September 15, 2013

Enhancing Human Rights Through European Integration: How recent litigation before the European Court of Human Rights and the Court of Justice of the European Union has advanced European asylum law

Clara Presler, University of Michigan - Ann Arbor
ENHANCING HUMAN RIGHTS THROUGH EUROPEAN INTEGRATION: 
HOW RECENT LITIGATION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND THE 
COURT OF JUSTICE OF THE EUROPEAN UNION HAS ADVANCED EUROPEAN ASYLUM LAW

INTRODUCTION

On December 1, 2011, the Grand Chamber of the European Court of Human Rights (ECtHR) announced that it would refuse the United Kingdom’s request to hear Sufi and Elmi v. the United Kingdom.1 This announcement finalized the ECtHR Fourth Section’s holding of June 28, 2011: parties to the European Convention on Human Rights (ECHR) must offer protection to Somalis who face a risk of inhumane treatment stemming from extreme and generalized violence in Somalia. The announcement signaled safety for scores of Somalis in Europe and future standing in the ECtHR for individuals fleeing war-torn countries. Additionally, it is one of the latest signs of mutual influence between the ECtHR and the Court of Justice of the European Union (CJEU). This relationship has a significant impact on the protection of human rights in Europe and the process of European integration.

At issue in Sufi and Elmi was a matter simultaneously covered by EU law and the ECHR: whether general conflict and violence can suffice as grounds for offering “subsidiary protection” to asylum seekers.2 In 2009, the CJEU, the court with jurisdiction over EU law, held that EU law provided protection beyond that of the ECHR: certain instances of extreme violence could give rise to “subsidiary protection” without a showing of individualized persecution.3 At the time,

1 Sufi and Elmi v. the United Kingdom, apps. 8319/07; 11449/07 (28 June 2011), discussed in more detail infra at III.A.3

2 The provisions at issue were 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), Article 15(c), discussed infra at Section III.A.2; and Article 3 ECHR, which states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

3 See Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, C-465/07 (17 February 2009).
the case law of the ECtHR did not offer such broad protection. Instead, asylum seekers appearing before the ECtHR had to show a distinguishing characteristic that indicated an individualized risk of harm. *Sufi and Elmi* loosened this position and brought ECHR protection closer to that offered by EU law. It explicitly noted the influence of the CJEU decision: “based on the ECJ’s interpretation in *Elgafaji*, the Court is not persuaded that Article 3 of the Convention . . . does not offer comparable protection to that afforded under the Directive.”

Evolution towards mutual influence between the ECtHR and the CJEU is far from inevitable. The two European courts charged with enforcing human rights law have differing procedures, mandates, and substantive law. On numerous occasions, the courts have rigorously maintained their distance and independence. These positions reflect the legal separation between the two: the EU is not yet a party to the ECHR; as such the ECtHR does not have jurisdiction over EU law and there is no formal mechanism for coordination between the courts. While some have described the relationship between the courts as “harmonious,” others note a

---

4 *Sufi and Elmi*, para. 226.


6 Since the Lisbon Treaty in 2009 provided the legal basis for EU accession to the European Convention on Human Rights, negotiations have been ongoing. For more information see Council of Europe, EU accession to the ECHR, [http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention](http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention) and Informal Group on Accession of the European Union to the Convention (CDDH-UE), [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp) (last accessed 11 August 2013).

“human rights gap.” As the reach of EU legislation grows with integration, so does the risk of legal uncertainty, conflict, and the marginalization of the ECHR.

This paper argues that, in the area of asylum law, case law from the European courts has, so far, defied these concerns. As EU asylum legislation has proliferated in recent years, the courts have shown a willingness engage in mutual influence in this area. They have done more than merely nod to the other’s human rights principles; the courts have genuinely engaged in each other’s case law and allowed for mutual influence. This coordination has not diffused human rights protection; rather it has strengthened the rights of asylum seekers and enhanced legal clarity.

To illustrate this evolution, this paper focuses on three issues within asylum law -- eligibility for protection; detention of asylum seekers; and identification of the EU member state responsible for processing asylum claims. The first two sections provide context for this analysis: section 1 provides an overview of the two legal orders, EU law and the ECHR, highlighting the formal separation between them and briefly outlines common concerns around the emergence of two legal orders charged with human rights adjudication; section 2 outlines the ECHR and EU-level commitments to protection of asylum seekers, illustrating the differing focuses of protection. Section 3 provides the heart of this study. It analyses how ECHR and EU

law interact around qualification for protection, permissible length of detention, and the
determination of the state responsible for asylum application, showing that this interaction has
enhanced human rights protection. Section 4 incorporates the Geneva Convention and Protocol
Relating to the Status of Refugees into this conversation to show how further collaboration with
international law could further enhance protection and rights of asylum seekers. As concluding
thoughts, the paper outlines the main debates around EU accession to the ECHR and reiterating
that, despite the protracted nature of these discussions, litigation has already worked to bridge the
gaps between the two legal orders.

I. Human Rights Protection in the European Union

Recognition and protection of human rights in Europe stem from several sources. As a
result, collaboration between the European Court of Human Rights and the Court of Justice of
the European Union cannot be appreciated without recognizing the fundamental differences
between the mandates and structures of European Convention on Human Rights and EU law.
These bodies of law have developed as largely separate orders, applicable to different, though
concentric, groups of Member States.

The following section provides a background of the ECtHR and CJEU case law by
providing a sketch of the relevant institutions and bodies of law and how they relate to each
other.

A. The ECHR and the European Court of Human Rights

The European Court of Human Rights (ECtHR), established in 1953 in Strasbourg,
France, has jurisdiction over the 47 signatory states to the Convention. These states comprise the
Council of Europe, which encompasses the entire European Union. The ECtHR’s sole mandate
is to interpret and identify violations of the European Convention on Human Rights (ECHR). Complaints to the ECtHR contend that signatory states have not correctly applied the human rights protections enshrined in the ECHR. The ECtHR considers whether a domestic decision in a Member State violated a Convention article, examining acts and omissions of domestic authorities. Indeed, its jurisdiction is limited to alleged violations of Convention articles; the ECtHR will not examine the substance of EU or international law.

A defining feature of the human rights protection offered by the ECtHR is the right of individual application, protected represented in Article 34 of the Convention. Any individual who believes that he or she has suffered a violation of the Convention by a Member State can lodge an application for review; the initial application does not need the assistance of a lawyer. In addition, the applicant must have exhausted all domestic remedies and must file an application within six months of the final domestic judgment.

The Court is limited by its methodological position on state sovereignty. When deciding cases, the Court applies a margin of appreciation. This doctrine recognizes that the Convention will be interpreted differently across the Member States. The Court takes into account local and cultural concerns when assessing whether a state has violated the Convention and leaves the responsibility of incorporating Convention articles into domestic law to the Member States themselves. Importantly, the margin of appreciation does not apply to Article 3, the primary

---

10 “The Court may receive applications from any person, non-governmental organization, or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties to the rights set forth in the Convention or its Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.” Article 34 ECHR.
11 See ECHR Article 35, Admissibility Criteria.
cause of action for asylum seekers.\textsuperscript{13} Instead, protection against torture and inhuman or degrading treatment or punishment is absolute under the Convention. A second important principle is the principle of subsidiarity: the obligation to apply the guarantees of the ECHR lies with the national authorities.\textsuperscript{14}

\textbf{B. EU Law and the Court of Justice for the European Union}

The Court of Justice for the European Union (CJEU)\textsuperscript{15} is the highest court in the EU that reviews “Union law,” or EU legislation. The CJEU, which is comprised of one judge per Member State\textsuperscript{16} and eight Advocates General,\textsuperscript{17} examines the legality of actions of the EU institutions, ensures compliance of Member States to EU treaties, and interprets EU law at the request of national courts.\textsuperscript{18} Pursuant to the Treaty on the European Union (TEU), it aims to “ensure that in the interpretation and application of the Treaties the law is observed,” and works to establish uniform application of EU law across member states.\textsuperscript{19} It receives cases by requests from domestic courts for a preliminary ruling. When a court is unsure about the correct application of a law, it refers the case to the CJEU for clarification. The European Commission

\textsuperscript{13} See, e.g., \textit{Chahal}, at para. 81 (there is no room for “balancing the risk of ill-treatment against the reasons for expulsion”). \textit{See also} \textit{Ahmed v. Austria}, App. 71/1995/577/663, Judgment (17 December 1996) at paras. 38-41.
\textsuperscript{14} See ECHR Articles 1, 13, 35.
\textsuperscript{15} Prior to the Lisbon Treaty in 2009, the courts of the European Community were the Court of Justice (ECJ), the Court of First Instance (CFI), and judicial panels. The Lisbon Treaty introduced “the Court of Justice for the European Union” which includes the ECJ, the General Court (previously the CFI), and specialized courts (previously named judicial panels). Article 19(1) TEU. For simplicity’s sake, this paper will refer to the CJEU, even when the court at the time was called the ECJ.
\textsuperscript{16} Article 19(1), Treaty on the European Union, C 117/17.
\textsuperscript{17} Article 253, Treaty on the Functioning of the European Union. The Advocates General are members of the court who issue written opinions for the Court, recommending how the case should be decided.
\textsuperscript{18} Note that Switzerland, Norway, and Iceland are not bound by EU legislation. Also some EU Member States are not bound by all of EU law. For example, Denmark is not bound by immigration legislation; the UK and Ireland have opted out of certain immigration and crime legislation.
\textsuperscript{19} TEU Article 19(1).
can also start infringement proceedings at the CJEU if it believes that a Member State has failed to correctly apply EU law.

