and article 45 Charter. According to article 45 (2) TFEU the right to free movement *may* be granted to TCNs who are legally resident, they do not enjoy the unconditional right to free movement.
[217] ECJ 26 February 2013, C-617/10, *Åkerberg Fransson.*
[218] ECJ 16 April 2015, Joined Cases C-446/12 to C-449/12, *Willems e.a.*, para. 48.
[219] Ibid, para. 50.
[220] Ibid, para. 52.

arrangements.[221] Since these cases concern Union acts, the ECtHR will apply the *Bosphorus* presumption and declare such case inadmissible.

The most frequently mentioned remedy to overcome the problems of human rights protection in the EU and to streamline the jurisdictions of the European Courts is the accession of the EU to the ECHR.

[221] Ahmed 2014, p. 116, 117.

5. Accession of the EU to the ECHR

Already in 1979 the Commission proposed that the EU should accede to the ECHR, because it is 'the best way of replying to the need to reinforce the protection of fundamental rights at Community level'.[222] The accession would serve several aims. First of all, the main goal of the accession is to establish external control over the EU by the ECtHR. This means that the ECtHR would be able to directly review the acts of the institutions of the EU institutions, thus to examine the compatibility of EU law with the ECHR. In this way the *locus standi* of individuals would also be improved, since they would be able to challenge acts of the EU institutions before the ECtHR. Also in case the national judge fails to refer (rightly formulated) questions, appeal would be possible after exhaustion of the national remedies.[223] Furthermore, the accession would overcome the risk of conflicting interpretations of the same legal norm by the ECJ and the ECtHR. After accession the ECtHR would have the 'last word' in such situations. Moreover, there is a political reason to desire accession of the EU to the ECtHR. It would increase the credibility of the EU as a promotor of human rights in third countries[224] and among the candidate Member States,[225] since the EU would adhere to the same principles as it promotes.[226]

It took quite some time till the Commission took further action but in 1990 it sought mandate from the Council to pursue this process.[227] However, an important obstacle was raised by the ECJ in its opinion 2/94. According to the ECJ the accession would constitute a substantial change of the EC system of human rights protection and, therefore, based on the by then applicable treaties the EC had no competence to accede to the ECHR.[228]

The EU legislature remedied this by including article 6(2) TEU in the Treaty of Lisbon to provide for a legal basis for the accession. This not only provides for the possibility to accede the ECHR but also obliges the Union to do so, which clearly shows the political consensus on this topic.[229] At the same time the special constitutional nature of the Union was taken into account by the addition of the second sentence in article 6(2) TEU, which stipulated that 'such accession shall not affect the Union's competences as defined in the Treaties'. Protocol 8 of the TEU and the TFEU gives more guiding on what this obligation entails. It provides that the accession shall preserve the specific characteristics of the EU and it shall not affect the Union's competences or the powers of its institutions, the situation of Member States in relation to the ECHR, or Article 344 TFEU. On this legal basis a Draft Agreement on the accession of the EU to the ECHR was written.

[222] COM(79) 210, p. 5.
[223] Article 35 ECHR.
[224] Promoting human rights is a policy of the EU, see COM/2001/0252.
[225] Candidate Member States have to ratify the ECHR before becoming an EU Member State, see Gragl 2013, p. 5.
[226] Council of Europe 2015.
[227] Callewaert 2014, p. 47.
[228] ECJ 28 March 1996, Opinion 2/94, para. 34-36.
[229] Callewaert 2014, p. 48.

5.1. Draft Agreement - the will of the legislature

It took more than thirty years, but on 5 April 2013 the representatives of the contracting countries to the ECHR and the EU finally came to an agreement and finalized the Draft Agreement on the accession by the EU to the ECHR (Draft Agreement).[230] According to the preamble of the Draft Agreement the accession will enhance coherence in human rights protection in Europe and it emphasizes the importance of the right of individuals to have access to external control of the ECHR over EU acts. Moreover, after the accession the ECJ will be able to apply the ECHR directly instead of only through the general principles of EU law and the Charter.[231] The negotiators had the very difficult task to find a way to proceed the accession and enable external review without compromising the autonomy and special characteristics of the EU legal order. At the same time also the general characteristics of the ECHR had to be maintained and the adaptations to the ECHR needed to be limited to what was necessary.[232]

5.1.1. Co-respondent mechanism

In the Draft Agreement the negotiators tried to find suitable solutions to these contradictory aspects of the accession. In this respect they introduced an innovative legal construction: the co-respondent mechanism. This mechanism aims to overcome the responsibility issues which may rise between the EU and the respective Member States. According to article 3 of the Draft Agreement the EU and the Member States may become co-respondent to proceedings before the ECtHR next to the initial party to the case (also a Member State or the EU). The co-respondent becomes party to the case and, therefore, will be held responsible equal to the initial party. In this way the ECtHR is able to review a case without giving a decision upon the division of responsibilities.[233] If the ECtHR had to decide on whether the EU, a Member State or both were responsible it would mean a direct interference in the division of powers between the EU and the Member States. This solution not only aims to preserve the autonomy of the EU, it is also of help to an individual who wants to lodge an application at the ECtHR.[234] The applicant does not have to unravel the complexities of the division of competences between the EU and the Member States. Besides, the Member State cannot defend itself by stating it was not responsible because the violation followed from strict EU obligations.[235]

5.1.2. Prior involvement of the ECJ

Article 3(6) of the Draft Agreement contains another provision to uphold the legal autonomy of the Union. It provides for prior involvement of the ECJ in proceedings where the EU is party and the ECJ has not yet ruled upon a case like the one at issue. In their joint statement the judges Costa and Skouris proposed this legal

[230] Council of Europe 2013.
[231] Gragl 2014, p. 15.
[232] CDDH-UE(2010)01, para. 4.
[233] Locke 2011, p. 1040.
[234] Douglas-Scott 2011, p. 664.
[235] Gragl 2014, p. 32, 33.

mechanism.[236] It will prevent the ECJ of getting side-lined in cases where EU law is at issue but the national court has not referred preliminary questions. Prior involvement actually creates an extra possibility for the EU to review national acts, since currently it does not get to rule on cases where the national court does not refer preliminary questions.[237] According to the judges prior involvement will probably not occur often since it is designed for exceptional situations. Still, they emphasize the importance to clearly define the type of cases might include prior involvement.[238] The Draft Agreement, however, does not give a clear definition. Neither does it clarify the legal effects of the ECJ's assessment nor does it specify the procedures.[239] It leaves this up to EU internal rules to deal with these issues.[240]

5.1.3. Further regulation by EU internal rules

With the inclusion of mechanisms such as the co-respondent mechanism and prior involvement an important step has been taken. However, the Draft Agreement remains silent on the functional implementation of these provisions. Like there is still need for further specification on prior involvement, several aspects of the accession will have to be regulated in further detail by EU internal rules.[241] These rules for instance need to determine the representation of the EU before the ECtHR, the internal attribution of responsibilities between the EU and the Member States, and the circumstances in which the co-respondent mechanism is triggered.[242] On the one hand leaving these issues to be regulated by internal rules is necessary to prevent interference with the autonomy of EU law.[243] On the other hand under the guise of further regulation by internal rules delicate issues remain unclear.[244] The question is whether regulation through internal rules will be sufficient. For example, the Draft Agreement does not deal with the situation where a case in pending before the ECtHR and the ECJ declares the contested EU measure invalid. This not only concerns the ECJ and EU law but also affects the ECtHR.

Another important issue in this respect is the way the Draft Agreement deals with article 344 TFEU. According to this article the ECJ has exclusive jurisdiction over disputes between the Member States concerning the interpretation and the application of the Treaties.[245] The Draft Agreement explicitly leaves aside whether inter-party cases between the Member States or between the EU and a Member State may be brought before the ECtHR after accession.[246] It only excludes the proceedings before the ECJ from article 55 ECHR which provides for the exclusive competence of the ECtHR. By making these issues subject to EU internal rules the autonomy of the EU is respected. However, by leaving these issues unresolved it

[236] Joint communication from Presidents Costa and Skouris, 24 January 2011.
[237] O'Meara 2011, p. 1923.
[238] Joint communication from Presidents Costa and Skouris, 24 January 2011.
[239] O'Meara 2011, p. 1823, 1824.
[240] Explanatory Report to the Draft Agreement, para. 66.
[241] Ibid, para. 21.
[242] ECJ 18 December 2014, Opinion 2/13, para. 47.
[243] Gragl 2014, p. 24.
[244] Pérez De Nanclares 2013, p. 15.
[245] Article 3 of Protocol 8 Relating to article 6(2) of the TEU; Article 5 Draft Agreement.
[246] Explanatory Report to the Draft Agreement, para. 72.

remains unclear whether the interplay between the Courts will indeed be streamlined without affecting their respective competences. It is also questionable whether issues as described above can be regulated by internal rules without any amendments to EU primary law, since they involve substantial changes.[247] The negotiators were, nevertheless, convinced that the Draft Agreement would be in line with the treaties. Therefore, when they requested the ECJ for its opinion on the Accession Agreement, as the next step in the accession procedures, all parties were expecting a possibly critical but positive outcome.

5.2. Opinion of the ECJ

Everyone concerned with the accession was waiting impatiently for the ECJ to deliver its opinion. When the Court finally published its opinion 2/13, it was met by disbelief and massive criticism.[248] Especially after the Conclusion of AG Kokott a positive outcome was expected, since the AG, after raising some points of critique, did approve the accession.[249] However, where all other parties - the Member States, the Council of Europe, the Commission and the European Parliament- reached agreement, even on the difficult aspects of the accession; the ECJ declares the Draft Agreement on five points incompatible with the EU law. After the first shock, some commenters opined that there were warning signs related to the autonomy of EU law and the characteristics of the EU legal order.[250] These principles are indeed the main points of concern of the ECJ. In its preliminary considerations it points out the conditions to the accession following from EU law and the particular nature of the EU legal order. The ECJ clearly shows us the ambiguity of the legal basis for the accession.

