General Articles

A Safe Harbour or a Sinking Ship? On the Protection of Fundamental Rights of Asylum Seekers in Recent CJEU Judgments

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For over a decade, the Common European Asylum System has been continuously tested in practice. However, it has been under particular pressure in recent years due to the unprecedented scale of the latest migration crisis. The Treaty of Lisbon extended the competencies of the Court of Justice of the European Union in asylum issues. A critical evaluation of the decisions of the Court in this article confirms the existence of a constant tension between ensuring the efficiency of EU law and respecting the rights enshrined in the Charter of Fundamental Rights of the European Union. These research findings are used to determine whether the Court of Justice has strengthened the protection of these rights (especially in the Dublin procedures and in the cases of detention of asylum seekers) and whether it has contributed to the ongoing European judicial dialogue on the rights of asylum seekers.

Keywords: Charter of Fundamental Rights of the European Union, EU asylum policy, refugees, right to judicial scrutiny, detention of asylum seekers, unprecedented flows of migrants

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I. INTRODUCTION

The number of migrants arriving to the European Union since the start of the migration crisis in 2014 and the death toll of persons attempting to cross the Mediterranean Sea[1] during that time have provoked many debates about, *inter alia*, the fundamental rights of asylum seekers in Europe. Questions about the fairness and effectiveness of the Common European Asylum System ('CEAS') have repeatedly been raised.[2]

This article analyses the scope of the judgments of the Court of Justice of the European Union (hereinafter 'Court of Justice' or 'CJEU') on the protection of fundamental rights of refugees and asylum seekers.[3] The evaluation of the

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1 Current data can be found in International Organization for Migration, 'Migration Flows - Europe' <http://migration.iom.int/europe/> accessed 2 October 2018.

2 See further Jenny Ritter and others, 'Introduction. European Perspective and National Discourses on the Migrant Crisis' in Melani Barlai and others (eds), *The Migrant Crisis: European Perspectives and National Discourses* (LIT-Verlag 2017) 13–20.

3 The CJEU decisions and Advocates General's Opinions were available on CURIA <www.curia.europa.eu> accessed 25 August 2018, and the European Court of

CJEU's contribution to a common European understanding of human rights (a so-called *ius commune europaeum*) takes into account the frequency and quality of the Court's references to the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter' or 'CFREU'),[4] the 1950 European Convention on Human Rights and Fundamental Freedoms ('ECHR'),[5] the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol ('Refugee Convention'),[6] and the decisions of the European Court of Human Rights ('ECtHR'). This topic has been widely discussed in the academic literature.[7] However, an update or revaluation of the case law is justified by the ever growing number of CJEU judgments on asylum issues.[8] Although some of the decisions have already been analysed by scholars,[9] in the publications currently available researchers have primarily scrutinised detailed aspects of EU asylum law e.g. a right to a legal remedy in the Dublin procedure.[10] In contrast, in this article 'asylum policy' is understood in its

Human Rights judgments were available on <https://hudoc.echr.coe.int> accessed 25 August 2018.

4 Consolidated version [2016] OJ C202/389.

5 ETS No. 5.

6 189 UNTS 137 and 606 UNTS 267.

7 Cf. Sílvia Morgades-Gil, 'The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?' (2015) 27 International Journal of Refugee Law 433, 433–456; Sara Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 European Journal of Migration and Law 137, 137–153; Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders' (2015) 22 Maastricht Journal of European and Comparative Law 812, 812–835.

8 Between 1 January 2015 and 15 September 2017, the CJEU closed 21 cases focusing on 'asylum policy'. Since then up until 14 November 2018, the CJEU has issued 11 judgments on asylum issues. CURIA (n 4).

9 Case C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:409 and Case C-155/15 *George Karim v Migrationsverket* EU:C:2016:410 are exceptional as they were commented in Maarten den Heijer, 'Remedies in the Dublin Regulation: Ghezelbash and Karim' (2017) 54 Common Market Law Review 859.

10 Heijer (n 9). The Dublin procedure is regulated in Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the

holistic meaning. It therefore applies to all issues starting from the submission of an asylum application to the moment when a decision on granting or rejecting asylum becomes final.[11] As such, it encompasses different rights available to asylum seekers e.g. to submit an asylum application, to appeal a decision denying asylum, and to have an asylum interview. Due to the impact of the CJEU's decisions on the member states' laws and practices, this analysis contributes to the discussion on the relationship between the *effet utile* of EU law and the protection of fundamental rights.

A critical evaluation of its recent judgments shows that the Court of Justice has recognised the importance of the Refugee Convention within the CEAS.[12] However, the CJEU has not established a consistent practice of referring to that Convention. Hopes that the CJEU will progressively develop the protection of rights enshrined in the Refugee Convention[13] have so far not materialised. The scope of the rights secured by the CFREU (which, according to Article 52(3) of the Charter, have the same meaning and scope as those in the ECHR) has also rarely been investigated by the Court of Justice.[14] The principle that the ECHR represents a minimum standard of

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criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31 (hereinafter 'the Dublin III Regulation').

11 See Article 78 of the 78 of the Treaty on the Functioning of the European Union. Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/47.

12 Case C-443/14 *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover* EU:C:2016:127, para 29, Case C-573/14 *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani* EU:C:2017:71, para 42, Case C-560/14 *M. v Minister for Justice and Equality, Ireland, Attorney General* EU:C:2017:101, para 22.

13 Roland Bank, 'The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law' (2015) 27 International Journal of Refugee Law 213, 213.

14 *M.* (n 12) paras 30-33, Case C-348/16 *Moussa Sacko v Commissione Territoriale per il riconoscimento della protezione internazionale di Milano* EU:C:2017:591, para 32 and Case C-578/16 PPU *C.K., H.F., A.S. v Republika Slovenija* EU:C:2017:127 are exceptional in this regard. However, the Charter applies only to issues which are 'within the meaning and scope of EU law'.

protection of fundamental rights in the EU was established by the CJEU to limit the analysis of the rights guaranteed by the CFREU.[15] Those rare and limited references to international human rights law (including the ECHR, as interpreted by the ECtHR) confirm that the Court of Justice still focuses primarily on the autonomy of EU law, insufficiently integrating this special legal regime into other branches of international law. This fundamentally limits the CJEU's contribution to the *ius commune europaeum*.

In certain areas, however, EU law and the Court of Justice's decisions provide for the protection of more precise and specific rights in comparison to the Refugee Convention or the ECHR. Some CJEU decisions may therefore set an example to other courts, including the ECtHR, particularly on issues such as the possibility of questioning the legality of intergovernmental cooperation, specific timeframes for permissible detentions, an obligation to issue a decision rejecting the examination of subsequent asylum applications, and the impact of the receiving country's actions on the efficiency of guarantees of persons subjected to the Dublin procedure.

Although the Court of Justice increasingly upholds fundamental rights, it does not do so consistently. Examples of decisions favouring member states' interests over the rights of asylum seekers can be found in judgments focusing on the arrival of exceptionally large numbers of migrants. These judgments focus on literal interpretations of EU law, favouring mutual trust over the individual's right to an effective remedy.[16] They also lack consistency with the standard set by the ECtHR. Due to the importance of the challenges associated with an unprecedented number of migrant arrivals, recalling that also non-EU state parties to the ECHR (*inter alia*, countries covered by the EU neighbourhood policy) are affected with the migration crisis, these judgments question the *ius commune europaeum*.

This article consists of five parts. The presentation of the methodology of selection of the CJEU judgments (section II) is followed by concise

15 Cf. Case C-239/14 *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy (CPAS de Huy)* EU:C:2015:824, *Ghezelbash* (n 9), Case C-18/16 *K. v Staatssecretaris van Veiligheid en Justitie* EU:C:2017:680, and *Mousa Sacko* (n 14).

16 Cf. Case C-646/16 *Khadija Jafari, Zainab Jafari v Bundesamt für Fremdenwesen und Asyl* EU:C:2017:586 and Case C-695/15 PPU *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal* EU:C:2016:188.

reflections on the coherence between the Council of Europe ('CoE') and the EU's standards of protection of human rights (section III). The CJEU's judgments are briefly presented in section IV. They are gathered in thematic sets in which cases are presented in chronological order to show the gradual development of fundamental rights. This section also analyses recent cases in light of earlier findings of scholars. Section V critically examines if the CJEU adequately protects the fundamental rights of refugees and asylum seekers, thereby contributing to the development of the *ius commune europaeum*.