The EU, formed around the goal of economic integration, was not originally concerned with human rights law.\textsuperscript{20} As recently as 1996, soon after the establishment of the EU, the CJEU ruled that the EU did not have the authority to promote and enforce human rights: “No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.”\textsuperscript{21} Although the CJEU would take inspiration from Member State traditions, which include adherence to the ECHR, its ability to rule directly on human rights concerns was limited.

This ambivalence towards human rights protections gradually shifted towards more direct recognition of human rights.\textsuperscript{22} This recognition emerged as the spheres of governance of the EU have expanded. The Charter on Fundamental Rights (CFR), drafted in 2000,\textsuperscript{23} articulates principles for protection of human dignity, equality, and citizens’ rights and now applies to EU institutions and Member States when implementing Union law.\textsuperscript{24}

Substantively, the CFR did not substantially expand the rights already represented in various laws and treaties. Indeed, Craig and de Burca refer to the CFR as a “creative distillation of the rights contained in the various European and international agreements and national

\textsuperscript{22} Olivier De Schutter comments, “The European Union . . . has come to acknowledge that, having achieved its current degree of integration, it cannot ignore the issue of human rights as a condition both for continued cooperation between its Member States and for cooperation with outside countries,” supra note 9 at 510.
\textsuperscript{23} Charter of Fundamental Rights of the European Union (2000/C 364/1).
\textsuperscript{24} Article 51(1): “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”
constitutions on which the [CJEU] had for some years already drawn."\textsuperscript{25} Instead, its value stems from the notion that bringing together existing rights-based traditions into a single document has an intrinsic value: “[I]t is necessary to strengthen the protection of fundamental rights . . . by making those rights more visible in the Charter.”\textsuperscript{26} With the introduction of the CFR, the EU institutions had a single human rights document to which they were accountable. The CFR recognizes foundational rights to life, freedom from torture, slavery, and execution; and civil and political rights, such as \textit{inter alia} rights to liberty, association, and family life. It adds social rights such as the right to education and, importantly for this paper, the right to asylum, which is not recognized in the ECHR.

There are limits to the CFR’s protection of human rights. Many provisions of the CFR identify principles rather than rights, a distinction that limits the enforceability. It instructs, “The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices, and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.”\textsuperscript{27} Unlike the ECHR, the CFR includes no individual right of action to challenge member state action at the CJEU.

The influence of the CFR has been delayed. For the first six years of its existence, the CJEU did not cite to it.\textsuperscript{28} For the first nine years of its existence, the CFR was nonbinding on member states. The Lisbon Treaty in 2009, which amended the existing Treaty on the European

\textsuperscript{26} Preamble, CFR.
\textsuperscript{27} Article 52(5) CFR.
\textsuperscript{28} Douglass-Scott, \textit{supra} note 20, at 651 (citing \textit{Parliament v. Council} [2006] I-5769 as the first direct reference by the CJEU to the Charter).
Union, made the CFR justiciable at the CJEU. Article 2 of the TEU now asserts that the EU is “founded on . . . respect for human rights.” The rights were made judicially cognizable at the CJEU through Article 6, which holds that the CFR has “the same legal value as the Treaties.”

The Lisbon Treaty enhanced the protection of human rights in other ways. As will be discussed in more detail below, it provided a legal basis for accession to the ECHR: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedom.” It also added additional substantive protections, such as Article 3, which declares that the EU will combat “social exclusion and discrimination,” and Article 7, which outlines procedures for suspending voting power of Member States should they fail to implement Article 2.

C. Relationship between the ECHR and EU Law

Despite their formal distance, the CJEU and the ECHR refer to and take notice of each other, at times even displaying an intent to collaborate. This cross-referencing lays the foundation for bridging gaps in human rights protection described later in this paper. The following section first outlines the basic relationship between the legal orders as articulated in the founding documents and various opinions; and, second, outlines debates around the growing emergence of two legal orders concerning human rights.

1. The approach of EU law to the ECHR

Without an EU accession agreement to the ECHR, the relationship between the CJEU and the ECtHR is rooted in Article 52(3) of the CFR: “In so far as this Charter contains rights which

---

29 Article 2 TEU.
30 Article 6 TEU: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted in Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”
31 Article 6 TEU.
correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be
the same as those laid down by the said Convention.” As such, the EU has looked to the ECHR
for guidance on human rights protection. Prior to the writing of the CFR, the CJEU cited the
ECHR as a “special source of inspiration” for general principles of human rights law.32

After the writing of the CFR in 2000, the relationship between EU law and the ECHR
became more explicit. The preamble to the CFR “reaffirms” the influence of the ECHR.33
Article 52 instructs that CFR articles that correspond to those in the ECHR will have the same
“meaning and scope.”34 As a practical matter, this means that the ECHR is relevant to EU law in
more ways than is apparent in formal documents. Every ECHR article has a corresponding
article in the CFR, which means that the ECHR is largely binding on EU law.

The CFR ensures that EU law is not limited by the ECHR: “This provision shall not
prevent Union law from providing more extensive protection.”35 It considers the ECHR a floor,
foreshadowing that the two legal orders might engage in healthy competition. Furthermore, the
CJEU maintains that the ECHR is not formally binding and its provisions are not a formal part of
EU law. Craig and de Burca point out that this “allowed the [CJEU] to continue to assert the
autonomy and supremacy of EU law, while avoiding the charge of having judicially incorporated
international agreements into EU law without Member State consent.”36 Laurent Scheeck
presents a stronger view that the CJEU’s priority is maintain a sphere of influence: “The [CJEU]
is torn between its obligation to protect fundamental rights and its aspiration for institutional

32 Craig and de Burca, supra note 25, at 367.
33 Preamble, CFR.
34 “In so far as this Charter contains rights which correspond to the rights guaranteed by the Convention for the
Protection of Human Rights and Fundamental Freedoms [ECHR], the meaning and scope of those rights shall be the
same as those laid down by the said Convention.” Article 52(3) CFR.
35 Id.
36 Craig and de Burca, supra note 25, at 367.
independence. The balancing act consists in using the ECHR to guarantee the protection of fundamental rights while simultaneously blocking off the ECtHR.”37 Scheeck highlights that the CJEU’s citations to the ECHR consistently fall short of recognizing dominance of the ECHR; rather, it is referred to as inspiration.38

2. The approach of the ECtHR to EU law.

Article 59 ECHR outlines the ability of the EU to sign on as a member39 but, until accession is finalized, the ECtHR has maintained that it is reluctant to examine the substance of EU law. It articulated its jurisdictional limits in *NA v. the United Kingdom*: “the Court . . . recalls that its sole task under Article 19 of the Convention is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto. It is not the Court’s task to apply directly the level of protection offered in other international instruments.”40 In that case, the applicant relied in part on an EU Directive that would have offered wider protection from ill-treatment than that of the ECHR. Although the ECtHR ultimately found in favor of the applicant, it refused to examine the applicability of the EU provision and rejected the argument that the scope of an EU Directive was binding on the ECtHR.

As the scope of EU law expands, the ECtHR has demonstrated that it will consider three types of EU-related complaints. First, instances have arisen where states rely on the provisions of an EU law to justify violations of the ECHR. In *Matthews v. UK*,41 the applicant, a resident of

37 Scheeck, supra note 8, at 856.
38 Id., at 853.
39 “The European Union may accede to this Convention.” Article 59(2) ECHR.
Gibraltar, complained of a violation of her Protocol 2 right, which holds that “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” Under a Treaty at the European Community level, which had been ratified by all Member States, Gibraltar, as a dependent territory of the United Kingdom, had limited voting power in the European Parliamentary elections. The ECtHR had to examine whether the United Kingdom was excused from violating Article 3, Protocol 2 since it followed an EU-level treaty.

The ECtHR maintained that, where a breach of a Convention right stems from provisions of the primary EU treaties, the treaty itself cannot be challenged at the ECtHR, as the European Union is not a contracting party. Nevertheless, the ECtHR held that where the UK freely entered into an EC Treaty, its responsibilities under the Convention continue. Commenting that the “Convention is intended to guarantee rights that are not theoretical or illusory,” the ECtHR found the UK in violation of Article 3, Protocol 2.

Second, the ECtHR has examined EU law where a Member State’s acts or omissions violate an EU law and thus are not in accordance with the law as required by the Convention. In Shaw v. Hungary, the ECtHR examined a child abduction case brought under Article 8, the right to privacy and family life. Article 8(2) states, “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law . . .” Hungary had acceded to the Hague Convention on Child Abduction, an international treaty

---

42 Article 3, Protocol 2 ECHR.
43 Matthews, at para. 32.
44 Matthews, at para. 34.
46 Article 8, ECHR.
adopted by all EU Member States, and incorporated its provisions into its domestic law. In
deciding to review the case, the ECtHR opined that “the positive obligations that Article 8 of the
Convention lays on the Contracting States in the matter of reuniting a parent with his or her
children must be interpreted, in the present case, in the light of the Hague Convention.”47 As
Hungary’s failure to comply with the Hague Convention signaled a failure to act “in accordance
with [its] law,” the ECtHR found a violation of Article 8 ECHR.

Third, there are instances in which a state may act in an area governed by EU law and
face a choice between complying with EU law and violating the ECHR, or complying with both.

*MSS v. Belgium and Greece,*48 discussed in more detail below, concerned the Dublin II
Regulations, an EU regulation that identifies the Member State responsible for examining an
asylum application when an individual has applied in more than one state. According to Chapter
III of the Regulations, a Member State is authorized to send an asylum seeker back to the first
country in which he or she lodged an application for asylum. Importantly, while the Regulations
require the receiving state to take responsibility over the application, it does not require the
sending state to expel the individual; the state may take responsibility for the application.

