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EU asylum procedures and the right to an effective remedy

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3 | International treaties as sources of inspiration for EU fundamental rights

International treaties containing human rights and fundamental freedoms, in particular the ECHR are an important source of inspiration for EU fundamental rights.¹ Therefore in this study's effort to define the meaning of the EU right to an effective remedy, such treaties and the views of their supervising bodies will play a crucial role. In this chapter a few important questions will be addressed regarding the (potential) use of these treaties by the Court of Justice in the context of CEAS. Furthermore the consequences of this (potential) use for the way in which this study is conducted will be discussed.

The level of protection offered by EU fundamental rights

The first question which should be answered is whether the fact that international treaties are not directly applied by the EU Courts, but are only used as sources of inspiration may result in EU fundamental rights offering a lower level of protection than those treaties. It is concluded in section 3.1 that this is generally not the case. It is possible though, that EU fundamental rights require broader protection than that offered by international treaties. The standards following from international treaties thus indicate the minimum level of protection which should be guaranteed by EU fundamental rights.

The role and significance of international treaties in the context of CEAS

This study takes into account the ECHR, the Refugee Convention, the ICCPR, the CAT and the CRC and the views of their supervising bodies. Section 3.2 will show that these international treaties have been or should be recognised as a source of inspiration in general and in particular in the context of CEAS. It follows from Article 63 (1) of the former EC-Treaty and Article 78 (1) TFEU that EU asylum legislation must be 'in accordance' with these treaties. Section 3.2.7 addresses the question whether this requirement entails that international treaties be directly applied by the Court of Justice and not only used as sources of inspiration.

The relative weight of international treaties

Finally section 3.3 examines the relative weight which should be attached to the treaties taken into account in this study. It is argued that in practice the

1 Art 6 (3) TEU, Artt 52 and 53 of the Charter.

importance of a treaty for the development of EU fundamental rights seems to relate foremost to the authority of the judgments or views of its sources of interpretation. It will be shown that the Court of Justice attaches great weight to the (binding) judgments issued by the ECtHR. The Court of Justice is a lot more hesitant to base its interpretation of EU fundamental rights on the non-binding views of other monitoring bodies. For this reasons in this study most weight will be accorded to the ECtHR's case-law, while the non-binding views of other monitoring bodies will only play a complementary role.

3.1 INTERNATIONAL TREATIES VERSUS EU FUNDAMENTAL RIGHTS

An important question, which will be addressed in this section, is whether EU fundamental rights may offer a lower level or a higher level of protection than human rights recognised in international treaties.

3.1.1 May EU fundamental rights provide a lower level of protection?

Both the Charter and the case-law by the EU Courts (which will be discussed in more detail in section 3.3), show that in principle EU fundamental rights do not provide less protection than international treaties. Article 52 (3) of the Charter provides that, in so far as the Charter contains rights which 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.'² According to the explanations with Article 52 (3) of the Charter this provision is intended to ensure the necessary consistency between the Charter and the ECHR and its Protocols.³ The meaning and the scope of the guaranteed rights are determined not only by the text of the ECHR, but also by the case-law of the ECtHR and by the Court of Justice. The explanations state that 'in any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.⁴

2 The explanations contain a list of rights which may, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR. Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/33-34.

3 See also the Joint communication from the Presidents of the ECtHR and the Court of Justice, Costa and Skouris of January 2011, in which they state with regard to the relationship between the ECHR and the Charter that 'it is important to ensure that there is the greatest coherence between the Convention and the Charter insofar as the Charter contains rights which corresponding to those guaranteed by the Convention.' In their view a 'parallel interpretation' of the two instruments could prove useful.

4 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/33.

Article 53 of the Charter provides more generally that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by international law and by international agreements to which the Union or all the Member States are party, including the ECHR. According to the explanations with the Charter this provision is intended to maintain the level of protection currently afforded within their respective scope by (amongst others) international law.⁵

Level of protection offered according to the Court of Justice's case-law

Some authors argue that general principles of EU law as applied by the EU Courts by their very nature allow for balancing human rights with competing principles in cases where the underlying provisions of international law do not.⁶ However most scholars seem to be of the opinion that the indirect application of international treaties does not result in less protection than their direct application. Groussot states that 'once the ECHR has been "filtered" by the ECJ through the general principles, the end result is much the same as if the Community was formally bound by the ECHR'.⁷ Battjes notes that it is questionable that one can conclude on the basis of the mere phrasing of the Court that the application of human rights law via general principles offers less protection. He refers to the judgments in *Steffensen* and *Akrich* where the Court seems to consider that human rights treaties must be complied with within the EU legal order.⁸ In *Steffensen* the Court states:

According to the Court's case-law, where national legislation falls within the field of application of Community law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down, in particular, in the European Convention for the Protection of Human Rights and Fundamental Freedoms – whose observance the Court ensures.⁹

In *Akrich* the Court observed that the right to respect for family life as enshrined in Article 8 ECHR 'is among the fundamental rights which, according to the Court's settled case-law, restated by the preamble to the Single European Act and by Article 6(2) EU, are protected in the Community legal order'.¹⁰ Section 3.3.1 will show that, also when actually interpreting EU fundamental

5 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/35.