II. The Methodology of Selection of the CJEU Judgments

A filtered search on the CURIA database shows that, between 1 January 2015 and 15 September 2017 (the period with the highest inflow of asylum seekers to the EU),[17] the CJEU closed 21 cases focusing on 'asylum policy'.[18] In those cases, the Court referred to: the CFREU (eleven judgments); the Dublin III Regulation (ten cases), Directive 2013/32 and Council Directive 2005/85 on asylum procedures (five cases),[19] Directive 2013/33 laying down standards for the reception of asylum applicants (five cases),[20] and Council Directive 2004/83 on minimum standards of qualification as refugees (one case).[21] The Mass Influx Directive (Council Directive 2001/55)[22] was cited once. Finally,

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17 Eurostat, 'Asylum statistics' [April 2018] Statistics Explained <https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 14 November 2018.

18 CURIA (n 3).

19 Four references to Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60. Council Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13 was cited once.

20 Directive 2013/33 of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96.

21 Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12.

22 Council Directive 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on

'asylum policy' cases also concerned the Schengen Borders Code[23] (two cases) and Directive 2008/115 on common standards and procedures for returning illegally staying third-country nationals (four cases).[24]

This article will analyse the following judgments, listed in chronological order, made by the CJEU between 1 January 2015 and 15 September 2017, which referred to the above-cited regulations: *Tall*, *Warendorf*, *Al Chodor*,[25] *J.N.*,[26] *Mirza*, *Ghezelbash*, *Lounani*, *M.*, *C.K.*, *H.F.*, *A.S.*, *Daher Muse Ahmed*,[27] *Moussa Sacko*, *A.S.*,[28] *Jafari*, *Mengesteab*,[29] *Amayry*,[30] *K*, and *Karim*. The above-mentioned cases have been chosen due to the fact that all of them were assigned the keyword 'asylum policy' by the CURIA and they were issued by the CJEU between 1 January 2015 and 15 September 2017. This research is thus based on the judgments issued during the period of the highest inflow of asylum seekers to the EU, namely 2015 and 2016. Additionally, it covers parts of 2017, as all asylum seekers should receive first-instance decisions in their cases, even if they submitted their applications by the end of December 2016 (as, according to Directive 2013/32 asylum decision should, as a rule, be made within six months). The analysis focuses on all requests by interested member states for a preliminary ruling in asylum policy cases. Therefore, it cites those CJEU judgments that address the situation of countries concerned with the transit of migrants (both the Mediterranean countries and countries located on the Balkan migration route) and destination countries.

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measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

23 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

24 Directive 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

25 Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor* ECLI:EU:C:2017:213.

26 Case C-601/15 *J.N. v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:84.

27 Case C-36/17 *Daher Muse Ahmed v Bundesrepublik Deutschland* EU:C:2017:273.

28 Case C-490/16 *A.S. v Republika Slovenija* EU:C:2017:585.

29 Case C-670/16 *Tsegezab Mengesteab v Bundesrepublik Deutschland* EU:C:2017:587.

30 Case C-60/16 *Mohammad Khir Amayry v Migrationsverket* EU:C:2017:675.

Nevertheless, not all of the cases which the CJEU marked with a keyword 'asylum policy' met the thematic criteria of this article.[31] In two cases the referring national courts withdrew their requests for a preliminary ruling, which makes it impossible to analyse them as they were removed from the register of the Court of Justice.[32] The *Mossa Ouhrami* case did not cite any asylum issues, but instead focused on the aforementioned Directive 2008/115. Finally, in *Ovidiu-Mihăiță Petrea*, the Court of Justice's decision concerned the right of a Romanian citizen to exercise his freedom of movement, and therefore does not meet the thematic criteria of this article. Thus, four of the CJEU judgments – *Max-Manuel Nianga*, *Seusen Sume*, *criminal proceedings against Mossa Ouhrami*, and *Ovidiu-Mihăiță Petrea* – could not be analysed.

The case selection for this research is thus based on clearly defined criteria, namely the thematic scope and the time of making judgments. As such, the selected decisions of the Court of Justice constitute a reliable starting point for a comparative analysis, focusing on the CJEU's standard of protection of the fundamental rights of asylum seekers. A relatively large number of analysed judgments ensures a well-grounded examination of the Court of Justice's interpretation of these rights. The CJEU's respect for *stare decisis*[33] increases the reliability of the present article's findings.

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31 To list the case law in a hronological order: C-445/14 *Seusen Sume v Landkreis Stade* EU:C:2015:314, Case C-199/16 *Max-Manuel Nianga v État belge* EU:C:2017:401, Case C-225/16 *a criminal proceedings against Mossa Ouhrami* EU:C:2017:590, Case C-184/16 *Ovidiu-Mihăiță Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis* EU:C:2017:684.

32 *Max-Manuel Nianga* and *Seusen Sume*.

33 Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press 2014); Pedro Caro de Sousa, 'Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance' (2012) 13 German Law Journal 979, 1002.

III. European Standards of Protection of Human Rights

1. The Development of Ius Commune Europaeum *as a "Safe Harbour"*

Diversification and expansion of international law has resulted both in its fragmentation[34] and specialisation.[35] The identification of an adequate standard of protection of human rights is a complicated issue, particularly 'when the wording and scope of the respective provisions contain subtle differences'.[36] This explains why building a common understanding of human rights – *a ius commune* – is always a work in progress.[37] It unveils conflicts between universal and regional systems of protection of human rights,[38] thereby 'strik[ing] at the heart of the principle of universality on which human rights rests, both legally and conceptually'.[39] There are divergent views about all principal features of the *ius commune*. Nevertheless, 'the

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34 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Fifty-Eighth Session, Geneva, 1 May-9 June and 3 July-11 August 2006' 10.

35 Ibid 17; Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law' (2007) 2 European Journal of Legal Studies 4.

36 Peter Van Elsuwege, 'New Challenges for Pluralist Adjudication after Lisbon: The Protection of Fundamental Rights in a Ius Commune Europaeum' (2012) 30 Netherlands Quarterly of Human Rights 195, 212; Sergey Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-Fertilisation' (2015) 84 Nordic Journal of International Law 371, 393.

37 Michael De Salvia, 'L'Élaboration d'un "ius commune" de Droits de I'Homme et les Libertés Fondamentales dans la Perspective de l'Unité Européenne: L'oeuvre Accomplie par la Commission et la Cour Européennes des Droits de l'Homme' in Franz Matscher, Gérard J Wiarda and Herbert Petzold (eds), *Protecting human rights: The European dimension: studies in honour of Gérard J. Wiarda = Protection des droits de l'homme: la dimension européenne* (Heymanns 1988) 555–563.

38 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 219; Raghunandan Swarup Pathak, 'Introductory Report' in Council of Europe (ed), *Universality of human rights in a pluralistic world* (Engel 1990) 5-17.

39 United Nations Human Rights Office of the High Commissioner, 'The European Union and International Human Rights Law' 8 <https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf> accessed 15 November 2018.

transnational and universal character of the discourse and the pervasive yet multifaceted relationship between the global discourse and local legal and political systems'[40] also increases the visibility and coherence of human rights and, consequently, the efficiency of the protection of those rights.

Although European values are often said to be imposed on non-European societies,[41] identifying a common European standard is not without difficulty. The Council of Europe and the EU play important roles in the protection of human rights in Europe, but both institutions operate in very different legal, political, and factual contexts. Even though 'the EU may have to adhere to human rights obligations indirectly through the prior obligations of its Member States',[42] EU law does 'not necessarily reflect the broader and deeper standards contained in UN instruments'[43] and in the ECHR. For 'this complex interplay between overlapping and interdependent dimensions [...] [to] not lead to a cacophony of divergent interpretations',[44] a well-managed dialogue between the CJEU and the ECtHR is necessary. This could indeed increase the fairness and predictability of the decisions of the two courts,[45] both of which should strive towards 'the development of a harmonious European common law of fundamental rights'[46] – a *ius commune europaeum*.

To this end, it would help to identify general European trends in the interpretation of these rights, which ultimately would assist in achieving a common – albeit not unified – European understanding of human rights. This requires the strengthening of judicial dialogue, both horizontal (i.e. between European and national courts, and constitutional and regional

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40 Paolo Carozza, 'My Friend Is a Stranger: The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 Texas Law Review 1031, 1077.

41 Paivi Leino, 'A European Approach to Human Rights? Universality Explored' (2002) 71 Nordic Journal of International Law 455, 460.

42 Tawhida Ahmed and Israel de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 European Journal of International Law 771, 772.