In *M.S.S.*, the applicant argued that Belgium violated Article 3 of the ECHR, protection
from inhuman treatment, when it sent him back to Greece, where he had originally lodged his
asylum application. Belgium tried to rely on the Dublin Regulations as a defense to justify its
expulsion of the individual to Greece. The ECtHR did not accept this argument, noting that,
under the Regulations, Belgium could have refrained from sending the applicant to Greece. It
held that a “State [is] fully responsible under the Convention for all acts falling outside its strict

47 *Shaw*, at para. 68.
international legal obligations, notably where it exercised State discretion provides an example of this.”

In order to reach this conclusion, the ECtHR had to examine the Dublin Regulations and its relationship to the Convention.

3. Cause for Concern?

Despite mutual acknowledgement and respect between the two legal orders, the relationship has not been straightforward. Indeed, “the European courts were never supposed to meet:” EU law and the ECHR law bind different, though overlapping, entities and, as discussed above, the respective courts have the different mandates and procedures. Without a formal legal relationship, the EU is not bound by the rulings of the ECtHR and the ECtHR does not have authority to rule on Member States’ compliance with the EU and international treaties.

European integration and the resulting expansion of the EU’s authority over human rights has not been viewed as unequivocally positive. When the EU adopted the CFR in 2000, some viewed this an attempt by the EU to create its own standards instead of adopting or deferring to the existing framework of the Council of Europe. These concerns are heightened by the fact that EU Member States now comprise the majority of the Council of Europe. Moreover, as the EU’s legislative reach widens and Member States cede more legal authority to the EU, the ECtHR faces a possible decline in influence since the rights protected by the ECHR only concern domestic law.

---

49 M.S.S., at para. 338
50 Scheeck, supra note 8, at 843.
51 De Schutter, supra note 9, at 512-13.
52 Scheeck, supra note 8, at 848.
The emergence of two parallel legal systems without a formal coordination mechanism runs the risk of conflicting holdings.\(^5^3\) This has occurred in the context of the relationship between business entities and right to respect for private life under Article 8, and the extent of the protection against self-incrimination in the right to fair trial under Article 6 of the ECHR.\(^5^4\) Johan Callewaert also highlights that the CFR’s attempt to simplify the wording of the Convention undermines legal certainty and causes confusion. As neither legal order is supreme to the other, there are few interpretive guideposts to resolve discrepancies.\(^5^5\) Callewaert comments, “the reality [of] harmonised and unharmonised areas seems a far cry from the universality proclaimed by the Universal Declaration, thus raising doubts as to whether Europeans are living up to their own notion of fundamental rights.”\(^5^6\)

II. Asylum protection under the ECHR and EU law

The rights and protection of asylum seekers in the European Union could be easily vulnerable to concerns about legal conflicts and gaps in protection. There are three sources of European asylum law: the Geneva Convention, the ECHR, and EU law. Each differs in scope, application, and enforceability. According to the structures of the legal orders to which they belong, each body of law imposes obligations of differing nature on Member States.

Against this backdrop, the emerging coordination and clarity in European asylum law is particularly remarkable. As a precursor to appreciating the significance and value of the

\(^{53}\) Scheeck, *supra* note 8, at 854 ("The ECJ’s increasing and ever more precise use of the Convention has rapidly turned out to be problematic. It has led to a situation where two supranational courts interpret the same text in different contexts and, sometimes, in different ways, without possessing any formal instruments for coordination.").


\(^{55}\) Callewaert, *supra* note 9, at 5.

\(^{56}\) *Id.*, at 7.
collaboration between the courts around asylum, this section outlines asylum law under the ECHR and EU law. It clarifies how the ECHR and the EU define the group of individuals eligible for international protection and the role the respective tribunals have had in offering this protection. Each legal order offers advantages and disadvantages for asylum seekers; no single system is sufficient.

A. Asylum protection under the ECHR

A crucial concept in this analysis is that there is no mention of asylum seekers or the right to seek asylum under the ECHR. Instead, individuals whose asylum claims have failed may bring a case to the ECtHR on the basis that expulsion would violate Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The basis for hearing failed asylum claims before the ECtHR grew out of the principle that an individual cannot be expelled by a state party if there is a real risk he or she will face torture or degrading and inhuman treatment in the home country. This principle was first developed in Soering v. UK, a case that concerned the extradition of a German national to the United States where he faced the risk of the death penalty. The ECtHR held that extradition to the US would impermissibly put the applicant at risk of a violation of Article 3.

The ECtHR expanded this principle to address risks faced by failed asylum seekers. In Cruz Varas v. Sweden, the ECtHR examined the claim of a Chilean Socialist who had been subjected to ill-treatment and sexual abuse under Pinochet. Although the ECtHR ultimately found that expulsion of the applicant would not violate of Article 3, it indicated that the

---

57 Article 3 ECHR.
framework laid out in *Soering* around extradition applied to expulsion cases as well.\(^{60}\) In order to gauge the applicability of Article 3, the ECtHR explained that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.”\(^{61}\)

Shortly thereafter, the ECtHR in *Vilvarajah and others v. the United Kingdom*\(^ {62}\) affirmed that failed asylum claims fall within the jurisdiction of the ECtHR. It clarified that mere possibility of ill-treatment would not meet the threshold of Article 3; there must be a likelihood of exposure to harm. The risk must be sufficiently personal; general turmoil or violence that subjects all citizens to harm would not qualify for an asylum claim.\(^ {63}\) The ECtHR, in examining the ill-treatment of Tamil asylum seekers, stated, “The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country . . . . A mere possibility of ill-treatment . . . in such circumstances, is not in itself sufficient to give rise to a breach of Article 3.”\(^ {64}\)

The protection offered by the ECHR through Article 3 is different than that provided by the Refugee Convention. First, asylum protection under the Refugee Convention brings certain substantive rights, for example, to employment and housing benefits.\(^ {65}\) Such rights do not exist under the ECHR. Second, although the ECtHR has required that individual show a

---

\(^{60}\) Cruz Varas, at para. 69.

\(^{61}\) Cruz Varas, at para. 83.

\(^{62}\) *Vilvarajah and others v. the United Kingdom*, Apps. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, (30 October 1991).

\(^{63}\) *Vilvarajah*, at para. 69.

\(^{64}\) *Vilvarajah*, at para. 111.

\(^{65}\) Articles 17-19, 21, Refugee Convention.
particularized harm, the individual does not have to be a part of the enumerated groups specifically required by the Refugee Convention. 66 Third, the protection offered by Article 3 is absolute while that of the Refugee Convention is not. Article 15 holds that, even in times of emergency, the absolute nature of Article 3 prohibits derogation. Therefore, in the context of asylum, Article 3 prohibits states from considering the conduct of the individual seeking international protection. The ECtHR explained:

The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention . . . Article 3 makes no provision for exceptions and no derogation from it is permissible . . . even in the event of a public emergency threatening the life of the nation. 67

Article 3 puts the burden on states to ensure that individuals will not face ill-treatment or torture in violation of the Convention. The requirement is rigorous; the ECtHR has specifically disregarded diplomatic assurances as sufficient for Article 3 purposes. The ECtHR articulated this position in Saadi v. Italy, 68 a case concerning an asylum applicant who was arrested in Italy on suspicion of terrorism. After a trial, Italy issued an order to deport him to Tunisia, his home country. The applicant requested political asylum on the grounds that he would be tried again for offenses he was accused of in Italy and would be subjected to ill-treatment in violation of Article 3. The Italian government requested diplomatic assurances from the Tunisian government that the applicant would not “suffer a flagrant denial of justice.” 69 The Tunisian government offered

66 The Convention requires that the persecution a refugee faces must be on account of his or her membership to a race, religion, nationality, or other particular social group, or political opinion.
67 Chahal v. the United Kingdom, App. 22414/93, (15 November 1996).
68 Saadi v. Italy, App. 37201/06, 28 February 2008.
69 Saadi v. Italy, at para. 51.
the requested assurance: “The Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.”

But the ECtHR found that this assurance was not sufficient for Article 3 purposes. It stated, “the existence of domestic laws and accession to international treaties . . . are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where . . . reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.”

Instead, the ECtHR put the burden on the sending state to investigate the conditions a deported individual will face. It held that the ECtHR has the “obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the [individual to be transferred] would be protected against the risk of treatment prohibited by the Convention.”

**B. EU Law and Directives**

In contrast to the ECHR, EU law specifies the right to seek asylum and has, over the last twelve years, developed a detailed framework for regulating asylum applications. It aims to standardize Member States’ procedures around asylum and avoid forum shopping within the EU.