With the inclusion of article 6 TEU and protocol no. 8 TEU to implement opinion 2/94 the EU the legislature inserted a legal basis for the accession into the treaties. At the same time these provisions set the condition that the accession shall not lead to changes of constitutional significance and require that situation between the Member States and the Convention shall not be affected. This seems to be in line with opinion 2/94 of the ECJ. However, these provisions are contradictory in nature, especially since the legislature did not actually change the constitutional context.[251] In retrospect one could say that the ECJ's critical attitude is not surprising, since it was exactly for reasons of the constitutional context the ECJ in its opinion 2/94 stated that a treaty amendment was needed. Furthermore, the ECJ in earlier case law already ruled that EU law is autonomous towards international law and, therefore, international obligations cannot have the effect of prejudicing the EU constitutional principles.[252] The ECJ was and still is clearly concerned about the perseverance of the autonomy of the EU legal order.

[247] Jacqué 2011, p. 1020.
[248] See e.g. Peers 2014b; Michl 2014; O'Neill 2014; Duff 2015.
[249] Odermatt 2015.
[250] Halberstam 2015, p. 6,7; Barnard 2015.
[251] Halberstam 2015, p. 7.
[252] ECJ 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi*, para. 285.

5.2.1. Five categories of violations of EU law

These considerations of legal autonomy and the specific characteristics of EU law form the foundation upon which the restrictive approach of the ECJ in opinion 2/13 is based. The ECJ distinguishes five categories of violations of EU law. Firstly, the ECJ in more detail discusses the way the Draft Agreement adversely affects the specific characteristics and the autonomy of Union law. The violation in this respect is threefold. According to the ECJ article 53 ECHR and article 53 Charter should be coordinated. Moreover, the Draft Agreement lacks a provision to prevent that mutual trust would be undermined. Furthermore, the ECJ fears that the prejudicial procedure would be circumvented because the highest courts of the Member States might refer questions to the ECtHR after ratification of Protocol 16 of the ECHR.

Secondly, the Draft Agreement leaves open the possibility of inter-party cases between the Member States and the EU and thus it does not preclude possible violation of article 344 TFEU. Where the Commission was of the opinion that further regulation was not required since article 5 Draft Agreement excludes the procedures before the ECJ from the exclusive jurisdiction of the ECtHR, the ECJ states that the fact that it is possible to bring inter-party cases between the Member States and the EU before the ECtHR already constitutes a violation of article 344 TFEU.[253] Thirdly, the ECJ condemns the fact that the Draft Agreement leaves several aspects of the co-respondent mechanism unregulated. Therefore, the preservation of specific characteristics of the Union and EU law are not guaranteed.

In the same line the ECJ, fourthly, finds a violation of EU law because the Draft Agreement does not sufficiently set rules to regulate the prior involvement of the ECJ. In line with the AG the Court points out that with regard to the co-respondent mechanism and prior involvement the Draft Agreement should have (better) assured that the ECtHR does not decide upon the determination of responsibility, the arguments to become a co-respondent or whether the ECJ has already solved the legal question at issue.[254] Moreover, prior involvement also needs to encompass the interpretation of EU secondary law. Contrary to the negotiators of the Draft Agreement who saw prior involvement as an exceptional instrument to fill up the gap in the prejudicial procedure, the ECJ uses prior involvement to assure an important role within the procedure of external review by the ECtHR. Lastly, the Draft Agreement does not rightly take into account the specific characteristics of Union law regarding the area of the Common Foreign and Security Policy.

5.2.2. Concerns about 'higher standards' and the principle of mutual trust

The first two points raised by the ECJ are mainly relevant for this thesis, since they are both substantive points of criticism directly related to human rights protection in the CEAS. This includes the level of human rights protection governed by the articles 53 of the ECHR and the Charter and the principle of mutual trust. Regarding the level of human rights protection, the ECJ starts by stating that in principle external review

[253] ECJ 18 December 2014, Opinion 2/13, para. 106, 107.
[254] ECJ 18 December 2014, Opinion 2/13, para. 106, 107, para. 218-133, 237-246 ; View of AG Kokott to Opinion 2/13, para. 177, 178, 183, 184, 232, 233.

of the EU by the ECtHR is in accordance with EU law. However, this external review may not apply with regard to the interpretation of EU law by the ECJ, especially if this includes the determination whether or not a Member State is bound by the EU human rights. The ECJ then considers article 53 ECHR and refers to its judgment in *Melloni*. As described above, in this case it decided that the primacy of EU law prevents the Member States from providing a higher level of human rights protection in fields which are fully harmonized.[255] This principle applies notwithstanding article 53 Charter. Subsequently, the ECJ extends its *Melloni* ruling to its interpretation of the ECHR. In this regard the ECJ points at article 53 ECHR and states that in so far as Article 53 ECHR permits the contracting parties to lay down higher standards than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the ECJ in *Melloni.* In this way 53 ECHR should be limited to level of protection provided for by the Charter and thus would be in line with the primacy, unity and effectiveness of EU law.[256] As Peers states: 'from the perspective of international human rights, it's shocking: it cuts into a central principle found in all human rights treaties'.[257] Nevertheless, considering the fact that the ECJ main consideration in its judgment *Melloni* was to safeguard the supremacy of EU law, it is not surprising that it want to make sure that the ECtHR will not cross this.

One could, however, question whether supremacy is indeed at issue. Article 53 ECHR is only a guarantee to prevent the ECHR from limiting human rights protection of another legal source. It does not give the right, only the possibility, to Member States to provide for higher standards than the Charter. If a case like *Melloni* comes before the ECtHR, it only has to make sure that the ECHR does not limit the human rights as provided for, notwithstanding the question whether the EU or a Member State has determined the level of protection.[258] It will leave aside the way the EU has dealt with this issue internally as long as it does not go the minimum standards of the ECHR. It is, however, exactly this criterion - the minimum protection as required by the ECHR - which makes the decision of the ECJ problematical. The ECJ in fact requires the ECtHR to follow its *Melloni* ruling and shields the EU and its Member States from review by the ECtHR. In this way it puts forward the Charter as the only relevant source for judicial review and does not allow the ECHR to go further.[259] Hereby it goes against the 'raison d'etre' of the ECtHR as minimum rights protector.

The second point contains one of the ECJ's main concerns: mutual trust. This is at the same time one of the hardest issues to solve.[260] The ECJ recalls that mutual trust is one of the pillars of the Union as an area without borders. It fears that from the moment the EU becomes a party to the ECHR, this principle will be undermined and hereby the underlying balance and the autonomy of the EU. The ECJ, therefore,

[255] ECJ 26 February 2013, C-399/11, *Melloni.*
[256] ECJ 18 December 2014, Opinion 2/13, para. 189
[257] Peers 2014b.
[258] Halberstam 2015, p. 22.
[259] Pirker 2015.
[260] Council of the EU, summary of discussions, 9 April 2015, 62351/EU XXV.GP.

requires that in the Draft Agreement will contain a provision to prevent that after accession the ECHR would require that the EU Member States and the EU check each other on whether they have observed human rights.[261] In this way the ECJ again shields the EU from review by the ECJ but on this point the Courts objections clearly have a large impact on the human rights protection in the EU asylum system. Even though the ECJ recognized that in exceptional circumstances the Member States can derogate from the principle of mutual trust, it is only allowed in case of systematic deficiencies.[262] The critics who condemned the Dublin system often saw the accession as a way to at least improve the system to some extend by judicial review by the ECtHR which would also check human protection in individual cases. If accession on the conditions of the ECJ will ever occur, this important additional check will not be included.

5.2.3. Remaining options after opinion 2/13

The ECJ has left the negotiators a very difficult task. According to article 218(11) TFEU they have only two options: either renegotiate and amend the Draft Agreement or revise the EU treaties. Without one of these actions accession may not occur. At the same time the obligation to accede according to article 6(2) TEU is still there. One thing is certain: accession will not occur in the short term. The EU legislature has to find out how it can solve the issues raised by the ECJ. For now, the Commission has pronounced a period of reflection for a legal and practical analysis of the opinion.[263] After the ECJ's opinion, however, the accession has substantively become a great challenge. Re-negotiation would mean again trying to bridge the divide between the contracting parties to the ECHR, while advocating the special position of the EU. Especially further negotiations with contracting parties like Russia, Switzerland and Turkey will be rather difficult, since they already made several concessions for the Draft Agreement.[264] A revision of the treaties would entail comprehensive amendment and especially in the current political climate of resistance to the EU, this would also be a troublesome process.[265] Apart from the fact that it will be a burdensome and lengthy process, the question arises whether accession under the conditions the ECJ has set will still really improve the human rights protection within the CEAS.

[261] ECJ 18 December 2014, Opinion 2/13, para. 194.
[262] ECJ 21 December 2011, joined cases C-411/10 and C-493/10, *N.S and M.E. and others.*
[263] Duff 2015.
[264] Besselink 2014; see the Russian declaration at Appendix VI to the Draft Agreement.
[265] Pirker 2015.

6. European judicial protection within the CEAS

The CEAS mainly consists of Directives which leave discretionary power to the Member States. Therefore, the ECtHR is able to perform indirect review over these instruments through the acts of the Member States. This has the same effect as direct review by the ECtHR, namely to ensure that the minimum level of the ECHR is respected by the Directives. The situation is different with respect to the Dublin Regulation. In principle a Regulation provides for exhaustive regulation and does not leave discretion to the Member States. The ECtHR, however, found a way to avoid the *Bosphorus* doctrine and is, therefore, able to review the acts of the Member States under the Regulation either. The fact that the ECtHR can indirectly review EU law creates, however, the risk that the Member States are confronted with conflicting interpretations by the European Court. This chapter will, therefore, compare the cases regarding the European asylum instruments which show considerable overlap to assess whether the ECtHR indeed performs indirect review over the EU and whether the European Courts already align their cases in practice.