43 United Nations Human Rights Office of the High Commissioner (n 39) 8.

44 Van Elsuwege (n 36) 197.

45 Guy Harpaz, 'The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' [2009] Common Market Law Review 105, 109.

46 Van Elsuwege (n 36) 197.

courts) and vertical (i.e. between European courts and constitutional courts).[47] International judges are already aware of the need to build such a common European understanding of human rights.[48] They strengthen the *ius commune europaeum* by 'cross-referenc[ing] each other's decisions when interpreting human rights norms',[49] and are inspired by other courts' *rationes decidendi*, even if it is still highly debated which principles are shared by European countries.[50]

An increased integrity and visibility of fundamental rights strengthens the predictability of the judgments of the European courts and increases coherency of interpretations of human rights standards. This is for the benefit of member states, as it limits the likelihood that an implementation of EU law would lead to an infringement of the ECHR. However, an increased integrity and visibility of fundamental rights is also an important advantage to individuals – especially asylum seekers – who can rely on interpretations by analogy, and on the CJEU's understanding of their rights. Therefore, in this article the CJEU judgments which underline the need to strengthen the establishment of a clear (well-justified and elaborated in the Court's decisions), balanced (taking into account interests of individuals, and of the member states), and coherent (taking into account not only EU secondary law but also the Charter, and the ECHR) European system of protection of human rights are called a "safe harbour".

Derivations from common interpretation lines lead to confusion regarding the commonality of European human rights, especially if judgments are not based on well-reasoned *rationes decidendi*.[51] This scenario may be called a "sinking ship" because it creates a risk to both states and individuals. Firstly,

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47 More in Agnès G Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009).

48 Van Elsuwege (n 36) 215.

49 Vasiliev (n 36) 372.

50 According to Michael De Salvia *ius commune europaeum* is focused on: human dignity, legality, equality of arms and proportionality. Michael De Salvia (n 37) 555-563. Others contested inclusion of the principle of equality to this list. Leino (n 41) 460.

51 Confront with Andreas Paulus, 'International Adjudication' in Samantha Besson and John Tasioulas (eds), *The philosophy of international law* (Oxford University Press 2010) 220.

diverting approaches can expose the EU member states – all of which are also state parties to the ECHR – to inconsistencies and uncertainties regarding the scope of their responsibilities under EU and international law. This could weaken the social acceptance of CJEU and ECtHR judgments, and increase tensions between the two courts.[52] Secondly, individuals would have difficulties in understanding and, consequently, successfully claiming their rights in mutually incoherent European systems for the protection of human rights. Therefore, their feeling of alienation may be analogous to being on a sinking ship which is left on a swell of the sea of human rights law. Hence, in this article the metaphor a "sinking ship" relates to a complex "ocean" of responsibilities of states on the one hand, and a complicated – from an individual's point of view – process of identifying the applicable standard of protection of fundamental rights on the other hand.

2. The Council of Europe's Standard

Actions aimed at establishing a European system for the protection of human rights preceded the end of World War II.[53] Scholars correctly claim that,

> from [...][the] initial starting point, the CoE has developed one of the most advanced systems for the protection of human rights anywhere in the world. The [...] system has a refined enforcement mechanism and is very effective.[54]

The efficiency of the system has increased over time, especially since the ECtHR began to operate on a permanent basis.[55] The ECtHR stressed early on that the Convention should be read in a way appropriate 'to realise the aim and achieve the object of the treaty'.[56] This approach was accompanied by the

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[52] Harpaz (n 45) 122-123.

[53] Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd edn, Oxford University Press 2007) 2.

[54] Rhona KM Smith, *Textbook on International Human Rights* (6th edn, Oxford University Press 2014) 97. The same conclusions were made by Bantekas and Oette (n 38) 221–222 and Vasiliev (n 36) 381.

[55] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby 1994 (ETS No 155). More in Mowbray (n 53) 14–18.

[56] *Wemhoff v Germany* App no 2122/64 (ECtHR, 27 June 1968), para 8.

development of the ECtHR's autonomous interpretation of ECHR rights.[57] The Strasbourg Court found that 'the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions'.[58] This is a clear indication that the ECtHR's aim is to ensure that the ECHR rights are not theoretical nor illusory, but practical and effective.[59]

This dynamic interpretation has extended the scope of application of the Convention to 'an ever-widening range of contexts'.[60] Hence, although the ECHR and its protocols do not contain a specific right to asylum, the ECtHR has nonetheless developed adequate safeguards in this regard,[61] by stressing the absolute nature of the rights under Articles 2 and 3 of the Convention.[62] Other ECHR rights, especially the right to private and family life – Article 8 – and the right to effective access to an appeal – Article 6 – go beyond the *non-refoulement* principle and substitute the Refugee Convention.

3. The EU's Standard

The European Economic Communities ('EEC') were initially established to strengthen the economic cooperation between its member states. However, a gradual expansion of the EEC's competences also increased the interest in

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57 More in George Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 European Journal of International Law 279.

58 *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 31.

59 *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979).

60 Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights Law Review 57, 58. Evolutive interpretation has been questioned by some States Parties to the ECHR. More in Fiona de Londras and Kanstantsin Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 Human Rights Law Review 523, 523.

61 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 311.

62 It started with *X v Belgium* App no 984/61 (ECtHR, 19 May 1961), 6 Collection of Decisions, 39, 40. Compare with Samantha Velluti, *Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts* (Springer 2014) 79; Agnès G Hurwitz (n 47) 190–191.

protecting human rights at the EEC level.[63] This was confirmed not only in the subsequent Treaties, but also in the decisions of the Court of Justice.[64]

The entry into force of the Treaty of Lisbon[65] in 2009 was a significant step towards protecting fundamental rights in the EU. As a result of the increase in the EU's functional powers, the protection of fundamental rights expanded into policy areas in which they were initially only incidentally regulated.[66] The widening of the CJEU's jurisdiction further contributed to that process, as the Court did not refrain from a *pro homine* interpretation of EU law even during transition periods.[67] However, to this day, the CJEU can only decide on issues which fall within the scope of EU law.[68]

Additionally, the Treaty of Lisbon made the CFREU legally binding, bringing the protection of fundamental rights to a new level.[69] According to Article 6(1) TEU, the Charter has the same legal status as the Treaties. The Charter was drafted using plain language, which is used in order to increase the visibility of fundamental rights protected by EU legislation, and to define the current state of development of these rights. The Charter does not directly quote the ECHR, however it does refer to it.[70] It is disputed whether

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63 Smith (n 54) 112; Christian Franklin, 'The Legal Status of the EU Charter of Fundamental Rights after the Treaty of Lisbon' (2010) 15 Tilburg Law Review 137, 139; Harpaz (n 45) 107.

64 Franklin (n 63) 148; Aidan O'Neill, 'The EU and Fundamental Rights – Part 1' (2011) 16 Judicial Review 216, 216; Van Elsuwege (n 36) 196.

65 Treaty on European Union [2007] OJ C306/1.

66 Elise Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 Common Market Law Review 219, 226–227; Eleanor Spaventa, 'Should We "Harmonize" Fundamental Rights in the EU? Some Reflections about Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System' [2018] Common Market Law Review 997, 1000.

67 Cf. Case C-19/08 *Migrationsverket v Edgar Petrosian and Others* EU:C:2009:41, and Case C-465/07 *Elgafaji and Elgafaji v Staatssecretaris van Justicie* EU:C:2009:94.

68 Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321, [1989] ECR 02609.

69 Spaventa (n 66) 1001; Muir (n 66) 219; Agnès G Hurwitz (n 47) 247.

70 Andrzej Bisztyga, 'Europejska Konwencja Praw Człowieka a Karta Praw Podstawowych Unii Europejskiej – Stan Kompatybilności czy Konkurencyjności?' (2011) 3 Przegląd Prawa Konstytucyjnego 179, 186.

the Charter's aim is to complement the ECHR,[71] or whether it guarantees a higher standard of protection.[72] Official Explanations relating to the Charter of Fundamental Rights provide little clarification and are not legally binding.[73]

4. The EU versus the Council of Europe

Article 6(2) TEU puts a time-unspecified obligation on the EU to accede to the ECHR. However, this accession shall not affect the Union's competences as defined in the Treaties. As a consequence, the CJEU has so far declared potential accession agreements to be incompatible with EU law.[74] Moreover, Article 53 CFREU guarantees that the ECHR sets out a minimum standard of fundamental rights protection in the EU. However, as the Charter applies only to issues which are 'within the meaning and scope of EU law', the CJEU decides *ad casum* if this precondition is met.[75] Still, it is unclear if 'the meaning and scope' refers to the set of rights enshrined in the Charter, or if it applies also to a certain standard of protection of those rights.[76] The first option provides a possibility to rely on the Charter only if EU law directly refers to fundamental rights. This approach focuses on the mere existence of the Charter rights, but ignores the differences between the CFRUE and the ECHR regarding the content of these rights. Instead, the

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71 Daniel Engel, *Der Beitritt der Europäischen Union zur EMRK: vom defizitären Kooperationsverhältnis zum umfassenden EMRK-Rechtsschutz durch den EGMR?* (Mohr Siebeck 2015) 24.