Several treaties enabled the emergence of and developed asylum law across the EU. The Maastricht Treaty, which formed the EU in 1992, offered the first statement that Member States

---


71 *Saadi*, at para. 147.

must consider immigration and asylum policy as matters of common interest.\textsuperscript{73} It was amended in 1997 by the Amsterdam Treaty to establish, through Article 63, the competency of the European Community to harmonize asylum, immigration, and visa policies. It stated, “The Council . . . shall . . . adopt measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.”\textsuperscript{74} This was the first statement that asylum policy would fall under the purview of EU institutions.\textsuperscript{75}

In 1999, the European Council declared the goal of establishing a Common European Asylum System (CEAS), based on the full application of the Geneva Convention. The CEAS was a response to the growing lack of uniformity as to the determination of refugee status within the Union. Aiming to establish rules on the recognition of refugees and establish a common criteria across the EU, it states:\textsuperscript{76}

This System should include, in the short term, 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. . . .\textsuperscript{77}

\textsuperscript{74} Article 63(1) Treaty of Amsterdam.
\textsuperscript{76} However, the UK, Ireland, and Denmark have established particular positions on these measures. Denmark does not participate at all; the UK and Ireland have negotiated an opt-in relationship. See Anneliese Balsaccini and Helen Toner, “From Amsterdam and Tampere to The Hague: An Overview of Five Years of EC Immigration and Asylum Law,” in \textit{Whose Freedom, Security, and Justice? EU Immigration and Asylum Law and Policy}, Baldaccini, Guild, and Toner, eds. (2007).
\textsuperscript{77} Fullerton, \textit{supra} note 77, at 95.
Over the next decade, a group of Directives emerged to form the CEAS. With the CEAS, “the European Union evolve[d] from a collection of nations that jealously guarded sovereign prerogatives over migration to a supranational institution that is devising a regional approach to asylum.” These Directives have ‘direct effect,’ meaning they are binding and justiciable and can be relied upon by individuals in national courts. Several are relevant to the succeeding discussion.

The Qualification Directive guides the evaluation of whether an individual qualifies as a refugee. It departs from the Refugee Convention and the ECHR by adding the category of “subsidiary protection” and “serious harm.” It expands the group of individuals to whom the state can offer international protection, the evaluation of which is less rigorous than for refugees. Article 15(c) states that, when there is a major societal conflict in the asylum seeker’s home country and “indiscriminate violence,” the state can offer subsidiary protection even though the individual has not shown that he or she is specifically targeted.

The Procedures Directive guarantees access to the asylum procedure and guarantees that the asylum seeker can remain in the Member State during the adjudication procedure. The Returns Directive regulates detention, holding that asylum seekers cannot be detained solely

---

78 Id., at 87-88.
79 Under TFEU Article 288, a directive “shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” See, also, e.g., Craig and de Burca, supra note 25, at 180.
80 Council Directive 2004/83, 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, 29 April 2004.
81 Article 15(c), Directive 2004/83.
83 Inter alia, the right to be informed of the procedure, right to consult with UNHCR, right to personal interview, right to interpreter.
because they apply for asylum. It is silent on the acceptable grounds for detention, but explicit on the requirement of judicial review and maximum length of detention.\footnote{Directive 2008/115, Article 18. See also discussion on detention, infra Section III.B.2.}

The Dublin II Regulation,\footnote{Council Regulation (EC) No. 343/2003, for 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, 18 February 2003.} mentioned above and in more detail below, form another part of the CEAS. The Regulations lay out the criteria of determining which member state is responsible for processing an asylum application.

The emergence of the Directives regulating asylum law has met criticisms. First, the Directives only lay out \textit{minimum} standards. Some worry that they could have the effect of lowering standards in Member States that previously offered heightened protection.\footnote{See, \textit{e.g.}, discussion in Fullerton, supra note 77, at 109-10.} In regards to the Qualification Directive specifically, some argue that the addition of subsidiary protection in Article 15(c) could create a hierarchy of asylum claims, leading to a fragmentation of international protection.\footnote{Jane McAdam, “The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime,” 17 INT’L J. REFUGEE L. 461 (2005).} Another criticism is that the Directives allow Member States to deprive asylum seekers of subsidiary protection when they believe that the individual may have committed a serious crime or that they constitute a danger to the community. This undermines the absolute protection stemming from Article 3 ECHR and the prohibition on derogation from this protection.\footnote{Fullerton, \textit{supra} note 77.}

In 2009, the implementation of the Lisbon Treaty significantly expanded the EU’s power to legislate further on immigration and asylum matters. It included strong language around the creation of asylum law: “The Union shall develop a \textit{common} policy on asylum, subsidiary
protection and temporary protection.”  This language takes the EU’s legislative obligations beyond minimum standards and instead calls on the EU to establish “common procedures” and “uniform status” of asylum seekers.  

III. The Value of Two Courts: Mutual influence between the ECHR and CJEU law around asylum law

This section focuses on recent decisions in asylum law from the European courts that demonstrate mutual influence between the two legal orders in the field of asylum law. Whether this is due to healthy competition, integration of the EU, or mutual respect, the result has been heightened protection for asylum seekers. This section outlines three areas of asylum law in which the ECtHR and the CJEU, in the absence of formal legal relationship, have influenced, or will influence, each other to the benefit of asylum seekers.

A. The Nature of the Risk of Harm: Article 3 ECHR and Article 15(c) of Qualification Directive

Determining an individual’s eligibility for asylum, either under Article 3 of the ECHR or the EU Qualification Directive, requires an assessment of the risk of harm in the individual’s home state. The risk is assessed both in terms of severity and nature. Although ECHR jurisprudence has not articulated specific grounds for persecution that will satisfy eligibility for asylum, it has long required that the applicant show that the risk is “individualized;” that is, he or she must have certain characteristics that suggest the applicant has a higher risk of harm than other nationals.  

90 Article 78 TFEU (emphasis added).
91 “...[T]he European Parliament and the Council...shall adopt measures for a common European asylum system comprising, (a) a uniform status of asylum... (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status...” Article 78 TFEU. An exception to this is the legislation as regards to rules on responsibility for applications.
92 See, e.g., Vilvarajah, Cruz Varas.
The ECtHR recently held that certain instances of generalized violence and turmoil may, in fact, require states to grant asylum to individuals without a showing of distinguishing characteristics. This decision, *Sufi and Elmi v. the United Kingdom*, follows a ruling by the CJEU, *Elgafaji v. Secretary of State* that interpreted a provision of the Qualification Directive. This section illustrates how the legal analysis of each decision worked to expand the reach of international protection.

1. **ECHR Article 3: The risk must be “individualized”**

   Historically, the ECHR has discriminated among types of risk. The ECtHR has required that an applicant for asylum under Article 3 show that the risk she faces in her home country is personal, exceeding that of the average person. General turmoil and violence in times of war or during humanitarian crises have not satisfied the ECtHR that protection is warranted. For example, in *Vilvarajah v. the United Kingdom*, the ECtHR refused to find a violation of Article 3 in the UK’s denial of asylum to a Sri Lankan national fleeing violence of the civil war. It commented, “the consequences of finding a breach of Article 3 in the present case would be that all other persons in similar situations facing random risks on account of civil turmoil in the state where they lived would be entitled not to be removed.”

   The ECtHR insisted that, in order to bring a claim under Article 3, the applicants need to show distinguishing characteristics that would enhance the risk of treatment incompatible with Article 3. Similarly, in *Muslim v. Turkey*, when the ECtHR considered the expulsion of an Iraqi national of Turkmen origin to Iraq, it found that the mere possibility of ill-treatment because of an unstable situation in that country could not, in itself, amount to a breach of Article 3.

---

93 *Vilvarajah*, at para. 105.
In recent years, situations of extreme, generalized violence have given the ECtHR the opportunity to hold that distinguishing characteristics are not always necessary to receive Convention protection. While closely reflective of the Refugee Convention requirements, the stringent requirements around asylum threatened the absolute nature of Article 3 protection. In *Salah Sheekh v. the Netherlands*, the ECtHR examined the situation of a Somali asylum seeker who was part of a minority clan. His original application for asylum was refused because, in part, the Dutch government believed that the problems the applicant had faced prior to departure were a result of a general instability in the country, not due to personal characteristics. Further, it considered the level of turmoil and violence in Somalia to be such that he could relocate to a more peaceful part of the country than Mogadishu. The ECtHR disagreed, finding that, while the harm the applicant experienced prior to departure was indeed a result of a general instability in the country, his membership to a minority clan was sufficient to show that he would be at risk. The ECtHR concluded, “[i]t might render the protection offered by that provision illusory if, in addition to the fact of his belonging to the Ashraf – which the Government have not disputed –, the applicant were required to show the existence of further special distinguishing features.”

The ECtHR displayed further movement in *N.A. v. the United Kingdom* when it revisited the question of indiscriminate violence, the term that refers to unrest in a country so widespread that any civilian is at risk. It commented that previous decisions, such as *Vilvarajah*, should not be interpreted to require that an applicant to show distinguishing characteristics when the general level of violence in the country of origin are so intense that any removal to the country could

---

96 *Salah Sheekh*, at para. 148.
give rise to ill-treatment in violation of Article 3.\textsuperscript{97} The ECtHR stated this would be the case “only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.”\textsuperscript{98} It articulated a balance: if the individual is part of a minority that is systematically exposed to ill-treatment, the applicant does not have a heightened burden to show further distinguishing features. That is, the requirement of showing distinguishing characteristics depends on the level of violence in the country and the societal group to which the applicant belonged.

In \textit{NA v. UK}, the applicant relied, in part, on the EU Qualification Directive. The Directive guarantees another level of protection, subsidiary protection, for individuals who would be at a risk of “serious harm” if returned to their country of origin.\textsuperscript{99} Article 15 defines serious harm as: “(a) death penalty or execution; (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.”\textsuperscript{100} At the time of the case, a reference from the Dutch government had been made to the Court of Justice for the European Union asking whether Article 15(c) of the Directive offered supplementary or other protection to Article 3 of the Convention; this case is the \textit{Elgafaji} decision mentioned above and discussed in detail below. The ECtHR held that, as the case discussed a provision of EU law, the question was outside its jurisdiction.