6.1. Interpreting the asylum Directives

6.1.1. An autonomous approach

As pointed out in the previous the Charter has become the primary source of human rights for the ECJ and serves as such as a separate legal basis for human rights protection by the ECJ. This is also true in relation to the asylum Directives: several cases show that the ECJ uses the Charter for an autonomous interpretation of EU law and often considers it unnecessary to refer to the case law of the ECtHR. Among others, this follows from a comparison of the case *Y and Z* with the case *Z and T v. the UK* [266] In these cases the European Courts were facing the question on how to define the scope of the freedom of religion in relation to the principle of non-refoulement.

The ECtHR takes as starting point that the freedom of religion is first and foremost a standard that need to be applied among the contracting parties which are bound by the democratic values, the rule of law and human rights. From the Geneva Convention, nevertheless, follows that threat on account of religion is one of the grounds upon which a refugee status can be granted. The ECtHR considers that protection shall be offered in case the asylum seeker 'will either suffer persecution for, *inter alia*, religious reasons or will be at real risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation', if returned to his country of origin.[267] The ECtHR hereby performs the test for non-refoulement as to any other case, which means that a higher threshold applies than in case of an alleged direct breach of the freedom of religion by one of the contracting parties. Besides the situation where this high

[266] ECJ 5 September 2012, joined cases C-71/11 and C-99/11, *Y and Z*, para. 49; ECtHR 28 February 2006, no. 27034/05, *Z and T v. UK*, p. 7.
[267] ECtHR 28 February 2006, no. 27034/05, *Z and T v. UK*, p. 7.

threshold is met, there is no obligation for the contracting parties to grant a refugee status.[268]

Six years later the ECJ had to answer the question whether every breach of article 10 Charter (freedom of religion) would constitute an 'act of persecution' under article 9(1)(a) Qualification Directive, hereby forming a ground for a refugee status. This is basically the same question as the ECtHR had answered in *Y and Z.* AG Bot indeed proposed to follow the decision of the ECtHR in *Z and T* in which according to his words the question was 'very close, not to say identical' to the preliminary question in this case.[269] The ECJ, however, refused to refer to the decision of the ECtHR and took a more lenient approach. It does refer to article 9 ECHR which corresponds to article 10 Charter and also agrees with the ECtHR that not every breach of the freedom of religion constitutes an act of persecution.[270] It, however, states that a violation of the right to freedom of religion may constitute persecution within the meaning of Article 9(1)(a) of the Directive 'where an applicant for asylum, 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 by one of the actors referred to in Article 6 of the Directive'.[271] By adding 'inter alia' into the sentence and the refusal to refer to the high threshold of the ECtHR, the ECJ leaves open the possibility to take into account other human rights breaches than the ECtHR has stipulated, hereby going beyond the minimum level of the ECHR.[272]

Also the cases regarding the right to an effective remedy show that the ECJ prefers to solve a case based upon an independent assessment. In *Diouf* a Mauritian national applied for international protection. His application was examined and rejected under an accelerated procedure for reasons that he had produced a forged passport and did not satisfy any of the substantive criteria giving grounds for international protection.[273] The relevant national law did not provide for a separate legal remedy against the decision to examine the application under an accelerated procedure. The ECJ had to answer the question whether the right to an effective remedy requires such national provisions. According to the ECJ the legal assessment framework consists of article 39 Procedures Directive and the right to an effective remedy as a general principle of EU law to which expression is given by Article 47 Charter.[274]
Based on these provisions the ECJ rules that national law does not need to provide for a separate appeal against the decision for an accelerated procedure as long as the substantive decision can be effectively challenged.[275] Again the ECJ does not refer to the ECHR of the case law of the ECtHR, even though the national judge referred to the Procedures Directive and the general principle of EU law prompted by Articles 6 and 13 ECHR. Moreover, reference would have been in place, since the

[268] ECtHR 28 February 2006, no. 27034/05, *Z and T v. UK*, p. 7.
[269] Opinion of AG Bot to ECJ 5 September 2012, joined cases C-71/11 and C-99/11, *Y and Z*, para. 71, 72.
[270] ECJ 5 September 2012, joined cases C-71/11 and C-99/11, *Y and Z*, para. 56, 58.
[271] Ibid, para. 67.
[272] Leboeuf & Tsourdi 2013, p. 411.
[273] ECJ 28 July 2011, C-69/10, *Diouf*, para. 19.
[274] Ibid, para. 48, 49.
[275] Ibid, para. 70.

ECtHR took a similar approach in *Jabari* by ruling that an appeal procedure against all administrative procedures is not required as long as an effective remedy against the substantive decision exists.[276] In its decision the ECJ follows the AG who concluded that through article 47 Charter the right to an effective remedy ' acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR'.[277]

6.1.2. Increased protection through judicial dialogue

Besides the tendency towards an autonomous approach by the ECJ, the described cases also show that the ECJ opens up the possibility to provide for more protection than the minimum level as guaranteed by the ECHR. In such cases a different interpretation does not cause problems; the Member States obviously have to follow the interpretation by the ECJ if it provides for a higher level of protection. The autonomous approach in this way leads to progress within the human rights protection and can sometimes even have the effect of upward competition between the Courts.[278] This is exemplified by the cases concerning the interpretation of article 15(c) Qualification Directive, more specifically the definition of 'individual threat'. According to this Directive the asylum seeker receives subsidiary protection when substantial grounds have been shown for believing that if returned to his country of origin he would face a real risk of suffering serious harm.[279] This provision incorporates the case law of the ECtHR, except for one term: where the ECtHR provides for protection in case of a real risk of being subjected to treatment contrary to article 3 ECHR[280], the Qualification Directive uses the term 'serious harm'. Article 15 Qualification Directive further defines 'serious harm' by enumerating three possible forms:

a) 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.

The forms described in article 15(a) and (b) closely reflect the wording of respectively article 2 and 3 ECHR.[281] The cases that will be discussed further elaborate on the form described in article 15(c). The question is whether this article provides an extra ground for protection. The ECJ was confronted with this question in the case *Elgafaji*.[282] Clarification of this issue became particularly necessary after the judgment of the ECtHR in *NA v. UK.*[283] Before the ECtHR had to decide upon this case, it always required the asylum seeker to individualize his case by showing that

[276] ECtHR 11 July 2000, no. 40035/98, *Jabari v. Turkey,* para. 48.
[277] Opinion of AG Cruz Villalón to ECJ 28 July 2011, C-69/10, *Diouf*, para. 39.
[278] Tinsley 2015.
[279] Article 2 (e) Directive 2004/83/EC.
[280] ECtHR 28 February2008, no. 37201/06, *Saadi v. Italy*, para. 125.
[281] Tsourdi 2014, p. 274.
[282] ECJ 17 February 2009, C-465/07, *Elgafaji*.
[283] Guild & Moreno-Lax 2015. p. 138.

he was at more risk than others.[284] Nonetheless, it had ruled that the principle of non-refoulement might also be violated where the asylum seeker is a member of a group systematically exposed to a practice of ill-treatment.[285] In the case *NA v. UK*, the ECtHR goes a step further by pointing out that it had 'never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity' to conclude article 3 ECHR would be violated by removal. It hereby emphasizes that this would only be the case in the exceptional circumstances of extreme general violence.[286]

In *Elgafaji* the referring judge picked up on the ruling of the ECtHR and asked the ECJ whether article 15(c) Qualification Directive should be interpreted as providing protection comparable to article 3 ECHR as explained by the ECtHR, or whether it provides additional protection. The ECJ states that only article 15(b) corresponds to article 3 ECHR. As a consequence article 15(c) should be determined through an autonomous interpretation, although with due regard for human rights as protected by the ECHR.[287] The ECJ, therefore, reformulates the preliminary question in line with an independent assessment on the basis of the Qualification Directive, thus without referring to the ECHR. It hereby goes a step further than the AG who stated that an independent interpretation was necessary, since it is not for the ECJ to determine which of the always changing interpretations by the ECtHR should prevail.[288]

The ECJ subsequently compares article 15(c) to forms of serious harm according to article 15(a) and (b) leading to the conclusion that the former 'covered a more general risk of harm' than the latter two.[289] According to the ECJ the term 'individual threat' of article 15(c) should, therefore, also cover the situations where the degree of indiscriminate violence reaches such a high level that the asylum seekers solely on account of their presence in the country of origin would risk a violation of the principle of non-refoulement, irrespective of their identity.[290] Hereby the ECJ, like the ECtHR, emphasizes that this is only the case in exceptional circumstances.[291] In this respect it introduces a 'gliding scale' test[292]: the more the asylum seeker is able to show that he is particularly affected by reasons of factors linked to his personal circumstances, the lower the level indiscriminate violence has to be to constitute a violation of article 15(c) Qualification Directive.[293] Even though the ECJ comes to this conclusion according to an autonomous interpretation, its test does not really differ from the test performed by the ECtHR. Both accept that in exceptional circumstances

[284] See for example *Soering v. UK*, para 91; *Vilvarajah and others v UK*, para 103.
[285] Ibid. 116; ECtHR 28 February 2008, no. 37201/06, *Saadi v. Italy*, para. 132.
[286] ECtHR 17 July 2008, no. 25904/07, *NA. v. UK*, para. 115.
[287] ECJ 17 February 2009, C-465/07, *Elgafaji,* para. 28.
[288] Opinion of AG Madura to ECJ 17 February 2009, C-465/07, *Elgafaji*, para. 20.
[289] ECJ 17 February 2009, C-465/07, *Elgafaji*, para. 32, 33.
[290] Ibid, para. 35.
[291] Ibid, para. 37, 38.
[292] Tsourdi 2014, p. 277.
[293] ECJ 17 February 2009, C-465/07, *Elgafaji*, ibid, para. 39.

general violence may constitute a violation of the principle of non-refoulement without individualization of the situation of the applicant.[294]

Indeed, in the case *Sufi and Elmi* the ECtHR made clear that the protection offered under article 3 ECHR is comparable to the protection under article 15 (b) Qualification Directive. In this case the UK, in line with the judgment *Elgafaji*, argued that article 15(c) was distinct from article 3 ECHR and that the former enabled the Member States to provide for a higher level of protection than required by article 3 ECHR.[295] In its reaction to this argument the ECtHR states that it is not competent to interpret EU law. Nonetheless, it considers the interpretation of the ECJ in *Elgafaji* and subsequently states that it is not persuaded that article 3 ECHR does not provide for protection comparable to the Qualification Directive. So according to the ECtHR the ruling of the ECJ in *Elgafaji* is already covered by article 15(b) Qualification Directive. This decision has the effect that the application of the criterion 'individual threat' will be guided by the case law of both Courts.