72 Bożena Gronowska, 'The EU Charter on Fundamental Rights – Do We Really Need It?' in Justyna Maliszewska-Nienartowicz, *European Union at the Crossroads: The Need for Constitutional and Economic Changes* (TNOiK 2007) 137.

73 Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

74 *Opinion 2/94 on accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECR 1996 P-1783; *Opinion 2/13* EU:C:2014:2454.

75 Francesca Ippolito, 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?' (2015) 17 European Journal of Migration and Law 1, 2–4. The CJEU has been criticised for not finding the application of EU law in Case C-638/16 PPU *X and X v Belgium*, EU:C:2017:173. Evelien Brouwer, 'The European Court of Justice on Humanitarian Visas: Legal Integrity vs. Political Opportunism?' (2017) CEPS Commentary 3.

76 Daniel Engel (n 71).

second view should be promoted because it increases the coherency of European systems of protection of human rights, thereby preventing potential conflicts between obligations stemming from the ECHR and EU law. As the EU has not yet acceded to the ECHR, member states would be the biggest beneficiaries of a strengthened *ius commune europaeum*, as it would mitigate the likelihood of repeating legal problems, such as those which arose in *M.S.S.*[77] Currently, the ECHR and the Charter standards may vary, so states have to check if the application of proportional and reasonable restrictions imposed by EU law will not infringe the ECHR.[78] However, this is not a systemic solution as it leaves discretion to national bodies regarding identification of the common understanding of these standards.

Finally, the Strasbourg Court has developed the doctrine of equivalent protection which provides for the possibility of checking the conformity of the EU's actions with the ECHR.[79] This was established despite the EU not being party to the Convention. The doctrine takes into account the peculiarities of EU law, including the principles of supremacy and direct effect, which makes it a reasonable compromise.[80] The Strasbourg Court has stressed that the ECHR did not prohibit state parties from transferring their sovereign power to an international organization.[81] However, such a transfer does not lift the human rights responsibilities of these states for the actions and omissions of their bodies under their international legal obligations. Therefore, even though the ECtHR have admitted that EU law generally ensures an equivalent protection of human rights, they have reserved a right to review if, in an individual case, a member state's actions are manifestly incoherent with the ECHR.

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77 *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

78 Daniel Engel (n 71) 27; Agnès G Hurwitz (n 47) 249.

79 *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005), paras 155–157. It was inspired by *Solange II* [1986] Wünsche Handelsgesellschaft 2 BvR 197/83. More in Elisa Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill 2017) 19–23.

80 Ravasi (n 79) 38–39; Van Elsuwege (n 36) 206.

81 *Matthews v the United Kingdom* App no 24833/94 (ECtHR, 18 February 1999) para 32.

The doctrine of equivalent protection was challenged before the CJEU in the *M.S.S.* and *N.S.* cases.[82] Nonetheless, the ECtHR has stuck to this standard and refrained from developing its own interpretation of EU law.[83] However, it follows from the CJEU decision in *Melloni*[84] that, in harmonised policy areas, national legislation cannot provide for a higher standard of protection of fundamental rights than that established by EU law, if this endangers the supremacy of EU law.[85] A 'minimum standard' approach was not promoted in this judgment, leaving member states with contradictory interpretations of their international human rights obligations. However, the Court of Justice subsequently maintained an equivalent protection doctrine.[86] National courts may also use the ECHR as a minimum standard if the CJEU finds that the case is not 'within the meaning and scope of EU law'.[87] The ECtHR has already confirmed that it will not refrain from checking the equal protection standard in asylum cases.[88]

5. Whose Standard?

The EU is slowly adopting an increased focus on fundamental rights. This was facilitated when the Charter became legally binding and was given the same legal basis as the Treaties. Nonetheless, the EU has not established a holistic fundamental rights policy. The ECHR sets the minimum standard of protection for the EU, even though the EU is not party to the Convention.

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82 Joined cases C-411/10 and C-439/10 *N.S. v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865.

83 *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 November 2011), paras 225–226. See references in Velluti (n 62) 88.

84 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107.

85 Krystyna Kowalik-Bańczyk, 'Autonomia Prawa Unijnego w Świetle Opinii 2/13' (2015) 12 Europejski Przegląd Sądowy 14, 19; Louise Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection - On Opinion 2/13 on EU Accession to the ECHR' (2015) 15 Human Rights Law Review 485, 492–493.

86 Bernhard Schima, 'EU Fundamental Rights and Member State Action After Lisbon: Putting the ECJ's Case Law in Its Context' (2015) 38 Fordham International Law Journal 1097, 1121–1124.

87 Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734, paras 71–72. More in Sánchez (n 7) 1593–1594.

88 *Tarakhel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014), para 88.

Nevertheless, it is still unclear whether the CJEU sufficiently indicates in its decisions the importance of ensuring consistency of application between the rights envisaged in the ECHR and in the Charter.[89]

The ECtHR can decide on all issues within state jurisdiction and, as such, it is a fully-fledged human rights court. The Court of Justice, on the other hand, can only refer to or uphold fundamental rights if the circumstances fall within the scope of EU law. As the EU regulates fundamental rights only incidentally, the CJEU is more restricted in securing these rights than the ECtHR.[90]

The Refugee Convention forms the basis of the CEAS. The importance of the Refugee Convention was underlined by Article 78(1) TFEU, Article 18(2) CFREU, and EU legislation building the CEAS. The CJEU was 'the first international court actually interpreting the Refugee Convention'.[91] This raised expectations that the Court of Justice 'would boost international refugee law',[92] as the CJEU's progressive interpretation of the Refugee Convention could be an inspiration to other non-EU legal systems. This establishes a "safe harbour".

As such, the most prominent advantages of the CoE's system of protecting human rights include the ECtHR's extensive experience in human rights law and its wide jurisdiction. The Strasbourg system is more holistic and the ECHR represents a minimal standard for the EU. Due to 'the living instrument doctrine', the ECHR is continuously developed and adapted to meet the current needs of European societies. However, this doctrine applies only when a general trend in the CoE is found, which limits accusations of judicial activism of the ECtHR.

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89 Currently there are no self-contained (closed) regimes, but some specialised regimes are increasingly independent from general international law. Ewelina Cała-Wacinkiewicz, *Fragmentacja prawa międzynarodowego* (Wydawnictwo C.H. Beck 2018) 386–392.

90 Turkuler Isiksel, 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 European Journal of International Law 565, 582.

91 Bank (n 13) 213.

92 Ibid.

IV. An Overview of the CJEU's Judgments

1. Increased Recognition of the Right to Effective Remedy in Dublin Cases

The Dublin III Regulation has significantly increased the procedural safeguards in asylum law without prioritising the speediness of the Dublin procedure over the right of the individual to judicial scrutiny.[93] This was stressed in *Ghezelbash*, in which the CJEU underlined that fundamental rights are not limited to 'systemic flaws in the asylum procedure and in the reception conditions for asylum seekers',[94] as this interpretation would deprive other rights of any practical effect.[95] This was an important development, particularly when compared to the judgment in the *N.S* case. In *Ghezelbash*, the CJEU stressed that an applicant can ask for a verification that the Dublin criteria were applied correctly to his or her case, but the decision responding to this request 'could have no bearing on the principle of mutual trust'.[96] However, this does not amount to a right to choose the country in which the asylum application is processed.

Ghezelbash can unquestionably be identified as creating a "safe harbour" as it stresses the importance of fundamental rights in the Dublin procedure. At the same time, the Court weighted the above-described *pro homine* interpretation of EU law against the interests of the member states by stressing that the right to judicial scrutiny cannot be understood as a right to choose the country of asylum. This balanced – and hence, compromised – approach increased the practicality of the CJEU judgment. The same purpose is achieved by the Court's indication that the right to judicial scrutiny applies not only in case of systemic flaws as in most cases this kind of flaws are not identified.

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93 More in Heijer (n 9) 859–860.

94 *Ghezelbash* (n 9) para 37. Limitations of the right to judicial remedy to systemic deficiencies were criticised by Isiksel (n 90) 586 and Hemme Battjes and Evelien Brouwer, 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?' (2015) 8 Review of European Administrative Law 183, 189–190.