\textsuperscript{97} \textit{N.A. v. UK}, App. 25904/07 (17 July 2008).
\textsuperscript{98} \textit{N.A.}, at para. 115.
\textsuperscript{100} Article 15, Directive 2004/83.
2. Qualification Directive: Article 15(c) and Indiscriminate Violence

The level of protection available to individuals seeking asylum in EU countries expanded after the CJEU’s *Elgafaji*\(^{101}\) decision in 2009. While the ECtHR was considering *N.A. v. UK*, a reference had been made to the CJEU to examine the substance of Article 15(c) of the Qualification Directive. The applications of an Iraqi couple, the Elgafajis, had been refused because they did not satisfy the government that they were at risk of serious and individual harm in Iraq. Members of the Shiite clan, the couple had received death threats after the death of Mr. Elgafaji’s uncle due to a terrorist attack. The applicants relied on Article 15(c) of the Qualification Directive, which defines serious harm as “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.” They argued that this provision provided separate protection from Article 15(b), which provides for protection against torture, and inhuman or degrading treatment, identical to Article 3 of the ECHR.

The issues in *Elgafaji v. Secretary of Justice* called upon the CJEU to examine, for the first time, the substance of Article 15(c) of the Qualification Directive. To do so, it had to clarify the relationship between the CJEU and the ECtHR. The Advocate General (AG), in his opinion to the *Elgafaji* ruling, affirmed the influence of the rulings of the ECtHR, stating, “[T]he importance that the ECHR may assume in the interpretation of the Community provisions which concern us cannot be overlooked,”\(^{102}\) Nevertheless, the AG held that the the ECtHR’s interpretation is not binding and therefore the scope of Article 15(c) must be considered independently from the ECtHR’s rulings. He affirmed that EU law must be given an

\(^{101}\) *Elgafaji*, C-465/07 (17 February 2009).

\(^{102}\) *Elgafaji*, AG Opinion, at para. 21.
“independent interpretation which cannot . . . vary according to and/or be dependent on developments in the case-law of the European Court of Human Rights.”

With this in mind, the CJEU held that Article 15(c) went beyond Article 3, providing supplemental protection apart from the requirements of Article 3. As a result, the applicants could rely on the risks associated with “indiscriminate violence” of terrorism in Iraq in order to obtain subsidiary protection. They did not have to show that they were subject to heightened risk due to individual characteristics, as the ECtHR required for application of Article 3.

In offering this interpretation of Article 15(c), the CJEU addressed the tension within Article 3: there may be instances where an individual is at risk of harm, even if discrimination is not at play. While 15(a) and 15(b) of the Qualification Directive, as well as Article 3 of the ECHR, cover instances in which an individual is subject to risk of harm due to a distinguishing characteristic, 15(c) fills in a gap, covering “situations of indiscriminate violence . . . so serious that, as the case may be, any individual within the ambit of that violence may be subject to a risk of serious harm to his person or life.”

Addressing the inclusion of the word “individual” in Article 15(c), the CJEU clarified that this simply means the applicant must show the risk is real: “Although a person is not covered by reason of features concerning him particularly, that person is no less individually affected when indiscriminate violence substantially increases the risk of serious harm to his life or person, in other words to his fundamental rights.”

103 Elgafaji, AG Opinion, at para. 19
104 Elgafaji, Judgment.
105 Elgafaji, at para. 34
106 Elgafaji, at para. 35.
3. Interaction between Article 3 ECHR and Article 15(c) Qualification Directive: *Sufi and Elmi v. the United Kingdom*

The rulings of *N.A.* and *Elgafaji* left unanswered the question of how the ECHR articles recognize protection from indiscriminate violence. The ECtHR addressed this question two years later in *Sufi and Elmi v. the United Kingdom*. The case concerned the asylum applications of two Somali nationals; one claimed to be a member of a sub-clan of the minority group and the other was the son of a military officer. Both claimed that their identities, along with the level of generalized violence in Somalia, exposed them to risk of harm. At issue was whether the meaning given to Article 15(c) of the Qualification Directive in *Elgafaji* could be transposed into Article 3 of the ECHR.

The ECtHR considered the ruling of *Elgafaji* and its previous ruling in *NA v. UK*, commenting that, “the threshold set by [Article 3 and Article 15(c)] may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there.”

To determine whether this threshold had been met, the ECtHR engaged in a fact-intensive examination of the current situation in Somalia. Using reports from NGOs, country reports, and other sources, the ECtHR observed that in many areas around Mogadishu, enemy forces conducted attacks in areas with dense civilian populations, which had resulted in thousands of casualties and mass displacement. The ECtHR further observed that only individuals with "connections at the highest level" would be able to secure protection; neither applicant had

---

107 Sufi and Elmi v. the United Kingdom, Apps. 8319/07; 11449/07 (28 June 2011).
enough ties in the country to be able to seek out protection from the violence. The ECtHR observed that, were the applicants to seek out safe places outside of Mogadishu, they would likely have to rely on IDP camps. The ECtHR concluded that the conditions in refugee and IDP camps were such that, reliance on these camps for refuge would result in ill-treatment of the applicants, a violation of Article 3.

The United Kingdom requested that the *Sufi and Elmi* ruling be referred to the Grand Chamber. In December 2011, Grand Chamber refused the request, signaling the finality of the judgment and the lasting influence of the CJEU on the ECtHR.

**B. Length of Detention**

It is common for asylum seekers in Europe to face detention while their claims are processed or after rejection of their application. The European Convention, under Article 5, and EU law, through the Returns Directive, impose restrictions on detention to ensure that it complies with human rights standards. In substance, the ECHR imposes only procedural limitations to ensure that any detention is not arbitrary. The Returns Directive imposes concrete time limitations.

This section focuses on detention of failed asylum seekers and describes how the requirements from each source interact to enhance protection from arbitrary and prolonged periods of detention after asylum proceedings have terminated.

---

109 *Sufi and Elmi*, at para. 249.

110 Article 43(1): “Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.”

111 Although not discussed here, the Reception Conditions Directive also addresses detention, in the context of freedom of movement, as does the Procedures Directive.
1. **ECHR Article 5(1)(f): A procedure prescribed by law**

Article 5 of the European Convention on Human Rights aims to prevent arbitrary deprivation of liberty. It lays out an exhaustive list of when detention is permissible. The legality of each is contingent on the detention being represented in domestic law: “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.”\(^\text{112}\)

The prohibition against arbitrariness is rigorous. “Prescribed by law” has procedural standards to ensure that any arrest and detention has a legal basis in domestic law. In order to adequately protect individuals from arbitrary action, however, the ECtHR has further held that Article 5 has a qualitative aspect, to ensure that the law is sufficiently clear and precise so that the individual knows the reasons for his or her detention.

Article 5(1)(f) is the only provision that addresses immigration detention. It provides that a person may be detained in the case of a “lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”\(^\text{113}\) ECtHR jurisprudence allows for the detention of asylum seekers, interpreting “unauthorised” to include any entry that is not yet authorized. In *Saadi v. the United Kingdom*, an Iraqi Kurd followed all asylum procedures correctly and cooperated with authorities.\(^\text{114}\) Although the applicant argued that detention was unlawful in this case since he was trying to effect an authorized entry, the ECtHR held that he fell into the category of Article 5(1)(f) since he was not yet authorized. Indeed, a notoriously

\(^{112}\) Article 5(1) ECHR.

\(^{113}\) Article 5(1)(f) ECHR.

\(^{114}\) *Saadi v. the United Kingdom*, App. 13229/03 (29 January 2008).
weak provision, it does not require that the detention be “reasonably necessary” as do other provisions concerning detention more generally.\footnote{Very few cases have found a violation of Article 5(1)(f). See, e.g., Singh v. Czech Republic, App. 60538/00 (25 January 2005).}

Although the ECHR does not set specific time limits on detention of asylum seekers, the procedural requirements of Article 5(1) have the effect of limiting the length of detention. The ECtHR will look towards domestic laws to ensure that any detention has a clear reason and justification. In \textit{Muminov v. Russia}, for example, the Court found that a detention was arbitrary when there was no clear legal procedure for extending detention and setting time limits.\footnote{\textit{Muminov v. Russia}, App. 42502/06 (11 December 2008).} It was not simply the length of detention that the Court took issue with; it was the lack of procedures to justify continued detention, signaling arbitrariness.

2. \textbf{The Returns Directive and the \textit{Kadzoev} ruling: A limit on the length of detention}


\begin{flushright}
32
\end{flushright}
The Returns Directive was the first piece of legislation to set limits on length of detention for asylum seekers whose claims have failed and all procedures and appeals have terminated.\textsuperscript{118} Article 15 articulates that detention of a third-country national shall be “for as short a period as possible” and “only maintained as long as removal arrangements are in progress and executed with due diligence.”\textsuperscript{119} In addition, the Article sets temporal limits: provided the conditions of the Directive are followed, any detention may not exceed six months, extendable up to 18 months for limited reasons.\textsuperscript{120} Extensions are permissible only when execution of removal is prolonged due to “lack of cooperation by the third-country national” or administrative delays. Article 15 further requires that detention only lasts as long as removal is a likely prospect. Finally, it provides for judicial review of a decision to detain an individual.\textsuperscript{121}

In 2009, the CJEU addressed the calculation of these time limits upon request from the Bulgarian court. \textit{Kadzoev v. Direktsia ‘Migratsia’ pri Ministerstvo na vatreshnite raboti} concerned the detention of a Russian national of Chechen origin who attempted and failed to seek asylum in Bulgaria.\textsuperscript{122} The Bulgarian authorities found that, without appropriate documents, it was impossible to establish the identity and nationality of Mr. Kadzoev with any certainty. As such, the Bulgarian authorities could not find a safe third country to which to deport him and held him in detention.


\textsuperscript{119} Article 15(1) Directive 2008/115/EC.

\textsuperscript{120} \textit{Id.}, Article 15(5)-(6).

\textsuperscript{121} \textit{Id.}, Article 15(2)(a).