Thus the case law of the ECtHR has impact on how to apply the *Elgafaji* judgment. In *Sufi and Elmi* the ECtHR already gave some guidance on how to apply the *Elgafaji* by means of a factual assessment of the situation in Mogadishu. By providing a more factual analysis, it complements the ECJ which only gave an abstract legal formula. Moreover, in *M.S.S.* the ECtHR came to the conclusion that the general circumstances in Greece were of such nature that, even though a large number of persons could face a risk of treatment in violation of article 3 ECHR, this also constitutes an 'individual threat' if the risk is sufficiently real and probable.[296] The evidence of such situation can be based upon independent reports and materials.[297] In reference to this judgment the ECJ came to the same conclusion in it judgment *N.S.*[298]

The ECtHR even further extended this line of reasoning in the case *Hirsi* where it ruled that the same test applies extraterritorially. The ECtHR came to the conclusion that Italy had violated article 3 ECHR due to an interception at sea, where it returned the TCNs directly back to Libya without any individual processing. Again the ECtHR based its judgment upon independent reports and ruled that 'the fact that a large number of irregular immigrants in Libya found themselves in the same situation as the applicants does not make the risk concerned any less individual where it is sufficiently real and probable'.[299] Notably, the ECtHR hereby referred to article 19(2) Charter as a codification of the principle of non-refoulement and to which Italy is bound.[300] This judgment is important due to the current problems in relation to boat migrants and the continuance of 'push back' and offshore interdiction operations by the Member States.[301]

[294] Tsourdi 2014, p. 281.
[295] ECtHR 28 June 2011, no. 8319/07, *Sufi and Elmi v. UK*, para. 221.
[296] ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*, para. 395.
[297] ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*, para. 347-349.
[298] ECJ 21 December 2011, joined cases 411/10 and C-493/10, *N.S. and Others.*
[299] ECtHR 23 February 2012, no. 27765/09, *Hirsi Jamaa and others v. Italy,* para. 136.
[300] Ibid, para. 135.
[301] McGuire 2015.

The ECtHR apparently does not avoid reference to EU law or the case law of the ECJ, when it deems it as desirable. These cases show that through cross-referencing to each other's case law the Courts might complement each other and this might even lead to improvement of the human rights protection. Nevertheless, the way the Courts ruled in cases *Elgafaji* and *Sufi and Elmi* might also be perceived as contradictory and confusing. The ECJ emphasized its autonomous interpretation leading to more extensive protection, which was subsequently undermined by the ECtHR in its conclusion that this interpretation is comparable to its own. Subsequent case law of European Courts need to clarify whether the scope of article 15(c) Qualification Directive and article 3 ECHR are indeed the same in practice and which situations of extreme violence meet their standards.[302] This uncertainty would, however, not be taken away by the accession of the EU to the ECHR. After the accession the ECtHR's jurisdiction will remain limited to the ECHR. It would never clarify the added value of article 15(c) Qualification Directive, since this would be an interpretation of EU law.[303] It would only make sure that its contracting parties do not undermine the minimum level of protection as provided for in the ECHR. This is exactly what it did in the cases discussed above.

From the foregoing follows that in practice the European Court align their cases and avoid conflicting interpretations, even though the ECJ often decides upon a case through an autonomous approach.[304] The case law even shows the positive side of an autonomous approach by the ECJ: it opens up the possibility for progress within the EU human rights protection. Through autonomous interpretation the ECJ often provides for more protection than the ECtHR, which might be taken over by the ECtHR hereby raising the overall level of human rights protection.

6.2. Interpreting the Dublin Regulation

Mutual trust is the core principle of the Dublin system, but it is at the same time the most contested principle within the CEAS. It is questionable whether Member States indeed provide for the same level of protection and, unsurprisingly, this system has led to several cases in which asylum seekers contest their transfer. Both courts have been confronted with cases on the application of the Dublin II Regulation to asylum seekers.

6.2.1. The ECtHR's conditional trust in the EU

The ECtHR was the first to rule on a case concerning the Dublin system. The case of *TI v. UK* concerned a Sri Lankan asylum who challenged his transfer from the UK to Germany. He argued that due to his transfer to Germany he would risk to be send back to Sri Lanka and, therefore, the UK violated the principle of non-refoulement. In

[302] Guild & Moreno-Lax 2015. p. 140.
[303] Spielmann 2014, p. xix
[304] Also in other cases the ECJ followed the case law of the ECtHR: compare the cases ECJ 30 November 2009, C-357/09 PPU, *Kazoev* with ECtHR 15 November 1996, no. 22414/93, *Chalal v. UK* and ECtHR 8 October 2009, no. 10664/05, *Mikolenko v. Estonia*; ECJ 18 December 2014, C-542/13, *M'Bodj* with ECtHR 27 May 2008, no. 26565/05, *N. v. UK.*

line with the Dublin Convention the UK argued that it did not need to assess the claim since this had already been done by Germany. The ECtHR does not follow this argument; it rules that also indirect removal could lead to a violation of the principle of non-refoulement. The fact that Germany was party to the ECHR and had ratified the Dublin Convention does not absolve the UK from its responsibility to ensure that the asylum seeker would not risk refoulement due the transfer to Germany.[305] By accepting the concept of 'indirect refoulement' the ECtHR makes clear that mutual trust is not absolute and can be rebutted.[306] The ECtHR hereby also explicitly takes into account the Dublin Convention and its objectives. It, however, takes a different approach than the UK: where the UK used this instrument to substantiate its decision not to assess the claim for asylum, the ECtHR points out that the effectiveness of the Dublin Convention would be undermined if different approaches were adopted by the Member States to the scope of protection offered.[307]

Nevertheless, the ECtHR rules that the UK had not violated the principle of non-refoulement. It refrains from a substantive check on whether Germany had examined the asylum claim substantively right but instead focuses on the procedural aspects.[308] The fact that the German law contained a provision which could be used to re-examine the case together with the assurances of Germany to apply that provision convince the ECtHR that the procedural guarantees suffice and, therefore, there is no basis to assume Germany would fail to fulfil its obligations under Article 3 ECHR.[309] Since the ECtHR does not find a violation of article 3 ECHR, it remains unclear how the principle of mutual trust can be rebutted.

From the subsequent case law follows that the ECtHR also takes into account independent assessments of the actual situation in the national asylum regimes.[310] Nevertheless, the case *K.R.S. v. UK* shows us that the ECtHR does not easily come to a violation of 'indirect non-refoulement'. In this case the UNCHR had provided evidence about procedural deficiencies in the Greek asylum system. This did, however, not convince the ECtHR to follow the Iranian asylum seeker in his application against his transfer from the UK to Greece. The adopted instruments within the CEAS contribute to the Court's reticent attitude. According to the ECtHR the Dublin II Regulation together with the Qualification Directive and the Reception Conditions Directive protect fundamental rights substantively and procedurally, which lead to the presumption that the Member States can be safely transferred.[311] Against this background the ECtHR considers that the fact that Greece currently does not remove people to Iran leads to the conclusion that there is nothing to suggest that a transfer to Greece will lead to a violation of the principle of non-refoulement. Even in the case Greece would start again to remove asylum seekers to Iran, this would not necessarily alter this presumption, considering the possibility of the

[305] ECtHR 7 March 2000, no. 43844/98, *T.I. v. the UK*, p. 15.
[306] Velluti 2015, p. 140.
[307] ECtHR 7 March 2000, no. 43844/98, *T.I. v. the UK*, p. 15
[308] Ibid, p. 16.
[309] Ibid, p. 15.
[310] ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*; ECtHR 2 December 2008, no. 32733/08, *K.R.S. v. the UK.*
[311] ECtHR 2 December 2008, no. 32733/08, *K.R.S. v. the UK,* p. 16, 17.

Member States to examine the asylum application on their own motion.[312] Interestingly, the ECtHR did not take into account the fact the ECJ had just condemned Greece for failing to transpose the Reception Conditions Directive in time.[313] It appears from this case that the ECtHR is quite lenient towards the EU Member States, since it maintains the presumption of safety despite of the evidence which calls this presumption into question.

6.2.2. Indirect review and judicial dialogue

There are nevertheless limits to the ECtHR's trust in the functioning of the Member States within the CEAS. This follows from the landmark case *M.S.S v. Belgium and Greece.* In this case an Afghan asylum seeker entered the EU through Greece, where his fingerprints were taken. He did not apply for asylum in Greece but travelled to Belgium where he lodged his application for asylum. In line with the Dublin II Regulation Belgium planned to transfer the asylum seeker to Greece. The asylum seeker tried to suspend his transfer by initiating procedures before the Belgian courts and interim measures before the ECtHR but these claims were rejected based on procedural reasons and the presumption of safety. Back in Greece he was detained in insalubrious conditions and when released he had to live on the streets without any support from the Greek authorities.