95 *Ghezelbash* (n 9) para 57.

96 Ibid paras 54–55.

In *Ghezelbash*, the CJEU did not specify which Dublin criteria may be contested by applicants. These issues were, however, addressed in *Karim*.[97] The Court explained that the national court has the right to verify the duration of absences of the asylum seeker from the EU.[98] *Karim* can be classified as contributing to a "safe harbour" as the ruling ensures the coherence of the CJEU's interpretation of the right to judicial remedy with its earlier decisions in *M.S.S.* and *N.S.*[99] The Court indicated that the Dublin criteria may be questioned by the applicant, and a national court must be able to verify substantive aspects of the applicant's claims. Yet, a national court's decision in an individual case cannot be understood as an attempt to question the mutual trust.

This gradually increasing recognition of the right to an effective remedy was affirmed in *A.S.*[100] The Court of Justice stressed that an applicant may claim improprieties in an individual Dublin transfer due to a late submission of the transfer decision.[101] This finding also applies in cases of illegal border-crossing when the transfers were accepted by the receiving country.[102] This increases the practical relevance of the *A.S.* decision since many applications are submitted in similar circumstances. The six-month period for a transfer should be calculated from the moment when the final appeal decision is made. This interpretation contributes to the *effet utile* because a submission of an appeal suspends the transfer. In times of a migration crisis, a judgment upholding another Dublin criterion, which can be relied upon by an applicant who has illegally crossed the border, is a useful clarification. Thus, it is clear that *A.S.* creates a "safe harbour".

The strengthening of the applicants' right to an effective remedy continued in the decision in *C.K., H.F., A.S.* Here the Court of Justice held that the applicants could present objective evidence of serious medical constraints to a Dublin transfer before national courts, and that the courts must then decide

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97 *Karim* (n 9); Heijer (n 9) 865.

98 *Karim* (n 9), paras 26-27. Dublin responsibilities cease when the receiving country will establish that the asylum seeker left the EU for more than three months. Heijer (n 9) 865.

99 Compare with Battjes and Brouwer (n 94) 187–188.

100 *A.S.* (n 28) paras 32–34.

101 Ibid para 35.

102 Ibid paras 90-92.

if the applicants' rights under Article 4 CFREU and Article 3 ECHR would be infringed if transfers were made.[103] This applies even when the asylum system of the destination country is not affected by any systemic deficiencies. This ruling is in line with *M.S.S.* (although this judgment was not cited by the CJEU) as systemic deficiencies should preclude all transfers *ad abstractum*. A reference to the ECtHR's decision in *Paposhvili*[104] increases the coherence between the case law of the CJEU and the ECtHR. Consequently, the CJEU's reasoning in *C.K., H.F., A.S.* contributes to the creation of a "safe harbour" as it reflects the ECtHR's level of protection and it is not limited to the systemic deficiencies of the destination country's asylum system.

The CJEU case law established in *Ghezelbash* and *Karim* was further developed in *Mengesteab*,[105] where the Court of Justice focused on the timeframe in which the request to take charge of an applicant should be made. It concluded that time limits 'contribute, in the same way as the criteria set out in Chapter III [of the Dublin III Regulation] [...], to determining the responsible Member State'.[106] Those deadlines can be invoked to question the proper implementation of the above-mentioned Regulation. Thus, the CJEU identified another factor, additional to those developed in *Karim* and *A.S.*, which can be raised during the judicial review. The Court also underlined that the receiving state's actions do not legalise the transfer if the Dublin III Regulation deadlines have been exceeded, thereby creating a "safe harbour".

The CJEU stressed, furthermore, that the decision of which state should be responsible for handling the asylum case should be initiated as soon as possible.[107] This does not necessarily signal the priority given to the speediness of the Dublin procedure, because it facilitates, *inter alia*, the search for family members of unaccompanied minors[108] and shortens the detention period. Regrettably, in *Mengesteab*, the CJEU did not address the

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103 *C.K., H.F., A.S.* (n 14), paras 75 and 90.

104 *Paposhvili v Belgium* App no 41738/10 (ECtHR 13 December 2016).

105 *Mengesteab* (n 29) paras 46–48.

106 Ibid para 53.

107 Ibid para 80–83. Therefore, judges focused on different aspect than in *N.S.* (n 82) para 108.

108 Jason Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) 47–78.

need to ensure the best interests of the child, even though it is clearly established in the Charter and CEAS. It also did not indicate that deprivation of liberty should be as short as possible. This suggests that the Court still focuses on EU integration, only reluctantly referring to the coherence of protection of fundamental rights, thus contributing more to a "sinking ship" situation. Owing to these deficiencies, it is difficult to classify *Mengesteab* as contributing either to the creation of a "safe harbour" or facilitating a "sinking ship".

The Dublin III Regulation does not set up objective preconditions for the limitation of liberty. Instead, it refers to Directive 2013/33 and Article 6 CFREU. Directive 2013/33 sets a higher standard than the ECHR because the Convention does not require a test of the efficiency of less coercive measures and of the existence of a risk of fleeing.[109] Nevertheless, the ECtHR judgment in *Del Rio Prada v Spain*[110] was referred to by the CJEU in *Al Chodor*[111] to find that any limitation to the right to liberty and security must be provided for by general law. Such law must be of a certain quality, sufficiently accessible, precise and foreseeable in its application; a consistent administrative practice does not meet that standard.[112] This finding increases the rule of law, and *Al Chodor* thus contributes to the *ius commune europaeum* because the CJEU specified that limitations to freedoms enshrined in the Charter have to be precisely defined by law, including by EU secondary legislation which has direct effect. This clarification applies to the right to asylum, but also to other rights envisaged by the Charter.

As the competencies of the EU are growing, member states are increasingly often, as Article 51(1) of the Charter puts it, 'implementing Union law'. Therefore, more and more frequently countries will have to decide to what extent they can limit the rights guaranteed by the CFREU. Consequently, the likelihood that the Charter's standard will not be applied correctly by

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[109] Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor* EU:C:2016:865, paras 49–55; *Al Chodor* (n 25) para 37.

[110] *Del Río Prada v Spain* App no 42750/09 (ECtHR 21 October 2013).

[111] *Al Chodor* (n 25) para 35

[112] Ibid, para 38-45. An increase in guarantees regarding detention in Dublin procedures was noted by Sánchez (n 7) 112.

member states is increasing. Hence, *Al Chodor* (which refers to the standard of law which limits freedoms envisaged in the Charter) will most likely be cited in other future CJEU judgments, also those focusing on other EU policies. Finally, the efficiency test could also be 'a source of inspiration' for the ECtHR in its future decision as it has already been criticised for not applying this test.[113] *Al Chodor* therefore clearly establishes a "safe harbour".

Tensions between the efficiency of EU law and the rights of asylum seekers lay at the heart of the decision in *Amayry*. The Dublin III transfer is suspended if the applicant asks for a judicial review of the Dublin decision. If that request is submitted after several weeks in detention, the deprivation of liberty is continuous and its total length may exceed the six-week period, which is, 'in principle, sufficient'.[114] A contrary view would put states which have introduced an automatic suspending effect of an appeal in a less favourable situation than those which have not introduced such a measure. It would also sacrifice judicial protection to the speediness of the Dublin mechanism. Moreover, the Court of Justice stressed that a detention of two months may not be overly excessive, but a three to twelve-month long deprivation of liberty is disproportionate.[115] This clarification is an important contribution to the *ius commune europaeum* because EU law, in that respect, is more specific than the ECHR. Hence, *Amayry* increases the fairness and predictability of rules on the deprivation of liberty, thereby contributing to a "safe harbour". Regrettably, a need to guarantee an individual case assessment and the national courts' supervision of the detention was only referred to in the context of longer periods of detention.[116] Moreover, considerations regarding the link between the duration and objective of the deprivation of liberty are missing references to the principle of proportionality and the ECtHR judgments, thereby forming part of a

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113 Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law Symposium: Part V: The Right to Belong: Citizenship and Human Rights' (2012) 19 Indiana Journal of Global Legal Studies 257, 282; Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 European Journal of Migration and Law 149, 176.

114 *Amayry* (n 30) para 30.

115 Ibid paras 45–47.

116 Ibid paras 46–47.

"sinking ship".[117] Despite these drawbacks, however, *Amayry* can be categorised as establishing a "safe harbour".

2. Combating Abuses of Asylum Procedures

According to statistical data some asylum seekers misuse asylum procedures, for example by submitting unfounded and subsequent applications.[118] To combat an overuse of refugee procedures, states may be tempted to sacrifice the rights of asylum seekers, especially the right to judicial remedy as it prolongs refugee status determination procedures.