\textsuperscript{122} \textit{Kadzoev v. Direktsia ‘Migratsia’ pri Ministerstvo na vatreshnite raboti}, C-357/09 (30 November 2009).
At the time of the CJEU’s review of the case, Mr. Kadzoev had been in detention for three years. Although Bulgaria had incorporated the time limits of the Returns Directive into its domestic law, the EU deadline for transposition into domestic laws had not yet passed. Moreover, the three years included periods in which removal proceedings were suspended due to Mr. Kadzoev’s application for asylum. Therefore, the legality of Mr. Kadzoev’s continued detention under the Returns Directive was unclear.

The CJEU interpreted the Returns Directive to limit the length of permissible detention. First, the court held that Mr. Kadzoev’s entire detention would be governed by the Returns Directive even the periods during which the deadline for transposition of the Directive into national law had not yet passed. Concluding that a situation in which an individual’s detention was calculated only after the deadline for transposition would “not be consistent with the objective” of Directive 2008/115, the CJEU held that the entire detention should be taken into consideration. Second, the CJEU held that the period of concern should include time periods during which execution of a deportation was suspended due to a judicial review procedure. The CJEU held that these periods must be considered in the maximum time limits because third-country nationals are guaranteed an effective remedy to appeal against or seek review of decisions related to their deportation. As nothing in Article 15(5) and (6) implied that procedures of judicial review should not be included in the period of detention, the Court held that these time periods must be included. Finally, when presented with the question of whether the time Mr. Kadzoev spent in detention while his asylum applications were pending should be included in the calculation, the CJEU answered that this detention is governed under the Reception and

123 Kadzoev, at para. 39.
124 Kadzoev, at para. 57.
Procedures Directives; the period of detention during which an asylum application is pending does not fall within the meaning of Article 15 of Directive 2008/115.

The *Kadzoev* sent a message to EU member states that the Directive would be binding immediately upon transposition. Secondly, it signaled to judicial systems that periods of judicial review must be conducted efficiently so that detainees do not languish in prison. Finally, Ryszard Cholewinski has commented that the *Kadzoev* ruling demonstrates that “the Court will carefully look at the wording in these new EU instruments, particularly when it concerns fundamental rights.”

3. **Implications of Directive 2008/115 for the ECHR Article 5(1).**

Although the ECtHR has not yet examined a case concerning length of detention for asylum seekers since the CJEU’s ruling in *Kadzoev*, the combined obligations of the ECHR Article 5(1) and the Returns Directive will enhance limit permissible detention more than either obligation alone.

First, applicants contesting a detention that exceeds the time limit of the Returns Directive will have a claim at the ECtHR. Although Article 5(1)(f) in itself imposes very weak controls on immigration detention, the ECHR’s prohibition against arbitrary detention rests on the instruction in Article 5(1) that any deprivation of liberty must be carried out in accordance with procedures “prescribed by law.” Since all Directives must be transposed into domestic law, the time limits will become a procedure “prescribed by law.”

---


126 Article 5(1) states, “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.”
Such a situation will arise when an EU Member State violates the Returns Directive, but the courts do not take any infringement action. As there are no direct remedies for individuals at the EU level, the only option for an individual held longer than six months will be to file an application to the ECtHR. The application will compel the ECtHR to examine the time requirements of the Returns Directive and, possibly, enforce EU law.127

Secondly, the procedural requirements of ECHR Article 5 ensure that the time limits of the Returns Directive are a ceiling. Even if an individual was held in detention within the time limits of the Directive, he may have a claim at the ECtHR. The Directive is not an authorization for states to keep individuals for maximum periods. The ECHR imposes the requirement that states provide continued justification for detention, whether the detention is six days or six months.

C. Member State Responsibility for Asylum Applications

The final area of asylum law that demonstrates collaboration between the ECtHR and the CJEU is in the identification of the state responsible for processing an asylum claim. When an individual enters the EU and has a connection to more than one Member State,128 questions arise as to the Member State responsible for examining the asylum application. The EU has implemented regulations to negotiate this situation, the Dublin II Regulations. Although the ECHR has no similar provision, Article 3 and Article 5 obligations put limitations on Member State’s actions under the Dublin II Regulations. The following section illustrates this relationship.

127 See Aristimuno Mendizabal v. France, App. 51431/99 (17 January 2006) for a comparable, though different, situation (interpreting Article 8 of the Convention in the light of Community law around Member States' obligations regarding the rights of entry and residence of EU nationals).

128 The Dublin Regulation applies, for example, to asylum seekers who travel to multiple states, claim asylum in more than one state, or to children in one Member State with family members in another.
1. EU Law Dublin II Regulation

The Dublin II Regulation (Council Regulation 343/2003)\textsuperscript{129} is one of the main EU legal instruments regulating asylum.\textsuperscript{130} Its goal is to prohibit individuals from filing multiple asylum applications within the EU.\textsuperscript{131} As such, its provisions aim to “determine rapidly the Member State responsible for examining an asylum application, so as to guarantee effective access to the asylum procedure and to prevent abuse in the form of multiple asylum applications.”\textsuperscript{132} Referred to as “a complex venue statute”,\textsuperscript{133} it establishes the criteria for this determination.

To determine the Member State responsible for processing an asylum application, the Regulation lists a hierarchy of criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State and applications made in an international transit area of an airport.\textsuperscript{134} Where none of these criteria apply, the default rule is that the first state in which an asylum seeker lodges an application is that which is responsible.\textsuperscript{135} The responsibility terminates if the asylum seeker has been absent from the State for a period of three months.\textsuperscript{136} The Regulation has the effect of authorizing a Member State to transfer an asylum seeker to another Member State in certain circumstances, for

\textsuperscript{129} The Dublin II Regulation was preceded by the 1990 Schengen Convention and the 1997 Dublin Convention. Each referenced the goals stated in the Treaty on the Functioning of the European Union related to abolishing internal borders within the EU. Member States, concerned that loosening borders would lead to individuals filing asylum applications in multiple states.

\textsuperscript{130} Regulation 343/2003 replaced the Schengen Convention of 1990.

\textsuperscript{131} Steve Peers, EU Justice and Home Affairs Law, 358 (3d ed. 2011).

\textsuperscript{132} Preamble, Regulation 343/2003, para. 4.

\textsuperscript{133} Fullerton, supra note 77, at 106.

\textsuperscript{134} Chapter III Regulation 343/2003.

\textsuperscript{135} Article 5(2), 4(5) Regulation 343/2003.

\textsuperscript{136} 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 (Dublin II Regulation), Article 4(5).
example, if the asylum seeker has traveled through that Member State and lodged an asylum application elsewhere.

Importantly, although the Regulation allows Member States to relinquish responsibility for an asylum application, it does not require states to do so. Indeed, a state may take responsibility for an asylum application lodged within it, even where it is not required to. The Regulations suggest that a state may do this for humanitarian reasons, towards the goal of family reunification, or when an individual is disabled and must remain with a family member or caretaker.\textsuperscript{137} If a Member State chooses to take responsibility for an asylum application, it “assume[s] the obligations associated with that responsibility.”\textsuperscript{138}

While the Dublin II Regulation contribute to an organized system for asylum review and avoid forum shopping, there are complications. First, the practical effect of the Dublin II Regulation is a regional imbalance of responsibility for asylum claims. Member States in northern Europe may decline responsibility for asylum applications, since a large percentage of asylum seekers in Europe enter by land through southern Member States: 90 percent of overland asylum seekers are said to enter the EU through Greece.\textsuperscript{139} Secondly, as will be discussed below, sound implementation of the Regulations rely on Member States complying with obligations under the EU Directives and the ECHR human rights obligations. In the field of asylum, the most pertinent concerns are prison conditions, examined under Article 3, and deprivation of liberty, Article 5.

\textsuperscript{137} Article 15 Regulation 343/2003.
\textsuperscript{138} Article 3(2) Regulation 343/2003.
\textsuperscript{139} FRONTEX data, press release from the Greek Ministry of Citizen Protection, 15 March 2011.
2. The ECHR and Member State Responsibility

The ECHR is silent on the negotiation of Member State responsibility for asylum applications. Indeed, transfers from one Member State to another under the Dublin II Regulation are not within the jurisdiction of the ECtHR. However, individuals who contend that a transfer under the Dublin II Regulation would result in ill-treatment may have a claim before the ECtHR under Article 3. Indeed, the ECtHR case law on the extraterritorial application of Articles 3 and 5 impose an obligation on Member States to consider human rights when sending asylum seekers to other Member States. While extraterritorial obligations exist in several areas of the ECHR, in the field of asylum law, this principle developed over the course of three cases, TI, KRS, and MSS v. Belgium and Greece.

TI v. the United Kingdom concerned the removal of a Sri Lankan national by the United Kingdom to Germany, where he had previously applied for and been refused asylum. Upon the issuance of removal directions to Germany, the applicant argued that his removal would violate Convention Article 3 since it would put him at risk of refoulement to Sri Lanka where he allegedly experienced torture by Sri Lankan officials.

The United Kingdom government submitted that the German courts had already considered the merits of the asylum claim in accordance with the national procedures. The German courts had considered the asylum claim to be “a completely fabricated tissue of lies,” and the UK government was hesitant to take on a “policing function” of another Member State’s procedures. The German government argued that its procedures were fully Convention-

---

140 See, e.g., Soering, Vilvarajah.
141 TI v. the United Kingdom, App. 43844/98, Admissibility Decision (7 March 2000).
142 TI v. UK, at A(2).
compliant and, in any event, the applicant would be able to present evidence for a fresh claim upon return to Germany.