At issue in the proceedings before the ECtHR were article 2 (the right to life), article 3 (prohibition of inhuman or degrading treatment or punishment) and article 13 (the right to an effective remedy) of the ECHR. In a lengthy judgment the ECtHR carefully considers the different aspects of the case hereby giving much weight to the reports of the UNCHR and NGOs which demonstrate the systematic problems relating to the reception conditions for asylum seekers and the asylum procedures in Greece.[314] The ECtHR comes to the conclusion that Greece had violated article 3 ECHR due to the degrading conditions of detention and reception, and 13 ECHR in conjunction with article 3 ECHR because of the deficiencies in the asylum procedures.[315]

Subsequently, the ECtHR turns to the questions which are important in relation to the Dublin II Regulation, namely whether Belgium had also violated the ECHR by transferring M.S.S. to Greece. The ECtHR rules that in this case Belgium should have verified how Greece applied its legislation on asylum in practice and whether this met the Convention standards.[316] Since Greece did not meet these standards, the ECtHR concludes that Belgium by transferring the asylum seeker to Greece 'knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment'.[317] In finding a violation of the ECHR the ECtHR overcomes the obstacles of earlier case law. Where in the cases *T.I.* and *K.R.S.* the ECtHR only theoretically accepts the principle of indirect refoulement, in this case Belgium is condemned for violating this principle. The ECtHR thus makes use of the

[312] ECtHR 2 December 2008, no. 32733/08, *K.R.S. v. the UK*, p. 17.
[313] ECJ 19 April 2007, C-72/06, *Commission v. Greece*.
[314] ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece,* para. 159-194.
[315] Ibid, para. 264, 321.
[316] Ibid, para. 359.
[317] Ibid, para. 367.

room it created in the cases *T.I.* and *K.R.S* to rebut the presumption of safety. Moreover, as pointed out in section 4.2. the ECtHR circumvents the *Bosphorus*-doctrine by stating that the Member States have a margin of discretion due to the sovereignty clause of article 3 (2) of the Dublin II Regulation. Several factors lead to this different outcome. Contrary to the previous cases M.S.S was already sent back to Greece and had actually suffered from the poor conditions. Moreover, the ECtHR takes into account the increasing frequency of adverse reports about the Greek asylum system issued by the UNCHR and NGOs after its decision in *K.R.S.* It hereby emphasizes that Belgium was informed about these degrading circumstances by a letter of the UNCHR.[318] For these reasons Belgium could not rely on the outcome of the case *K.R.S.*[319] Furthermore, where the ECtHR considers the procedural guarantees in *T.I.* thin but sufficient; in *M.S.S* it points out some specific procedural shortcomings in the Belgian system leading to the conclusion that M.S.S had no effective remedy by which he could complain about a violation of article 3 ECHR.[320]

From the described cases it follows that the ECtHR takes into account the European asylum system and its specific characteristics. In principle it respects the principle of mutual trust and the underlying presumption of safety. Nevertheless, this presumption can be rebutted and, even though the ECtHR does not easily comes to this conclusion, in *M.S.S* it has shown that it indeed uses the possibility of rebuttal if considered necessary. The decision on whether the presumption of safety needs to be rebutted depends on the particular facts and circumstances of the case. Formal guarantees like being party to the ECHR and ratification of the Dublin Regulation do not suffice in themselves; the ECtHR performs a factual test to assess whether the presumption of safety is justified in practice. Notably, the changing context within the CEAS has an impact on the judgments of the ECtHR. In *K.R.S.* the ECtHR uses the adopted instruments within the CEAS to constitute its decision to rely on the presumption of safety. Also in *M.S.S.* these instruments play a role. At the moment the ECtHR decided in the case *M.S.S* the second phase of the CEAS had started and the Commission had launched proposals to strengthen the human rights protection in the Dublin Regulation. The ECtHR used this as a factor to come to the conclusion that the presumption of safety is rebutted.

The year in which the ECtHR delivered its ground-breaking judgment *M.S.S* the ECJ had to decide on similar cases, the joined cases *N.S. and M.E*. In the first case N.S., an Afghan national, applied for asylum in the UK. He had entered the EU through Greece and, therefore, the UK requested Greece to take responsibility for his asylum claim. According to N.S. he had been detained in appalling conditions in Greece after which he was expelled to Turkey. He could escape and travelled directly to the UK. N.S. opposed his transfer to Greece claiming that the transfer would violate his rights under the ECHR.[321] The second case, *M.E.*, concerned five asylum seekers who

[318] ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece.* para. 349.
[319] See partly dissenting of judge Bratza to ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece,* who was, contrary to the majority of the Court, of the opinion that Belgium could rely on the *K.R.S.*
[320] ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*, para. 369-397.
[321] ECJ 21 December 2011, joined cases 411/10 and C-493/10, *N.S. and Others*, para. 34-38.

travelled through Greece to Ireland where they lodged an asylum application. These asylum seekers opposed their return to Greece by arguing that the procedures and conditions for asylum seekers in Greece are inadequate and, therefore, Ireland was required to apply the sovereignty clause, article 3(2) of the Dublin II Regulation.[322]

Both the British and Irish courts referred questions to the ECJ relating to the compatibility of Dublin transfers with human rights, whereby only the British court refers to the ECHR. The first question the ECJ had to answer was whether a decision on the basis of article 3(2) Dublin II Regulation falls within the scope of EU law and the Charter. Like the ECtHR the ECJ stated that Member States have discretionary power in applying the sovereignty clause. However, in derogation of the reasoning of the ECtHR, the ECJ emphasized that this discretion has to be exercised in line with EU law and has consequences as provided for by the Dublin II Regulation. Therefore, according the ECJ the Member States are implementing EU law when they apply article 3(2) Dublin II Regulation, through which the Charter is applicable. Interestingly, along these lines both Courts explain the discretionary power of the Member States in a way it will fit in their jurisdiction.[323]

Regarding the substantive questions about the compatibility of Dublin transfers with human rights, the ECJ takes as starting point the principle of mutual trust as the basis of the CEAS. In line with this Member States should be presumed to act in accordance with the requirements of the Charter, the Geneva Convention and the ECHR.[324] Nevertheless, the transfer of asylum seekers would be incompatible with article 4 Charter, 'if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment'.[325] The ECJ hereby emphasizes that not just any infringement of a human right would lead to a violation of article 4 Charter. According to the ECJ this would otherwise undermine the Dublin system which is aimed at quickly designating the Member State responsible for examining an asylum claim.[326] In examining the actual situation in Greece, the ECJ relies on the judgment of the ECtHR in *M.S.S.* It refers to the outcome of the case and also to the evidence and reports issued by the UNCHR, NGOs and the Commission as examined by the ECtHR. Based on this the ECJ rules that Member States are not allowed to transfer an asylum seeker to the responsible Member State if they cannot be unaware of the systematic deficiencies in the asylum procedure and reception conditions of the latter.[327]

6.2.3. Discrepancy unveiled

The cases *M.S.S* and *N.S. and M.E.* seem to provide a perfect example of the Courts seeking rapprochement with each other. Their answers to the question of admissibility show that they do not want to leave the case to the judgment of the

[322] ECJ 21 December 2011, joined cases 411/10 and C-493/10, *N.S. and Others*, para. 51, 52.
[323] Sanden 2012, p. 155.
[324] ECJ 21 December 2011, joined cases 411/10 and C-493/10, *N.S. and Others,* para. 78-80.
[325] Ibid, para. 86.
[326] Ibid, para. 82-85.
[327] Ibid, para. 94.

other but after declaring themselves competent they take a similar approach.[328] In assessing whether the transfer is in line with the Charter, the ECJ very much relies on the ECtHR's judgment in *M.S.S* It hereby considers the sources the ECtHR used in its judgment and the judgment itself. It seems that in case a judgment of the ECtHR has great impact on EU law, the ECJ lets go of deciding autonomously. Based on the considerations of the ECtHR the ECJ concludes that the presumption of safety is rebutted if 'a Member State cannot be unaware of systematic deficiencies that amount to substantial grounds for believing that there is a real risk of treatment contrary to article 4 Charter'.[329] In this way the ECtHR functions as a fact finder of which the concrete assessment is used by the ECJ to fill in its rather abstract formula.[330]

However, if one zooms in on the cases it appears that they are not as streamlined as they seem to be at first sight. The *N.S.*-formula of the ECJ includes three important elements, namely 'cannot be unaware', 'systematic deficiencies' and 'substantial grounds for believing that there is a real risk'.[331] The latter is clearly in line with the case law of the ECtHR, since this literally takes over the test which is performed by the ECtHR in its case law.[332] Also the element of 'cannot be unaware' seems to be in line with the case law of the ECtHR. The ECtHR comes to the conclusion that Belgium 'knowingly' exposed the asylum seeker to conditions of detention and living conditions that amounted to degrading treatment. So according to the ECtHR Belgium was aware of the circumstances in Greece, hereby explicitly taking into account the letter from the UNCHR to the Belgian authorities. In this respect the ECJ fully relies on the judgment of the ECtHR in *M.S.S.* and the evidence brought forward in that case. However, the element 'systematic deficiencies' opens up the possibility of different interpretations.

After *N.S.* it was not entirely clear whether the ECJ indeed used the element 'systematic deficiencies' as an additional requirement.[333] This uncertainty was taken away by the ECJ in the case *Abdullahi* where it ruled that the *only* way for the applicant for asylum to call into question the choice of the criterion to appoint the responsible Member State 'is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.[334] The ECJ again includes the element 'systematic deficiencies' in its ruling and makes explicit that this is the only ground upon which an asylum seeker may challenge an agreement between two Member States on the responsibility for the asylum claim. Moreover, the *N.S.*-ruling is taken over in the Dublin III Regulation, including the criterion of

[328] Zuijdwijk 2010/11, p. 830, 831.
[329] ECJ 21 December 2011, joined cases 411/10 and C-493/10, *N.S. and Others*, para. 86.
[330] Sanden 2012, p. 170.
[331] Costello 2012b, p. 89, 90. ; Sanden 2012, p. 169.
[332] ECtHR 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*, para. 365.
[333] Costello 2012b, p. 89.
[334] ECJ 10 December 2014, C-394/12, *Abdullahi*; confirmed in ECJ 14 November 2013, C-4/11, *Puid.*

'systematic deficiencies'.[335] The ECtHR, on the other hand, points out in *M.S.S.* that there are systematic deficiencies in the Greek asylum system but does not put this as an additional requirement.