These constraints were addressed in *Tall*, in which the CJEU clarified that the right to judicial remedy also covers the right to contest 'a decision not to further examine a subsequent application', even if it is followed by a return decision.[119] Nevertheless, it would be disproportionate to oblige member states to fully re-examine cases when no new evidence or arguments were found in the preliminary examination of the renewed application. The decision in *Tall* can therefore be considered a helping hand to countries which struggle with the overuse of asylum systems, as they can refrain from re-examining renewed applications. It also ensures a fair balance between the right to judicial scrutiny and the efficiency of asylum procedures, because prior to the delivery of this judgment subsequent applications were processed in accelerated procedures in which the applicants' rights were limited.[120] Owing to these reasons, *Tall* can be classified as creating a "safe harbour".

Similar constraints were addressed in *M*. EU legislation guarantees the right to a hearing in subsidiary protection cases, only if national law stipulates that an application is analysed as a request for asylum and, if a refugee status is denied, as a request for a subsidiary protection.[121] Nevertheless, this right should also be provided when a single procedure is not implemented. In that context, EU law will not apply directly. Still, rights conferred by EU law have to be effectively protected by domestic legislation, as the member states will

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117 Cf. *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) para 70.

118 Eurostat (n 17).

119 *Tall* (n 15) paras 44–45.

120 Sandra Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe* (Central European University Press 1999) 50.

121 Article 14 read with Article 10(2) of Directive 2013/32.

clearly be acting within the scope of EU law when they implement, enforce, or interpret EU secondary legislation.[122] This explains why *M.* contributes to a common understanding of the concept of 'acting within the scope of EU law' which applies also to other EU policies. For these reasons, *M.* contributes to the creation of a "safe harbour".

The possibility of limiting the right to an interview in an appeal was confirmed in *Mousa Sacko*.[123] Nevertheless, this restriction must respect guarantees established in Articles 6(1) and 13 ECHR. An appeal court or tribunal 'must be able to review the merits of the reasons which led the competent administrative authority to find that the application for international protection was unfounded or made in bad faith'.[124] Due to a close link between first instance and appeal proceedings, applicants may be denied a hearing on appeal, if the 'information contained in the administrative file in the proceedings at first instance' is sufficient.[125] That view seems to balance the fairness of the asylum procedure with its speediness. It is also in line with a literal interpretation of Directive 2013/32, which does not guarantee access to an interview in an appeal procedure. At the same time, references to the ECHR's standard provide adequate guarantees of protection of the applicants' rights. As such, *Mousa Sacko* is also part of the establishment of a "safe harbour".

In *Daher Muse Ahmed*, the CJEU concluded that a decision on the inadmissibility of an asylum application should be issued to an applicant who had been granted subsidiary protection by another member state.[126] Hence, applicants should submit their asylum claims in the first secure country. Some scholars support such an interpretation,[127] whereas others claim that this limitation is not explicitly provided for by the Refugee Convention.[128] As such, clarifications from the CJEU have contributed to a *ius commune europaeum* and the establishment of a "safe harbour". However, they were not

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122 Franklin (n 63) 152–154; Van Elsuwege (n 36) 199–200.

123 *Moussa Sacko* (n 14) paras 36–39.

124 Ibid para 36.

125 Ibid para 46, and *M.* (n 12) para 54.

126 *Ahmed* (n 27) paras 39–40.

127 Agnès G Hurwitz (n 47) 47.

128 Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 International Journal of Refugee Law 630, 650.

sufficiently justified and lacked references to the Refugee Convention, the ECtHR's judgments, and the Charter, thereby contributing to a "sinking ship" scenario. *Daher Muse Ahmed* therefore cannot easily be classified either as establishing a "safe harbour" or contributing to a "sinking ship".

3. Application of the 'Safe Country Concept'

The Court of Justice has been alleged by member states of increasing the protection of fundamental rights beyond the wording of EU Treaty provisions by defining EU standards in areas which were deliberately not regulated by EU law-makers or in which EU legislation was insufficiently precise and clear.[129] In other words, states have been accusing the CJEU of excessively favouring the rights of individuals over the state's sovereignty. Nevertheless, it would be misleading to say that the Court has always opted for a *pro homine* interpretation of EU law.[130] Evidence for this can be found in cases focusing on, for example, the 'safe country concept'.[131]

In *Mirza*, the CJEU upheld the transfer of the applicant to the country in which his asylum claim would be presumed to be inadmissible, on the grounds that he had travelled via a safe country.[132] A contrary interpretation could introduce a new exception to the general rule. It could also encourage migrants to continue their journey without waiting for the asylum decision issued by the first safe country, which would overburden destination countries and be contrary to the foundations of the CEAS. This part of *Mirza* does not raise doubts regarding compliance with fundamental rights. The same cannot be said about the release of the transit country of its obligation to provide the sending country with extracts from national law concerning

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[129] Muir (n 66) 221-222. More in: Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review 945, and Karen J Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (1998) 52 International Organization 121.

[130] Some scholars claim that this *pro homine* interpretation is at odds. Isiksel (n 90) 582–583.

[131] More on this concept in Lavenex (n 120); Claudia Engelmann, 'Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990–2013)' (2014) 16 European Journal of Migration and Law 277.

[132] *Mirza* (n 16) para 63.

the concept of 'a safe country'.[133] The laws and practices of member states as regards this concept vary.[134] Nevertheless, the CJEU unquestionably favoured mutual trust over a duty to ensure that the Dublin transfer would not result in the automatic removal to a country which is presumed to be safe. This raises questions regarding *Mirza*'s coherence with *M.S.S.*[135] As the concept of 'a safe country' is also applied by non-EU countries, *Mirza* may encourage them to favour unconditional mutual trust, thereby contributing to a "sinking ship" scenario.

Jafari is another example of a *pro integratione* judgment, as the CJEU concluded that if a country has tolerated the entry of an individual into its territory (also as a result of an avoidance of border controls), it could not escape Dublin responsibilities, because the Schengen Border Code, Directive 2001/55 and Article 78(3) TFEU, provide mechanisms which could mitigate the migration crisis.[136] Regrettably, the CJEU did not address the fact that these measures do not help transit countries to stop secondary movements of large numbers of asylum seekers efficiently. Therefore, *Jafari* neither ensured the *effet utile* of EU law, nor safeguarded satisfactory reception standards. It can thus be classified as contributing to a "sinking ship" scenario.

These deficiencies were addressed in *A.S.*, in which the CJEU extensively cited *Jafari*, but softened its line of interpretation. The transit country is responsible for processing asylum claims if this does not expose the applicants to a real risk of suffering inhuman or degrading treatment.[137] Regrettably, in *A.S.,* the Court did not specify whether such a risk should be identified *ad casum* or *in abstracto*. The CJEU complicated its answer to this question by citing in the same paragraph both an individualised risk and a risk existing in EU member states.[138] Hence, *A.S.* can also be considered as creating a "sinking ship" situation.

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133 Ibid paras 57–63.

134 Engelmann (n 131) 288–300.

135 Battjes and Brouwer (n 94) 188.

136 *Jafari* (n 16) paras 90–92.

137 *A.S.* (n 28) para 41.

138 Ibid.

V. "Safe Harbour" or "Sinking Ship"?

1. Functional Interpretation of EU Law in Asylum Cases

Interpretation of EU law can be difficult due to differences in language versions of the EU legislative acts. A comparative analysis of the different language versions may also be insufficient.[139] Therefore, it is necessary to consider the context of EU law and the objectives pursued by the rules which a specific provision is part of.[140] Thus, the CJEU have repeatedly examined the objectives of the Dublin III Regulation[141] and the CEAS.[142]

In *Fransson,* EU fundamental rights were cited to give effect to EU rules, even though the EU legislation which was at the heart of this case left a certain level of discretion to the member states.[143] Some scholars supported this view and explained that 'the scope of EU law should be understood more broadly whenever this is a pre-condition for emphasising fundamental rights protection throughout the European Union'.[144] This approach should be applied especially 'when it presents even a partial connection with EU law'.[145] These opinions should be praised because the Charter has increased the visibility of fundamental rights in the EU.[146] Moreover, Article 51(1) of the Charter supports the CJEU in promoting fundamental rights,[147] making the Court co-responsible for building the *ius commune europaeum*. A broad understanding of a term 'within the scope of EU law' would therefore strengthen the EU integration process, thus establishing a "safe harbour".