The ECtHR noted that a return of the applicant to Germany did not impose a direct risk of treatment contrary to Article 3, as it had sufficient domestic procedures in place for examining asylum claims. Instead Germany was “one link in a possible chain of events.” Nevertheless, the ECtHR stated that indirectness does not relieve the UK from all responsibility to ensure that the applicant is not exposed to ill-treatment as a result of an expulsion. The ECtHR further noted that the provisions of the Dublin II Regulation cannot automatically relieve the UK from examining the effects of an expulsion: “It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.”

In the end, the ECtHR found the claim inadmissible. Despite the slim likelihood of a decision favorable to the applicant upon return to Germany, the ECtHR found that the German procedures were sound and did not violate Article 3 of the Convention. Nevertheless, the principle remained: the UK had the responsibility to consider the procedures the applicant would face in Germany.

The ECtHR qualified this position in *KRS v. the United Kingdom*. An Iranian applicant entered the European Union through Greece and later claimed asylum in the UK. Pursuant to its power under the Dublin II Regulation, the UK government requested that Greece accept responsibility for the asylum application; the Greek government agreed. The applicant contested his subsequent removal orders, claiming that, in Greece, he would be exposed to ill-treatment in

---

143 *TI*, at A(2).

144 *KRS v. the United Kingdom*, App. 32733/08, Admissibility Decision (2 December 2008).
violation of Article 3 and would be denied an effective remedy, guaranteed by Article 13 of the Convention. The UNHCR and several non-governmental organizations provided information about the detention conditions in Greece, including abuse by police officials, and prolonged confinement.

The ECtHR found the complaint “manifestly ill-founded,”\textsuperscript{145} and declared the case inadmissible. It acknowledged its previous holding in \textit{T.I.}, that signature to an international agreement does not absolve a Member State of its responsibility to consider the human rights implications of an expulsion or a transfer under the Dublin regulations. However, it found that the applicant had not sufficiently shown that he would be subjected to a real risk of ill-treatment in violation of Article 3 upon return to Greece. The ECtHR noted that Greece was not currently removing individuals to Iran,\textsuperscript{146} and that other EU instruments, such as the Procedures and Qualification Directives, imposed responsibility on Greece to adequately examine the asylum application. The ECtHR maintained, the “presumption must be that Greece will abide by its obligations under those Directives.” The ECtHR refused to comment on whether Greece acted in conformity with its obligations under EU law, as this fell outside of its jurisdiction. Finally, the ECtHR held that any concern about asylum procedures and ill-treatment in Greek prisons was not the responsibility of the UK; any complaint should be taken up with the Greek authorities.

Just six months later, the ECtHR took bolder position on Dublin II transfers to Greece. In the seminal case of \textit{M.S.S. v. Belgium and Greece},\textsuperscript{147} the ECtHR examined the case of an Afghani interpreter who, claiming his life was at risk by the Taliban, applied for asylum in

\begin{itemize}
\item \textsuperscript{145} \textit{KRS}, at I(C).
\item \textsuperscript{146} \textit{KRS}, at I(B).
\item \textsuperscript{147} \textit{M.S.S. v. Belgium and Greece}, App. 30696/09 (21 January 2011).
\end{itemize}
Belgium. Belgium requested that Greece take responsibility for the application, as the individual had first passed through Greece. After an unsuccessful attempt to stop the transfer by a request to the ECtHR for an interim measure, the applicant was transferred. In Greece, he experienced extremely poor detention conditions -- no bed, poor sanitation, little subsistence, and physical abuse. The asylum procedures and his responsibilities under them were unclear, due to inadequate information and translation services. The applicant subsequently filed complaints against Belgium and Greece: against Greece he claimed violations of Article 3 due to the poor detention conditions and Article 13 for deficiencies in the asylum procedures which put him at risk of human rights violations in Afghanistan. Against Belgium he claimed that removal to Greece exposed him to these risks.

The ECtHR found that both Belgium and Greece had acted in violation of Article 3 and 13, the right to an effective remedy. Most significant for the developing the interaction between the ECHR and EU law is its holding against Belgium. The finding against Belgium means that a Member State can violate the ECHR even when lawfully following an EU law, in this case the Dublin Regulations. M.S.S. solidified the notion that states cannot rely on membership or signature to a treaty to ensure human rights protection.

The ECtHR noted that, since the decision of K.R.S., a more substantial body of information concerning the asylum procedures in Greece had become available. The sources corroborated each other regarding the practical difficulties of applying for asylum. Importantly, the ECtHR noted that these difficulties should have been known to the Belgian authorities and that the applicant “should not be expected to bear the entire burden of proof.”

148 M.S.S., at paras. 321, 360.
149 M.S.S., at para. 352.
The ECtHR further scrutinized the assurances given by Greece in regards to the applicant’s asylum application. The Belgian government had received a notice from Greece stating, “Please note that if he so wishes this person may submit an application [for asylum] when he arrives in Greece.” Belgium wanted to rely on this, as well as on Greece’s obligations under EU Directives, as a form of diplomatic assurance. The ECtHR, on the contrary, found that this was not a sufficient guarantee because the wording was “stereotyped” and did not reference the applicant in particular.

The shifting of the burden away from the applicant, along with its skepticism around diplomatic assurances led the ECtHR to conclude that Belgium’s removal of the applicant to Greece constituted a violation of Article 3. The ECtHR concluded:

It was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3.

3. Interaction: The CJEU and Member State Responsibility after M.S.S.

M.S.S. marked a significant shift in interpretation of the extra-territorial obligations of the ECHR: the principles of extraterritoriality, that previously governed expulsion to a non-EU or Council of Europe state, now also apply to the transfer of asylum seekers from one EU Member State to another. However, it left open the question of whether fundamental rights obligations affected the interpretation of Member States’ responsibility under the Dublin II Regulation. That is, if a Member State issued a transfer of an asylum seeker to another state in accordance with the

150 M.S.S., at para. 24.
151 M.S.S., at para. 354.
152 M.S.S., at para. 359.
criteria of the Dublin II Regulations, could the CJEU examine an infringement proceeding brought against the sending state if the individual faced ill-treatment or lack of fair procedures?

After the ECtHR’s examination of *M.S.S. v. Belgium and Greece*, the CJEU examined the same question in the case of *N.S.*, an Afghan national who travelled through various countries in the European Union, including Greece. While in Greece, he was arrested and ordered to leave the country within 30 days. He travelled to the UK where he claimed asylum. The Secretary of State issued a certified opinion that, contrary to the applicant’s argument, removal to Greece would not violate Article 3 of the ECHR since Greece was on the UK’s list of safe countries.

The CJEU had to decide whether a decision to expel an individual under the Dublin II Regulation could raise an issue of fundamental rights under EU law. Article 3(2) of the Dublin II Regulation is a discretionary provision; it allows Member States to decide whether to examine an asylum application or send the individual to the Member State that is deemed responsible under the Regulations. In exercising this discretion, the CJEU considered whether Member States must consider human rights obligations under the CFR. Article 51(1) CFR states, “The provisions of this Charter are addressed to the institutions and bodies of the Union . . . only when they are implementing Union law.” The CJEU answered in the affirmative, holding that the discretion exercised by a Member State must be considered an “implementing measure” of the Regulations.

---

153 *N.S. and the Secretary of State for the Home Department*, joined cases C-411/10 and C-493/10, judgment of the Court (Grand Chamber) (21 December 2011).
154 *N.S.*, Judgment, at para. 38.
155 “. . . [E]ach Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation . . .” Article 3(2), Directive 343/2003.
Dublin II Regulations, it must have regard for the prohibition against torture and inhuman or degrading treatment or punishment (Article 4) and the right to an effective remedy (Article 47).

The CJEU also considered whether the obligations of the CFR preclude the transfer of an individual if there is reason to believe that fundamental rights would be infringed in the receiving state. In this inquiry, the CJEU looked closely at the ECtHR’s judgment in M.S.S. to examine the relationship between Article 3 ECHR and the CFR.\(^{157}\) Citing Article 52(3) of the CFR, which states that the Charter rights must have the same meaning and scope as the corresponding rights in the ECHR, the CJEU commented that the Charter is to be construed as a “dynamic reference . . . cover[ing] the case law of the [ECHR].”\(^{158}\) As *M.S.S. v. Belgium and Greece* expanded the obligations of Article 3, the CJEU concluded that the CFR must adapt to mirror the scope of the ECHR. As the Advocate General commented:

> [T]he Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.\(^{159}\)

The CJEU holding in *N.S.* expands the scope of the CFR and has significant implications for the Common European Asylum System (CEAS). The CJEU recognized that proper functioning of the CEAS relies on “mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.”\(^{160}\)

---

\(^{157}\) *N.S.*, Advocate General Opinion, at paras. 101-05.

\(^{158}\) *N.S.*, Advocate General Opinion, at para. 145.

\(^{159}\) *N.S.*, Judgment, at para. 94. The Court also looked to Article 18 CFR, which outlines the right to asylum and embraces the principles of the Refugee Convention, including principle of *non-refoulement*. The Court held that if a state concludes that the conditions of another state’s asylum system put a refugee at risk of *refoulement*, the state is precluded from transferring the individual to that state.

\(^{160}\) *N.S.*, Judgment, at para. 83.
However, similar to the ECtHR’s skepticism of diplomatic assurances in *M.S.S.*, the CJEU maintained that participation in the CEAS would not excuse Member States from examining the practical reality of asylum procedures in other states. To that end, the obligations of the CFR imposed conditions on reliance on the Directives.