The gap between the reasoning of the ECtHR and the ECJ is revealed in the case *Tarakhel v. Switzerland.* Contrary to the ECJ's decision in *Abdullahi,* the ECtHR makes clear that it does not require an additional criterion of 'systematic deficiencies'. In this case an Afghan couple with their six minor children entered the EU through Italy. However, the family soon moved to Switzerland because of difficult living conditions in Italy. They challenged the Swiss decision to return them to Italy, arguing this would violate article 3 ECHR as well as article 8 ECHR (the right to family life). They linked their complaint to the 'systematic deficiencies'-test.[336]

The ECtHR, nevertheless, makes clear that the claim does not need to be linked to the 'systematic deficiencies'-test to come to a violation of article 3 ECHR. It does refer to the *N.S.*-formula of the ECJ including the criterion of 'systematic flaws'[337] but it subsequently states that the presumption of safety can '*therefore* validly be rebutted' on the basis of its own test of 'substantial grounds' and 'real risk'.[338] By adding 'therefore' into the sentence, the ECtHR clearly holds on to its own test which also encloses circumstances of 'systematic deficiencies' but does not include this as an additional requirement.[339] It explicates that the Member State need to carry out 'a thorough and individualized examination of the person concerned'.[340] According to the ECtHR it had also performed such examination in the case *M.S.S.*, where it 'examined the applicant's individual situation in the light of the overall situation prevailing in Greece'.[341] Notably, the ECtHR in rejecting 'systematic deficiencies' as an additional criterion, referred to the recent *EM*-judgment of the UK Supreme Court in which this Court ruled that 'systematic deficiencies' was not the only ground for rebuttal of the presumption of safety.[342] By referring to this judgment instead of the ECJ's judgment in *Abdullahi* clearly shows which line of reasoning the ECtHR prefers.

After this clarification the ECtHR directly set example on how to perform such an individual test. It first considers the overall situation in Italy and concludes that despite the existing problems in Italy, the situation could in no way be compared to the situation in Greece at the time of the *M.S.S.*-judgment. Therefore, there could not 'be a bar to all removals of asylum seekers to that country'. Then the ECtHR turned to the individual situation of the application which was neither comparable to the situation in *M.S.S.*, since in this case the family was directly taken care of by the Italian authorities. Nonetheless, Switzerland did not meet the requirements following from article 3 ECHR, because it had no sufficient guarantees that Italy would take charge of the applicants adapted to the age of the children and would

[335] Article 3(2) Dublin III Regulation.
[336] ECtHR 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland,* para. 100.
[337] Ibid*,* para. 102, 103
[338] Ibid*,* para. 104.
[339] Costello & Mouzourakis 2014, p. 408.
[340] ECtHR 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland,* para. 104.
[341] Ibid, para. 101.
[342] Ibid, para. 104.

keep the family together.[343] The ECtHR hereby especially takes into account the fact that this case included minor children which have specific needs and are extremely vulnerable.[344]

Also the ECJ takes into the account the particular vulnerability of minor children as it has been shown in the case *MA.*[345] The case concerned minor applicants without any family members within the EU. They all travelled to a second Member State where they wanted to stay instead of being returned to the State of entry. The ECJ decided that they could stay in the Member State where they were present, because they had no family elsewhere in the EU and it was in their best interest not to be transferred.[346] The similarity between the cases might suggest that an exception based on individual circumstances is a possibility for both Courts if the case concerns minors. However, even though the decision of the ECJ in *MA* seems to suggest that it also considers other circumstances than only 'systematic deficiencies', this decision was ignored in its later judgment *Abdullahi* in which the ECJ ruled that the *N.S.*-formula was the only ground upon which a Dublin transfer may be challenged. Moreover, the ruling of the ECJ in *MA* has been codified in article 8(4) Dublin III Directive and is currently one of the criteria to appoint the responsible Member State. Therefore, in the current Dublin system the *MA*-ruling is not to be regarded as an exception ground anymore.

Where the ECJ seemed to have cut off the possibility of extending its *NS*-formula to the inclusion of an individual assessment; the ECtHR on the other hand holds on to its ruling in *Tarakhel* and explicitly leaves open the possibility that also other factors than age may lead to rebuttal of the principle of safety. In the recent case *A.M.E. v. the Netherlands* the ECtHR performs two separate tests: one based on 'systematic deficiencies' as in *M.S.S.* and the other based on the individual circumstances as in *Tarakhel*.[347] Regarding the latter, the ECtHR repeats well-established case law by stating that the assessment on the basis of article 3 ECHR depends on the circumstances of the case, including the duration of the treatment, its physical and mental effects and in some instances, the sex, age and state of health of the victim. The ECtHR points out that in this case the applicant as an asylum seeker belongs to a vulnerable group but that in this case he was not forced to leave Italy. Moreover, contrary to the situation in *Tarakhel* the applicant was an able young man with no dependents. For these reasons the ECtHR concluded that there was no violation of article 3 ECHR. Despite the fact that also in this case the applicant's age is a decisive factor; the way of reasoning of the ECtHR shows us that it takes into account other factors which might lead to rebuttal in other cases.[348] Moreover, other case law show us that in cases including minor children the ECtHR does not automatically

[343] ECtHR 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*, para. 122.
[344] Ibid, para. 119.
[345] ECJ 6 June 2013, C-648/11, *MA and Others.*
[346] Ibid, para. 66.
[347] ECtHR 13 January 2015, no. 51428/10, *A.M.E. v. the Netherlands,* para. 34, 35.
[348] Strasbourg Observers 2015

comes to the same conclusion as in *Tarakhel*[349], clearly other factors need to be considered as well.

6.2.4. A search for coherency

Both Courts have clarified their positions, hereby unveiling the underlying discrepancy between the cases *M.S.S.* and *N.S.* which seemed to be a perfect example of a similar approach of the Courts. The ECJ might have the opportunity to close the gap. Two cases currently pending before the ECJ raise the question whether the ECJ will maybe revise its judgment in *Abdullahi*.[350] In these cases the question is raised whether the judgment of the ECJ in *Abdullahi* is still applicable after the entry into force of the Dublin III Regulation. Article 27 of this Regulation introduces the right to an effective remedy. According to several commenters this will limit the effect of *Abdullahi*. In their opinion the right to an effective remedy should also encompass the right to challenge the allocation of responsibility and the factual and legal premises upon which it is based.[351] If the ECJ follows this interpretation the rights of applicants would be extended by giving them other grounds than the *N.S.*-formula to challenge a Dublin transfer. This outcome would bring the case law of the European Courts closer together.

The ECJ might also adopt a more restrictive approach. It could be argued that article 27 Dublin III Regulation only provides for the procedural guarantees to ensure the asylum seeker has indeed access to an effective remedy. In this view article 27 Dublin III Regulation cannot be used as a legal basis for additional grounds to challenge the allocation of responsibility. The Dublin III Regulation has not changed the goal of the Dublin II Regulation which is according to the ECJ 'to speed up the handling of claims in the interests both of asylum seekers and the participating Member States'.[352] This goal was decisive for the ECJ in *Abdullahi* and the ECJ might hold on to this. Moreover, in this respect the concerns of the ECJ in relation to the principle of mutual trust need to be considered. From its opinion 2/13 clearly follows the task for the negotiators of the Draft Agreement to make sure this principle will not be undermined by the accession.[353] The ECJ emphasized that the Member States need to hold on to the principle of mutual trust and deviation should only be possible in exceptional circumstances.[354] Nevertheless, the ECJ cannot ignore the fact that the Member States have to follow the judgment of the ECtHR in *Tarakhel.* Several Member States, such as the Netherlands and Germany, have already implemented *Tarakhel* for transfers to Italy.[355] The case *N.S.* suggests that if a

[349] ECtHR 2 April 2013, no. 27725/10, *Mohammed Hussein and Others v. the Netherlands and Italy*. See also Jointly Partly Dissenting Opinion of judges Casadevall, Berro-Lefèvre and Jäderblom in *Tarakhel* arguing that the different outcome in the cases is not justified.
[350] ECJ, application on 10 April 2015, C-63/15, *Gezelbash,* judgment to be awaited; ECJ, application on 29 May 2015, C-155/15, *Karim,* judgment to be awaited. For the referral decisions of the national courts see http://www.minbuza.nl/ecer (only available in Dutch).
[351] Symes 2014; EDAL 2013; Aida 2013.
[352] Abdullahi para. 53, 59. This goal is again mentioned in recital 5 of the Dublin III Regulation.
[353] Opinion 2/13, para. 194.
[354] Ibid, para. 191.
[355] Garlick & Fratzke 2015.

judgment of the ECtHR has a direct and far-reaching impact, the ECJ explicitly takes such judgment into account.

A solution may be found in the opinion of AG Cruz Villalón in the case *Abdullahi.* According to him an asylum seeker has two options to challenge a Dublin transfer. Firstly, appeal is possible if the presumption of safety is rebutted on the basis of the *N.S.*-formula. This option was followed by the ECJ. The ECJ did however not spend a word on the second proposed option for appeal, which according to the AG relates to 'the recognition by Regulation No 343/2003 of certain specific rights, ancillary to the right to asylum itself, and the guarantees associated with them'.[356] These rights are for example those connected with the right to family life, the rights of minors and time-limits.[357] The new adopted right to an effective remedy would create the possibility for the ECJ to reconsider *Abdullahi* and also adopt the second option as proposed by the Advocate General. Allowance of the grounds of appeal would bring the ECJ's case law in line with the individual assessment as required in *Tarakhel.*

Even though the outcome of these cases must be awaited, the foregoing analysis already gives us some clues about the interplay between the Courts regarding the cases on the application of the Dublin Regulation. It has been shown that the ECtHR despite the *Bosphorus*-doctrine has created the possibility to review the acts of the Members States under the Dublin Regulation. From *M.S.S.* and *Tarakhel* follows that the ECtHR is not afraid to use that possibility to condemn the Member States, hereby holding on to its own standards. Hence, the ECtHR performs the external control as wished for by the ones supporting the accession of the EU to the ECHR. It takes into account the particular EU context which contributes to a reticent attitude but steps in when it considers the protection within the EU comes below the minimum level of the ECHR.