However, a functional interpretation, which has already caused fundamental rights to spill over into areas which were not initially covered by EU law,[148] may cause concern among member states which would rather opt for slower

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139 Cf. *Al Chodor* (n 25) para 21; Opinion of AG Øe in *Al Chodor* (n 109) paras 38–39.

140 Case C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* EU:C:2013:862.

141 *Ghezelbash* (n 9) para 57; *Jafari* (n 16) paras 83–85; *Mengesteab* (n 29) paras 73–74; *Amayry* (n 30) para 37.

142 *K.* (n 15) paras 36 and 49.

143 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

144 Muir (n 66) 228; Schima (n 86) 1108.

145 Ippolito (n 75) 3.

146 Eeckhout (n 129) 971.

147 Franklin (n 63) 157.

148 Muir (n 66) 237–238; O'Neill (n 64) 223.

EU integration. They may accuse the EU institutions of trying 'to claim competence which the Treaties did not confer on the EU',[149] especially as 'a purely functional power to lay down rules on human rights [in asylum policy] [...] may be most meaningful'.[150] Hence, a functional interpretation may hamper amendments to EU law.[151] Nevertheless, the CJEU should not avoid this interpretation, especially as 'the Charter project [...] may be understood as an attempt at limiting the CJEU['s judicial activism]'.[152]

2. Limited Explanations to CJEU's Judgments

To refrain from becoming involved in national disputes, the Court of Justice avoids giving concrete answers to preliminary questions and instead provides limited *rationes decidendi*.[153] Thus, it leaves 'the final balancing to the referring [national] court'.[154] However, this makes judgments abstract and difficult to implement.[155] This may explain why some preliminary questions are repeatedly referred to the CJEU.

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149 Stephen Brittain, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: An Originalist Analysis' (2015) 11 European Constitutional Law Review 482, 489; Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, Cambridge University Press 2015) 31; Van Elsuwege (n 36) 199.

150 Eeckhout (n 129) 984.

151 More in Piotr Sadowski, 'Wpływ Poszerzenia Kompetencji Trybunał Sprawiedliwości Unii Europejskiej na Rozwój Europejskiej Polityki Migracyjnej' in Piotr Sosnowski, Anita Garnuszek (ed), *Rola Trybunałów i Doktryny w Prawie Międzynarodowym* (WPiA UW, Interdyscyplinarne Koło Naukowe Dyplomacji i Prawa 2010) 213–214.

152 Aidan O'Neill, 'The EU and Fundamental Rights – Part 2' (2011) 16 Judicial Review 374.

153 Isiksel (n 90) 582. Cf. *Mirza* (n 16); *Daher Muse Ahmed* (n 27).

154 Schima (n 86) 1126.

155 Hélène Lambert, 'Transnational Law, Judges and Refugees in the European Union' in Hélène Lambert and Guy S Goodwin-Gill (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 8.

An example which supports this theory is *J.N.* This judgment develops the previous *Arslan* decision,[156] even though it is not explicitly cited in *J.N.* In *Arslan,* the CJEU had upheld the detention of an applicant who submitted one application for asylum during a return procedure. In *J.N.,* this interpretation was expanded to include repeated asylum claims. In both cases, detention served the 'purpose of expulsion', because 'an eventual rejection of that application may open the way to the enforcement of removal orders that have already been made'.[157] The deprivation of liberty should be imposed only after assessing if 'individual conduct represents a serious threat to public policy, public security, or national security'.[158] This view has been expressed in a context of applications which are frequently rejected because they are submitted only to delay the return. The Court of Justice correctly concluded that the return procedure must be continued at the stage at which it was suspended by a submission of the asylum application.[159] It clarified the EU's interpretation of the term 'purpose of expulsion', ensuring that it was in line with the ECtHR's judgments. Thus, *J.N.* contributes to the creation of a "safe harbour". It is likely that the decision will be cited in subsequent judgments.

The avoidance of the Court of Justice to provide straightforward answers to preliminary questions can also be perceived as a confirmation of the view that 'the CJEU's main focus seems to be on ensuring the acceptability of its judgments for the national courts of the Member States'.[160] Examples supporting the latter statement can be found in *A.S.* and in paragraph 55 of *Jafari*. The CJEU stressed that the Dublin III Regulation applies when countries tolerated an entry by an individual, because EU law provides exceptional mechanisms which then apply.[161] However, this approach can be called a "sinking ship" as the inefficiency of those measures resulted in overburdening the countries in question.

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156 Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* EU:C:2013:343.

157 *J.N.* (n 26) para 79.

158 Ibid para 73.

159 Ibid para 80.

160 Ippolito (n 75) 38.

161 *Jafari* (n 16) paras 97–99.

3. Building an Ius Commune Europaeum*?*

The CJEU is limited to interpret issues which have been brought by the national referring courts, which is a major challenge to developing a holistic perception of fundamental rights.[162] However, an internal referencing system (when the CJEU cites its own judgments), as evidenced in cases *M.*[163] and *A.S.*,[164] as well as cases which refer to *Ghezelbash*[165] and *Al Chodor,*[166] develop a comprehensive approach to fundamental rights in asylum policy. Moreover, the harmonisation clause (also known as a coherence clause),[167] which is provided for in Article 52(3) of the Charter, confirms that the ECHR defines a minimal standard of respect of fundamental rights. Thus, some scholars claim that it should be compulsory for the CJEU to refer to ECtHR judgments, because the ECtHR is the only body legally empowered to interpret the ECHR.[168] Nevertheless, others recall that the framers of the Charter did not intend to impose such an obligation on the Court of Justice.[169] The latter view is implicitly supported by the CJEU as it only very inconsistently cites the ECHR and the ECtHR's judgments.

This research also confirms that the Court of Justice only reluctantly refers to the Refugee Convention in its decisions.[170] The Refugee Convention forms an essential part of the argument only in the *Warendorf* decision, in which the Court of Justice held that Directive 2011/95 must be read 'in a manner consistent with the [...][Refugee] Convention and the other relevant treaties referred to in Article 78(1) TFEU [and with] the Charter'.[171] Thus, the Refugee Convention applies to the right of freedom of movement, because

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162 More in Lambert (n 155) 2.

163 *M.* (n 12) paras 28–34 and 46–48.

164 In *A.S.* (n 28) the CJEU cited *Jafari* (n 16) and *C.K., H.F., A.S.* (n 14).

165 *Amayry* (n 30) para 65; *Al Chodor* (n 25) paras 33–35; *Karim* (n 9) paras 22–23; *Jafari* (n 16) para 41; *A.S.* (n 28) paras 24, 31–32; *Mengesteab* (n 29) paras 43–49, 58.

166 Cf. *Al Chodor* (n 25). It was cited in *Amayry* (n 30) para 43 and in *A.S.* (n 28) para 41.

167 Engel (n 71) 25.

168 Gráinne de Búrca, 'The Evolution of EU Human Rights Law' in PP Craig and Gráinne de Búrca (eds), *The evolution of EU law* (2nd edn, Oxford University Press 2011) 490.

169 Krommendijk (n 7) 816; Brittain (n 149) 504.

170 *Warendorf* (n 12) para 29; *Lounani* (n 12) para 42; *M.* (n 12) 22.

171 *Warendorf* (n 12) para 29.

under EU law the rights and benefits of refugees and beneficiaries of subsidiary protection should be equal. These rights must also be exercised under the same conditions and restrictions as those provided for other foreigners who are legally resident in the member state which has granted them protection.

Moreover, in *Lounani*, the Court of Justice cited the 1945 Charter of the United Nations, the Refugee Convention, the resolutions of the United Nations Security Council, and addressed the facts of the case. It concluded that an exclusion clause may also be applied to applicants who were not convicted of widely interpreted terrorist offences, even if it has been established that neither the leaders of a terrorist group, nor their subordinates, have committed terrorist attacks.[172] *Lounani* is therefore an important contribution to the *ius commune europaeum*, owing to a well-reasoned *ratio decidendi* and a clearly established link between EU law and UN agreements. It also proves that the CJEU can refrain from highlighting the distinctiveness of EU law from international law.[173] Thus, *Lounani* can be called a "safe harbour".

In cases focusing on Articles 2, 4 and 6 of the Charter, the CJEU has referred to Articles 2, 3 and 5 of the ECHR and followed the ECtHR's judgments. In most CJEU judgments, the Refugee Convention and the ECHR were only a point of reference. Therefore, the interpretation of the Refugee Convention still remains primarily in the hands of national courts.[174] Hence, this research confirms other scholars' findings that the CJEU has 'limited itself to dealing with the EU law provisions in the sense of a self-contained regime',[175] although the term 'specialised regime' may be more adequate in this context. This interpretation is supported by Article 51(1) of the Charter.