Importantly, the CJEU confined this holding to violations of the CFR and the Geneva Convention. It recognized that CEAS was created in order to improve the efficiency and standardization of asylum policy across the EU. If any failure of obligations by a Member State precluded a states from transferring an asylum seeker, the entire system would be undermined. Therefore, failure to comply with the EU Directives, would not result in an obligation on a Member State to assume responsibility of the asylum seeker. Rather, it would give rise to a claim against the offending Member State itself.\textsuperscript{161}

IV. The Refugee Convention

Focusing on the categories of subsidiary protection, detention, and *non-refoulement*, this Article has recognized positive examples of collaboration between the ECtHR and the CJEU that has resulted in enhancement of protection for asylum seekers. Rigorous embrace of the Convention Relating to the Status of Refugees (“Refugee Convention” or “the Convention”), however, is critical to further enhancement protection of asylum seekers. The Convention provides the foundation for Member States’ commitment to refugee protection. Signed in 1951 and expanded by the Protocol Relating to the Status of Refugees in 1967, all European Union Member States are signatories it. When such individuals are unable to access protection in their own country, they may seek refuge in the signatory countries to the Convention. The

\textsuperscript{161} N.S., Judgment, at para. 83-84.
Convention provides the substantive definition of refugee in EU law. The Charter of Fundamental Rights cites it as source of authority, and the ECtHR cites it as a guidepost for its decision-making. Much of this influences pivots around the Convention’s primary principle of non-refoulement: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

The Refugee Convention provides guidance for the topics discussed in this paper. For example, as pointed out by James Hathaway, although the Qualification Directive mirrors the definition of the Refugee Convention in its inclusion of the category “membership of a particular social group,” it has not caught up with the progress the Convention has made in interpreting this category, particularly in the area of protection of women and sexual minorities. Similarly, the UNHCR has expressed concern that, as the Qualification Directive’s focus on subsidiary protection grows, “the Refugee Convention and refugee status will become increasingly

---


163 “The right to asylum shall be guaranteed with due respect for the rules of [the Refugee Convention]”

164 Article 33(1) UNHCR.

165 James Hathaway, “EU Accountability to International Law: The Case of Asylum,” 33 Mich. J. Int’l L. 1 (Fall 2011), p. 2. Accord Volker Turk, “Protection Gaps in Europe?” Person fleeing the indiscriminate effects of generalized violence,’ Statements by the Assistant High Commissioner for Protection and Director of the Division of International Protection, 18 January 2011. http://www.unhcr.org/. (“There are those who, in UNHCR’s view, meet the Convention criteria but who, because of varying interpretations, are not recognized by states as refugees under the 1951 Convention. For instances, those who fear gender-related persecution or presecution by non-state agents or . . . Those who flee persecution in areas of on-gong conflict or general violence may not, in some states, be determined to be refugees. It is our view that a proper application of the 1951 Convention and the 1967 Protocol is itself key in securing international protection to these categories of persons. Limiting such persons to complementary forms of protection is, in UNHCR’s view, not appropriate.”).
sidelined as the appropriate framework for securing international protection.”\textsuperscript{166} Those who might fall under the Convention criteria according to the UNCHR -- and would therefore be eligible for the full host of rights articulated in Articles 2-33 -- are granted a lower level of protection by being granted only “subsidiary protection.”

Similar concerns surround the detention of asylum seekers. As discussed above, the ECtHR and the CJEU have made positive steps to limit the circumstances under which and time periods that an asylum seeker may be detained. The Reception Conditions Directive permits states, for legal reasons or reasons of public order, to confine an applicant to a particular place in accordance with national law. But, Cathryn Costello has argued, even this is a “distort[ion]” of the Refugee Convention, which is “based on the premise that asylum seekers are presumptive refugees, and to be treated accordingly, particularly in light of the declaratory character of refugee status.”\textsuperscript{167} Without inclusion of asylum seekers in the category of refugees, detention among asylum seekers has become “endemic” in Europe.\textsuperscript{168}

Moreover, the Convention contains a rich spectrum of rights that extends far beyond non-refoulement. Having as its mandate “to lead and safeguard the rights and well-being of refugees,” the Convention recognizes a network of civil, political, social, and economic rights for those who qualify as a refugee, and a legal framework within which to evaluate them. The Convention provides refugees the benefits of its provisions without discrimination as to race, religion, or country of origin (Art. 3), the right acquire property to the extent of other aliens in the same circumstances (Art. 13), the right to protection of literary, artistic, and scientific works

\textsuperscript{166} The Refugee Convention at 60, p. 10.
through trademarks (Art. 14), freedom of association (Art. 15), access to the courts of the host
country (Art. 16), the right to wage earning employment (Art. 17), the right to housing benefits
to the extent accorded to aliens in the host country (Art. 21), access to elementary education to
the extent provided to nationals and access to higher education to the extent provided to other
aliens (Art. 22), equal access to labor legislation and social security (Art. 24), and freedom of
movement, which limits the state’s power to detain asylum seekers and refugees (Art. 26). It
further outlines that any expulsion of a refugee must be in accordance with the due process
protections provide by law: the refugee “shall be allowed to submit evidence to clear himself,
and to appeal to and be represented for the purpose before competent authority.” (Art. 32).

While the Refugee Convention is an enormously rich document, it has limitations. Most
significant to this article is the fact that the Convention lacks a supervision procedure to review
the correctness of decisions to recognize an individual as a refugee. As a result, a large body of
divergent case law has developed from tribunals who use the Convention.

Thus, the influence of the Refugee Convention is dependent on the European courts. It is
incumbent these courts to ensure that the rich framework of rights afforded to refugees under
international law is not eclipsed by the absolute requirement of non-refoulement. While the
European courts grapple with absolute rights and prerequisite issues of administration of asylum
claims, the full range of rights to which asylum seekers are entitled under international law are
less prevalent in the case law. As Hathaway argues, “the continuing effort to ‘shoe horn’ respect
for refugee law norms into the limited jurisdiction of the ECHR may actually be indirectly (if
inadvertently) responsible for the pervasive belief in Europe that no more than minimal
constraints (specifically, risk of refoulement or torture or cruel or inhuman treatment) restrict the authority of states to force refugees away.”

IV. Conclusion: Accession and the Role of Litigation in Human Rights Protection

Affirmative protection and enforcement of human rights is a relatively recent resolution of the European Union. The EU was founded primarily upon the economic goals of free trade and movement of goods and people; human rights was not originally within the purview of the EU as an institution. Protection of human rights was left up to the Member States and the obligations imposed on them through the European Convention on Human Rights. It was not until 2000 that the EU wrote its own Charter of Fundamental Rights and not until 2009 with the Treaty of Lisbon that this Charter became binding and justiciable.

Discussions around accession of the EU to the ECHR have been brewing since the 1970s, but it was not until the Lisbon Treaty in 2009 that there was a legal basis for accession. In order to inspire greater coherence and consistency of human rights protection in Europe, and “close gaps in legal protection,” Article 6(2) declares, “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” Since then the Committee of Ministers, the decision-making body for the states that are party to the ECHR, have worked with the Member States of the EU to write the instrument that will form the basis for accession.

169 Hathaway, supra note 165, p.6.
Myriad debates remain to be settled before accession will be complete. For example, a co-respondent mechanism would allow Member States and the EU to join as co-respondents before the ECHR. When this would be available and how this would affect the ability of individuals to bring cases remains a live debate. Additionally, if the EU is joined as a co-respondent and an issue of EU law is not clear, the CJEU must have the opportunity to decide on the correct interpretation of the law at issue. How and when to implement an accelerated procedure before the CJEU is likewise unsettled.

This paper seeks to show that, in the absence of resolution of these issues, litigation has accomplished what political discussions have not. Recent decisions by the ECtHR and the CJEU show that the courts are closing the gaps in human rights protection that exist from their differing mandates, jurisdiction, and interpretive methods. Instead of using these differences and as a barrier, the two courts have looked to each other for influence, heightening standards for human rights protection for asylum seekers in Europe.

First, in the field of identifying who is eligible for protection, the CJEU held that the Qualification Directive offered wider protection than the case law of the ECtHR. Although this was originally intended to cover areas not covered by Article 3 ECHR, the ECtHR, in *Sufi and Elmi*, held that the CJEU’s decision in *Elgafaji* must influence its own interpretation of Article 3.

Second, in establishing limits on detention of asylum seekers, the ECHR and EU law together provide heightened protection where each on its own would be relatively weak. The ECtHR imposes procedural obligations on states to continuously provide justification for

----


deprivation of liberty to ensure that the deprivation is not arbitrary. The Returns Directive sets concrete time limits on detention; the Kadzoev ruling by the CJEU offered guidance for Member States on the calculation of these limits. Together, the legal obligations will ensure, first, that no asylum seeker is held for over 18 months and, second, that the limits are a ceiling.

Finally, the ECtHR and the CJEU have acted in tandem on the Dublin Regulation. The ECtHR’s decision in M.S.S. signaled to Member States that membership to Conventions and diplomatic assurances will not relieve the burden of ensuring that the human rights of removed asylum seekers would be respected. In turn, the CJEU in N.S. ruled that the new interpretation of Article 3 ECHR must expand the parallel protection offered by Article 4 CFR. Membership to the Common European Asylum System would not relieve Member States from ensuring fellow states’ compliance with fundamental rights.

Mutual engagement between the ECtHR and the CJEU in the field of asylum law sends an important message to litigators that human rights protection is dynamic, even when the political climate is uncertain. Further, it shows that integration of multiple legal orders within the EU and the Council of Europe can be seen as an opportunity rather than a constraint. Finally, these decisions serve as a guide for policy makers and legislators. The expansion of human rights legislation that will follow EU accession to the ECHR must match the legal obligations already developing in the courts.