The judgment of the ECtHR was not directed to the EU institutions but the effect was as if the ECtHR had performed external control over the EU institutions, since the *M.S.S.*-judgment has been followed by the ECJ and the EU legislature. This shows that even when a judgment of the ECtHR touches upon mutual trust, the ECJ rather follows the ECtHR than causing conflicting interpretations. The fact that it incorporated this judgment according to a slightly different interpretation would probably not have been different after accession of the EU to the ECHR. Due to subsidiary nature of its judicial power the ECtHR would never declare national law, and thus EU legislation, invalid. It leaves the contracting parties free to choose the means to comply with the ECtHR's judgment.[358] After *M.S.S.* the consequences of the judgment were not entirely clear and ECJ made a possible interpretation of it.[359]

However, due to this different interpretation the Member States are, nevertheless, confronted with divergent norms of the European Courts since *Tarakhel*. This might

[356] Conclusion of AG Cruz Villalón to ECJ 11 July 2013, C-394/12, *Abdullahi,* para. 44.
[357] Ibid, para. 46.
[358] ECtHR 2010, para. 25.
[359] Also legal scholars perceived the cases *M.S.S.* and *N.S.* as an example of convergence between the Courts. See Morano-Foadi & Andreadakis 2014, p. 40.

lead to uncertainty among the Member States on which norm to follow. Yet, the current divergent norms are not really problematical. Contrary to the situation in *Melloni*, the Member States under the Dublin Regulation have discretionary power. It would not be contrary to EU law to provide a higher level of human rights protection. The Member States can, therefore, follow the interpretation of the ECtHR in this respect till the ECJ had clarified its position.

Though, in the light of legal certainty it would have been better if the Courts would provide a clear coherent line of reasoning. It is, however, questionable whether this would be achieved by the accession of the EU to the ECHR. In the eyes of the ECtHR national courts are in a better position to perform a balancing act between the interests of the community and the protection of the individual interests.[360] It would, therefore, only review marginally cases like *N.S.* and would probably not unveil the underlying discrepancy with *M.S.S.* Moreover, if accession would occur according to the current state of affairs, it would happen under the conditions set by the ECJ. In its opinion the ECJ has emphasized the importance of autonomy and has specifically stated that after the accession mutual trust must be maintained. Therefore, even after the accession the ECtHR would not be able to fully assess the compatibility of the principle of mutual trust with the ECHR and would only provide for fragmentary guidance on how to apply the exception grounds.

6.3. More coherency through optimized dialogue

All in all, from the described cases clearly follows that the ECJ desires to develop its autonomous line of reasoning based upon the Charter, while the ECtHR performs indirect control over EU law. At the same they show mutual respect to each other's case law and avoid conflicting interpretations. Though, it differs per case whether or not they explicitly refer to each other's case law and to what extent they take into account each other's judgments. This makes it hard to predict the outcome of the cases. It is inherent to judicial protection, which is developed case by case, that a certain level of uncertainty remains. However, the cases *Tarakhel* and *Sufi and Elmi* show that this uncertainty might be aggravated due to the interplay between the ECtHR and the ECJ.

A solution to this might be found in optimization of the dialogue between the ECtHR and the ECJ. Judicial dialogue, by which the European Courts look at each other's case law in deciding on their cases[361], is already being performed as it has been shown in the analysis above. Besides, there is an informal judicial dialogue between the ECtHR and the ECJ in the form of informal meetings once or twice a year.[362] In addition, the accession would constitute an institutionalisation of the dialogue by introduction of constructions as the co-respondent mechanism and prior involvement.[363] It is, however, unclear whether the accession will indeed strengthen the dialogue between the Courts and take away uncertainties as after *Tarakhel* and

[360] Senden 2011, p. 23.
[361] Morano-Foadi & Andreadakis 2014, p. 42.
[362] Ibid.
[363] Ibid, p. 43.

Sufi and Elmi. In discussing the accession legal scholars only gave little reference to this function of the accession.[364] Also the Draft Agreement does not give clarity on whether the accession will improve the dialogue between the European Courts, since it remains silent on the specifications of the co-respondent mechanism and the prior involvement of the ECJ. These legal mechanisms need to be further discussed to make sure they will also serve the dialogue between the ECJ and the ECtHR.

[364] Morano-Foadi & Andreadakis 2014, p. 99.

7. Conclusions

Human rights have become one of the core values of the EU and are as such protected by the ECJ and ECtHR. Nevertheless, the current problems within the CEAS show that human rights protection falls short in several respects. This brings us to the research question of this thesis: *How and to what extend are human rights protected within the CEAS and will this protection be strengthened by the accession of the EU to the ECHR considering the interplay between the ECJ and the ECtHR?*

Human rights protection within the CEAS has shown to be performed by an accumulation of restricted protectionary forces. The EU legislature finds its limitations in the lack of political consensus with regard to human rights protection within the CEAS. Politically the protection of asylum seekers is highly sensitive. Due to the current mass influx of migrants the controversies have been pushed to the outer limits, hereby showing the tension between protecting national sovereignty and fulfilling human rights obligations. The drive to provide for vigorous and straightforward legislation to complete the CEAS has faded away. To reach agreement sensitive topics are left undecided resulting in ambiguities, gaps and inconsistencies within EU asylum law. This has as a consequence that the asylum instruments adopted in the context of the CEAS might form a breach of human rights themselves.

Due to this legislative deadlock, the role of the European Courts is of crucial importance. However, also their protectionary power is limited. The ECJ as 'newcomer' in the field of human rights protection is limited in its competence. Further still, the last decade the ECJ is gaining power in this respect and especially since the entry into force of the Charter it is going its own path in protecting human rights. With regard to the CEAS the adopted instruments in combination with the Charter give the ECJ the possibility to fully assess the compatibility of these instruments with human rights. However, judicial protection depends on the cases brought before court. In this respect the protection by the ECJ is limited due to the restricted *locus standi* of the individuals. The ECtHR from its side guarantees a minimum level of human rights protection among its contracting parties already for decades. Individuals can lodge appeal before the ECtHR, provided that they exhaust national remedies. However, the ECtHR neither can review EU law because the EU is not a contracting party to the ECHR.

To overcome the limitations within the EU human rights protection the EU legislature introduced the obligation for the EU to accede to the ECHR. The reasons for accession are multiple. First of all, the accession would enable external review over EU law. The ECtHR as specialized human rights court would be able to directly assess the compatibility of EU law with the ECHR. As a consequence the minimum level of human rights protection as required by the ECHR would be guaranteed. Secondly, the individual *locus standi* is said to be improved. The right for individuals to file a complaint against the EU before the ECJ is currently very much restricted. The ECtHR does not fill this gap, since direct claims against the EU before the ECtHR will be declared inadmissible. The accession would take away the latter restriction.

Thirdly, the accession would take away the risk for Member States to be hold responsible by the ECtHR for infringements of the ECHR directly stemming from EU law and prevent the Member States to be confronted with conflicting norms. The last reason is political: the accession would increase the credibility of the EU as a promotor of human rights. Despite these laudable aims the Draft Agreement may be criticized for leaving important topics undecided under the guise of further specification by EU internal rules. Especially opinion 2/13 of the ECJ has shown the contradictory nature of the obligation for the EU to accede to the ECHR without compromising specific characteristics of the Union. Due to this negative opinion it will be very difficult to proceed on the accession and it is worth to re-consider the four aims of the accession in the following subsections.

7.1. External review

With regard to the first aim, to establish external review, the necessity of accession is taken away by the fact that in practice the ECtHR performs indirect review over human rights protection within the CEAS. Even though the ECtHR has repeatedly stated that it is not competent to directly review EU law, it has shown to be very inventive in finding a way to indirectly review EU law.

In general the ECtHR is not eager to interfere with EU law. On the contrary, the ECtHR takes a reticent position towards the EU and would not easily conclude that the ECHR is violated due to an act of the Member States on the basis EU law. This is clearly reflected by the *Bosphorus* doctrine. Nonetheless, the ECtHR has not side-lined itself. The *Bosphorus* presumption can always be rebutted if the ECtHR considers human rights protection in the EU 'manifestly deficient'. Moreover, notwithstanding the *Bosphorus* doctrine the ECtHR found ways to step in where necessary.

Regarding the main part of the key instruments of the key instruments within the CEAS, the ECtHR could easily overcome its limited competence. Three of the four key instruments are Directives which leave a margin of discretion to the Member States. It is mostly for this margin of discretion that the Directives were criticized; the legislature left sensitive topics undecided leading to unclear definitions and leaving much room for derogation and different interpretations. Since the *Bosphorus* presumption does not apply when there is a margin of discretion, the ECtHR is able to perform indirect review through the acts of the Member States, particularly over the sensitive parts of the Directives.

The other key instrument is the Dublin Regulation which is directly applicable in the Member States and thus in principle does not leave discretion to the Member States. It this way it has functioned as an ultimate way to test the position of the ECtHR. First of all, the ECtHR found a way to circumvent the *Bosphorus* doctrine by interpreting the Regulation as partly giving discretionary power to the Member States. Besides, the Dublin Regulation is the most criticized instrument within the CEAS. Many critics have expressed doubts about its compatibility with human rights, especially due to the principle of mutual trust based on the presumption of safety. At

the same time this principle is the core principle of the Dublin Regulation and is as such embraced by the ECJ. The cases *TI* and *K.R.S.* show that the ECtHR is reticent to interfere. Nonetheless, this lenient approach has its limits. In *M.S.S. t*he ECtHR has shown even in sensitive cases it does not shy away from interference if it considers necessary. Still, the ECtHR does not assess the principle of mutual trust as such but sets limits according to the specific facts of the case.

In this way the ECtHR performs external control as wished by the EU legislature, namely external review without affecting the competences of the EU. So in this respect, the accession would not improve the level of human rights protection in practice.

7.2. Individual locus standi

Then the second aim of the accession would be the improvement of the individual locus standi. After the accession individuals would have direct access to the ECtHR and may directly challenge acts of the EU institutions. The accession is, therefore, regarded as a way to improve the individual locus standi. However, in practice the accession would make no difference in this respect. The advantage of access to external control enabled by the accession is taken away by the fact that the ECtHR already performs indirect control over human rights protection within the CEAS. Currently, individuals have the right to challenge acts of the Member States before the ECtHR which can bring about indirect review of EU law if necessary. The ECtHR indeed took judgment many cases which touch upon issues which are also regulated by the asylum instruments. The accession would thus not improve the individual locus standi in this regard.