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172 *Lounani* (n 12) paras 74–77.

173 A lack of that commodity was contested by Harpaz (n 45) 127 and Piotr Sadowski, 'Can Terrorists Be Denied Refugee Status?' (2015) The Polish Quarterly of International Affairs 91, 100–101.

174 Lambert (n 155) 4; Geoff Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?' (2004) 15 The European Journal of International Law 963, 969.

175 Bank (n 13) 213; Ippolito (n 75) 20.

Nevertheless, the ECHR has played an important role in CJEU judgments on the detention of asylum seekers.[176] Article 5 ECHR was referred to in order to indicate limitations which may be legitimately imposed on the exercise of the rights laid down in Article 6 CFREU.[177] The ECtHR's judgments were referred to in paragraph 38 of *Al Chodor*, thus creating a "safe harbour". However, in *K.,* the Court of Justice briefly explained that 'detention [...] [is not precluded], provided that such a measure is lawful and implemented in accordance with the objective of protecting the individual from arbitrariness'.[178] This is an important clarification of the legitimacy of detention for the purpose of, *inter alia*, establishing identity and nationality – an issue essential for all member states struggling with the migration crisis. Regrettably, the CJEU has refrained from any further in-depth elaborations and missed the opportunity to develop a *ius commune europaeum*, contributing thereby to the "sinking ship" scenario.

In most of the cases analysed in this article, the CJEU did not provide extensive reasoning on the level of protection of rights provided for in the Charter. However, in paragraphs 30-33 of *M.*, the CJEU scrutinised the right to be heard and, in paragraph 32 of *Moussa Sacko*, it analysed the right to an effective legal remedy. Finally, in *C.K., H.F., A.S.,* the judges recalled the absolute nature of the right covered by Article 4 of the Charter and linked its application to human dignity (Article 1 of the Charter).

The EU has not established a comprehensive fundamental rights policy. Thus, the CJEU should continuously increase the visibility of these rights by emphasising their importance. It should therefore 'rely on the Strasbourg Regime and on the jurisprudence of the Strasbourg Court in a more explicit, coherent, systemic, integrative and comprehensive manner'.[179] This would strengthen the coherence between the CJEU and the ECtHR's judgments and, consequently, also their predictability. References to the CoE's regime would demonstrate the willingness of the Court of Justice to continue the judicial dialogue with the ECtHR.[180] This could be an incentive for the

176 *Al Chodor* (n 25) paras 37–39; *K.* (n 15) para 52.

177 *Al Chodor* (n 25) para 39; *J.N.* (n 26) para 47.

178 *K.* (n 15) para 52.

179 Harpaz (n 45) 115.

180 This dialogue has been facing challenges after the CJEU's *Opinion 2/13* (n 74).

ECtHR to also refer to the CJEU's judgments. Increased mutual respect between these two courts would furthermore strengthen a feeling of a co-responsibility for development of the *ius commune europaeum*.

Moreover, references to international law, in particular to developments in the UN and the CoE, could increase the legitimacy and authority of the CJEU. In that way, the Court of Justice could 'promote [...] [a] higher level of compliance with its verdicts'.[181] That could also increase the social acceptance of the CJEU's judgments, as it would 'assist [...] [the Court in] striking the delicate equilibrium between national, regional and universal protection of human rights within the EU'.[182] Thus, a well-justified *obiter dicta* explaining the relationship between international law and EU law could become the CJEU's contribution to the *ius commune europaeum*.

Regrettably, references like those outlined above were rarely made in the analysed CJEU judgments. *Al Chodor*, *K.,* and *Amayry* confirm previous findings that the CJEU has not developed a systematic methodology and consistent practice of referring to the ECtHR's jurisprudence.[183] Some scholars perceive this as an attempt by the Court of Justice to keep a monopoly over the interpretation of EU law.[184] This, however, seems a too far-reaching statement, as the CJEU is not explicitly obliged to cite the ECHR.

The CJEU is more likely to refer to the Charter than to the ECHR. References to Articles 4, 18, 34, 45, and - more frequently – Article 47 of the Charter have served 'as a "yardstick" for the protection of fundamental rights in the European Union [and the Court] was also (though not always) capable

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181 Harpaz (n 45) 120.

182 Ibid 117.

183 Bruno de Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice' in P Popelier, Catherine van de Heyning and Piet Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia 2011) 19; Krommendijk (n 7) 816-817.

184 Kowalik-Bańczyk (n 85) 20; Philippe Sands, 'Reflections on International Judicialization' (2016) 27 European Journal of International Law 885, 893. Contrary view was expressed by Isiksel (n 90) 572.

of determining a sometimes "progressive" interpretation of human rights'.[185] This can be seen in the decisions in *Tall*, *K.*, *Ghezelbash* and in *Moussa Sacko*. Rare references to the ECHR could also signal that the CJEU tries to avoid conflicts with the ECtHR, since the Court of Justice refers to ECHR only when the issue at stake has already been analysed by the ECtHR.[186] The CJEU could use this approach to its advantage. This would, however, require the Court of Justice to stress that it is primarily focused on the interpretation of the Charter, and that the ECHR is used simply as a minimum standard.

VI. Conclusions

Unprecedented migratory pressure has put the CEAS to the test. It has also revealed loopholes in EU member states' national laws and practices. The decisions of the Court of Justice between 1 January 2015 and 15 September 2017 on the rights of asylum seekers have focused on the application of the Dublin III Regulation and Directive 2013/32. We should especially praise the Court's views on a need to ensure the efficiency of the right to judicial scrutiny, and on a tolerated entry of individuals. Reflections on the transit of foreigners who intended to submit their applications for asylum in another member state, and on the conflict between, on the one hand, the right to judicial scrutiny for a decision on a Dublin transfer and, on the other, the need to ensure a speedy execution of the Dublin procedure are also valuable clarifications of EU law. *Ghezelbash* has already been recognised as a milestone in the development of the rights of asylum seekers, but *Al Chodor* and *Jafari* will most likely become similar cornerstones of the EU asylum policy.

Nevertheless, the CJEU's deliberations on the fundamental rights of asylum seekers cannot unambiguously be classified as either creating a "safe harbour" or contributing to a "sinking ship". This is because, in some cases, the Court of Justice has supported the need to respect the fundamental rights of the

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185 Ippolito (n 75) 20.

186 Franklin (n 63) 159–160. This was a common approach of the Luxembourg Court. O'Neill (n 152) 386. A more sceptical view was presented by Christian Tomuschat, 'The Micro Level: Insights from Specific Policy Areas: The Relationship between EU Law and International Law in the Field of Human Rights' (2016) 35 Yearbook of European Law 604, 611.

applicants, whereas in others it relied on the functional approach to evade making a reference to these rights.

The analysis in this article confirms that the CJEU is gradually strengthening the protection of fundamental rights of asylum seekers in the EU. In *Ghezelbash*, the Court underlined this approach by stressing a limited use of reasons which can be invoked by asylum applicants to ask for a judicial scrutiny of the decisions on their transfer. That list of exceptional reasons was expanded in *Karim* and new exceptions were exemplified in *A.S., Mengesteab, C.K., H.F., A.S.*, and *Al Chodor*. In *M.*, and *Mousa Sacko* the CJEU limited the right to a hearing, but ensured the respect for the fundamental rights of the applicants. Those explanations can unquestionably be called a "safe harbour".

References to the Charter in the CJEU judgments confirm that 'the entry into force of the Lisbon Treaty has marked a new era for European Union involvement in fundamental rights matters',[187] indicating that the Charter has contributed to establishing a "safe harbour" in the EU. On the other hand, the practice of making references to the CFREU has not yet become routine. They are more frequent in less controversial matters, but even in those cases they are not extensively elaborated on. Thus, the CJEU's judgments do not provide thorough clarifications regarding a correlation between the rights enshrined in the CFREU and those in the ECHR. This is a missed opportunity for the development of a *ius commune europaeum*, a project that would increase the coherence of human rights protection across Europe and, consequently, the efficiency of protection of those rights. Therefore, it is legitimate to say that in some cases the Court of Justice has sacrificed fundamental rights protection in order to deepen the EU integration process, thereby contributing to the "sinking ship" circumstances.

However, the CJEU has also gradually opened up a dialogue with the ECtHR by referring not only to the ECHR but also to the ECtHR case law, consequently creating a "safe harbour". This furthers the development of the *ius commune europaeum*. Nevertheless, the CJEU is far from having established a consistent methodology of citing the ECtHR's judgments, lending support to the "sinking ship" scenario.

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[187] Muir (n 66) 219.