Still, individuals experience an obstacle in their right to appeal before the ECtHR due to the obligation to exhaust all domestic remedies. This obligation would, however, remain the same after accession of the EU to ECHR. It might even become an extra burden for the individual to lodge appeal before the ECtHR. After accession individuals would in theory be able to directly challenge the legality of EU legislation. However, they would then first have to exhaust all legal remedies at EU level and would, therefore, still face the problem of restricted possibilities to challenge EU legislation due to article 263 TFEU. Moreover, if they would wish to challenge a national measure implementing EU law, they could either follow the EU of national legal pathway. The EU legal pathway would again be very much restricted due to article 263 TFEU. Also by following the national legal pathway the individual would be confronted with an extra burden, since it would probably face two defendants: the Member State and the EU as co-respondent.[365] The accession will thus cause an extra obstacle for the individual to lodge appeal. Since the ECtHR is able to perform indirect review in the current situation, the legal position of individuals will actually decline due to the accession.

[365] Ippolito & Velluti 2014, p. 183, 184

7.3. Responsibility of Member States and the risk of conflicting norms

The subsequent aim to be re-considered is to take away the risk for Member States to be confronted with conflicting interpretations of the ECtHR and the ECJ. The fact that the ECtHR performs indirect review over the CEAS does not take away this risk. On the contrary, by indirectly interpreting EU law the ECtHR increases the risk of conflicting interpretations based on the same legal provision. Over the years the jurisdiction of the ECtHR and the ECJ got more and more intertwined due to their role as human rights protectors. The ECJ, which originally had no competence in human rights protection, continuously expended its competences in this field, especially after the entry into force of the Charter. At the same time the ECtHR did not let go of its competences, it on the contrary increasingly performed indirect review over EU law to fill the human rights gap within the EU. At first sight one might regard the Courts as rivals. The case law of the Courts on the contrary show that they try to streamline their cases and avoid conflicting interpretations. From the joint statement of the presidents of the Courts follows that also the judges realize the importance of coherence between the ECHR and the Charter.

This cooperative attitude is reflected by the case law in the area of EU asylum law. The analysis of the cases in this field shows that the relation between the Courts can be described as 'constructive human rights pluralism' which according to Costello 'describes the desirable mode of interaction between human rights regimes, whereby each cultivates a degree of openness to the others, while maintaining its own integrity'.[366] While the ECJ emphasizes its autonomous position in deciding upon human rights cases, its judgments show convergence with the case law of the ECtHR. It differs per case if and in what way the ECJ refers to the case law of the ECtHR but as shown by the cases *Y and Z*, *Diouf* and *Elgafaji* the ECJ avoids conflicting interpretations.

These cases also show the positive side of autonomous interpretation by the ECJ: progress in human rights protection. Since the entry into force of the Charter the ECJ can base its decisions on a separate, EU based, legal document. Even though the Charter contains several provisions corresponding to rights in the ECHR, it also provides for additional rights, such as article 18 and 19, and rights with a wider scope. It can, therefore, easily serve as a basis to go beyond the minimum level of protection provided in the ECHR. Also the ECtHR takes into account EU law and the case law of the ECJ, and occasionally even explicitly refers to EU law. As it has been shown by the case *Sufi and Elmi* the ECtHR might even refer to the case law of the ECJ to raise its own level of protection.

Even in N.S., the case which concerned the sensitive topic mutual trust, the ECJ explicitly referred to the ECtHR's judgment in M.S.S. and followed the outcome of that case. All in all, these cases show that the ECJ and ECtHR in practice align their cases and avoid conflicting interpretations.

[366] Costello 2012a, p. 260.

Still, the need for more coherency remains. This follows from the case Tarakhel. Since the judgment of the ECtHR in this case it is uncertain whether the case law of the Courts will remain in line with each other. This situation is caused by the fact that courts decide case by case. At the time of N.S. the interpretation of M.S.S. as made by the ECJ was in line with the case law of the ECtHR. Only after further specification of the exception grounds was given when the ECtHR had to decide upon a case suitable for this, the discrepancy between the interpretations became clear. The accession would arguably not prevent such situation. The ECtHR would still only assess a case as N.S. marginally, since it entails a balancing act between the interest of the EU and the interest of the individual. Moreover, according to the current state of affairs, the accession would occur as restricted by the opinion 2/13 of the ECJ. Due to these restrictions, the ECtHR would not be able to fully assess the compatibility of mutual trust with the ECHR. It would, therefore, still depend on the cases brought before the ECtHR to get bit by bit the overall picture of the exception grounds.

Positively, the accession would take away the uncertainty on which norm to follow. The ECtHR would have the 'last word' and it would be clear for the Member States that they have to follow the norm set by the ECtHR if the ECJ provides for a lower level of protection. However, as argued above, the accession will not by its nature prevent the existence of diverging norms. A way to increase the coherency might be found in optimization of the dialogue between the ECJ and the ECtHR. The accession might contribute to this through the co-respondent mechanism and the prior involvement of the ECJ. These mechanisms might enable the EU and the ECJ to share their point of view before the ECtHR takes judgment in a case.

7.4. Political reason

What remains is the political reason for the accession: to adhere to the same values as the EU promotes. Disappointingly, the opinion 2/13 of the ECJ has diminished the credibility of this argument. If accession would occur in line with the conditions as put forward by the ECJ, the EU would be put in a special position towards the other contracting parties to the ECHR. The EU would be shielded from review by the ECtHR in several respects, which does not support the view that the EU wants to adhere to the same values as it promotes. This is to be criticized from a constitutional point of view, more specifically with regard to the division of powers. All the EU institutions (except for the ECJ) have expressed the urge for accession and made it to a treaty obligation. All the more, they reached agreement with the Council of Europe. Notwithstanding the efforts to reach agreement and the common will to proceed the accession, the ECJ issued such a negative opinion that it will be very difficult to reach agreement again and to proceed with the accession.

7.5. Main conclusion and recommendations

With regard to human rights protection within the CEAS, the accession would not directly entail substantive improvement of the human rights protection within the CEAS. Currently, the Charter and the ECHR form a sufficient basis for the European Courts to review cases concerning human rights issues within the CEAS. The Charter

even enables the ECJ to go beyond the minimum protection of the ECHR. From the re-consideration of the aims of the accession it follows that these are already performed in practice. The ECtHR performs indirect review over EU law as wished by the EU legislature. This has as a consequence that the legal position of the individual is currently better than it would be after the accession. Furthermore, the analysis of the case law of the ECtHR and the ECJ shows that in practice they align their cases and avoid conflicting interpretations. Also the political reason of explicit adherence to human rights has become less convincing due to the opinion 2/13 of the ECJ. Continuing the accession in line with the ECJ's objections would emphasize the special place of the ECJ among the other contracting parties and partly shield the EU from external review, even on some controversial issues.

To be able to assess the necessity of the accession in general, it is recommended to also perform an analysis as in this thesis with regard to the other aspects of human rights protection to see whether the accession is a real necessity. Such research is mostly of relevance in the legal areas which are fully harmonized, considering the problematic judgment *Melloni* which might have the effect of undermining the minimum level of protection provided for by the ECHR.

On the basis of this thesis it is clear that even though the EU legislation is often criticized for falling short of human rights protection in the CEAS, the ECJ and the ECtHR make sure that at least the minimum level of human rights protection within the CEAS is safeguarded. Regarded this way, the accession might be perceived as a merely symbolic step, as a more visible expression of embracing human rights protection within the EU, but not resulting in significant changes in human rights protection within the CEAS.

On the other hand, one should be cautious not to neglect the consequences of the accession for the legal principles of democratic legitimation and legal certainty.
From the perspective of democratic legitimation the accession is desirable. Firstly, the EU legislature has wished the accession, which resulted in a legal obligation to do so. If the accession would no longer take place because of the objections raised by the ECJ - a non-democratic institution - the democratic legitimation of the EU would be undermined. Furthermore, the indirect external control over EU law as currently performed by the ECtHR and followed by the ECJ is fully based upon their own case law. This self-established external control is maybe desirable from a human rights perspective, but has no legal basis in EU law. The accession would provide for such legal basis. This would bring the current judicial review in line with the rule of law and thus serve the democratic legitimacy.

Besides, the legal certainty would be improved by the accession. It would ascertain that the ECtHR keeps performing external control over EU law. Also if (unintentional) discrepancies between the interpretations of the Courts would occur, the Member States will be assured that they could follow the norm of the ECtHR if the ECJ provides for lower protection. Still, in the current state of affairs it is unclear whether the accession would fully improve the legal certainty. An important aspect of the legal certainty in human rights protection within the CEAS is the coherency between

the case law of the Courts. Even though the ECtHR would have the 'last word' after the accession, incoherencies between the interpretations of the Courts may still occur. The co-respondent mechanism and prior involvement of the ECJ might serve as a way to optimize the dialogue between the Courts and like this improve the coherency in their case law. The current Draft Agreement, however, leaves the specifications on these mechanisms to EU internal rules.

The current options after the opinion on accession of the ECJ are either continuation of the negotiations with the Council of Europe or a treaty amendment. In any case, the further specifications on the accession need to be discussed. This thesis has shown that with regard to the CEAS the accession will mainly serve the legal certainty and is this respect there is the need for more coherency. Hence it is important for subsequent discussion on the accession that this aspect is taken into account. It is recommended to specifically assess in what way the co-respondent mechanism and prior involvement of the ECJ can be used to optimize the dialogue between the ECtHR and the ECJ, hereby increasing the coherency between their case law. An optimized dialogue also contributes to the preservation of the autonomy of the European Court. Instead of placing one Court above the other to repair incoherencies, such incoherencies can be prevented by co-operation on an equal footing.

So there is no direct necessity for the EU to accede to the ECHR to strengthen the human rights protection within the CEAS. Nonetheless, the accession is more than a merely symbolic step as it might serve the legal principles of democratic legitimacy and legal certainty.

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