6 Battjes 2006, p 92.

7 Groussot 2006, p 71.

8 Battjes 2006, p 92.

9 Case C-276/01, *Steffensen* [2003], para 70. See also Case C-260/89, *ERT* [1991], para 42,

10 Case C-109/01, *Akrich* [2003]. See also Case C-60/00, *Carpenter* [2002], para 41 and Case C-482/01, *Orfanopoulos* [2004], para 98.

rights and principles, the Court of Justice complies with the standards following from the ECHR and the ECtHR's case-law.

3.1.2 May EU fundamental rights provide broader protection?

EU fundamental rights cannot offer less protection than international law, but they may offer broader protection.¹¹ An EU fundamental right has an autonomous character and comprises more than just a sum of the rights included in the ECHR which inspired it.¹² This may be derived from Article 52 (3) of the Charter, which states that this provision shall not prevent Union law providing more extensive protection than the ECHR.¹³ In the Court of Justice's case-law several examples of such a broader interpretation of a fundamental right can be found.¹⁴

3.2 INTERNATIONAL TREATIES AND THE COMMON EUROPEAN ASYLUM SYSTEM

Article 63 (1) of the former EC-Treaty requires the asylum measures based on that provision, such as the Procedures Directive, to be 'in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties'. Article 78 TFEU also states that the common policy on asylum, subsidiary protection and temporary protection must be in accordance with those treaties. This section will explain that besides the Refugee Convention, to which mentioned provisions explicitly refer, also the ECHR, the ICCPR, the CAT the CRC should be considered 'relevant treaties' in the context of CEAS. Furthermore it shows that all these treaties have been, or should be recognised as sources of inspiration for the interpretation of EU fundamental rights. Treaties which will not be addressed in this study but which may nevertheless be considered 'relevant treaties' in the context of CEAS are the International Convention on the Elim-

11 The Court of Justice has held that the nature and scope of EU fundamental rights must be determined autonomously and may thus differ from fundamental rights recognised amongst others in the ECHR. See Murray 2008, p 538.

12 See the opinion of A.G. Cruz Villalón in Case C-69/10, *Samba Diouf* [2011], para 39. Kunoy & Mortansson state that in the *Chakroun* judgment the Court of Justice declined the invitation to emancipate the Charter from the ECHR. Kunoy & Mortansson 2010, pp 1826 and 1829-1830.

13 See also A.G. Maduro, opinion in Case C-465/07, *Elgafaji* [2009], para 23.

14 Bronckers writes that the Court of Justice reserves for itself the possibility to give its own, diverging interpretation of the Convention's fundamental rights as incorporated in general principles of EC law. Bronckers 2007, p 601. See also Van Cleynenbreugel 2012, p 344. See further section 3.3.1.

ination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁵

The explicit requirement of 'accordance with' international law laid down in Article 63 (1) of the former EC-Treaty and Article 78 TFEU is rather unique in EU law.¹⁶ It raises the question whether, on the basis of these provisions, the Court of Justice should apply the Refugee Convention and other relevant international treaties directly, instead of using them as sources of inspiration. Section 3.2.7 briefly addresses this question and explains why this study uses international treaties only as sources of inspiration for the EU right to an effective remedy and not as a separate category of norms.

3.2.1 The European Convention on Human Rights

The ECHR contains a set of civil and political rights, which apply to every person within the jurisdiction of the High Contracting Parties irrespective of that person's nationality or legal status.¹⁷ According to Article 6(3) TEU, the Charter¹⁸ and the Court of Justice's case-law, the ECHR has special significance for the development of EU fundamental rights.¹⁹ In the context of the Common European Asylum System, the ECHR should also be considered a 'relevant treaty' in the meaning of Article 63 (1) of the former EC-Treaty and Article 78 TFEU. This is due to the fact that Article 3 ECHR contains by far the best developed prohibition on *refoulement*.²⁰ Article 2, Article 1 of Protocols Nos 6 and 13 and in exceptional cases Article 6 also contain prohibitions of *refoulement*.²¹ The grounds for qualification as a person in need of subsidiary protection laid down in Article 2 (e) in conjunction with 15 QD are (partly) based on the ECtHR's case-law under Article 2 and 3 ECHR.²² It will be argued in

15 Both the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women addressed the position of refugees. See for example CERD General Recommendation No 22 (1996) and CEDAW General Recommendation No 19 (1992).

16 Battjes 2006, p 97.

17 Wouters 2009, p 202.

18 The Charter specifically states that it reaffirms the rights included amongst others in the ECHR and following from the case-law of the ECtHR. Furthermore Art 52 (3) states that the meaning and scope of the rights included in the Charter which correspond to a right guaranteed by the ECHR shall be the same as those laid down by the ECHR. Other human rights conventions such as the ICCPR or the CAT are not explicitly mentioned by the Charter.

19 Case C-222/84, *Johnston* [1986], see also Case C-540/03, *Parliament v Council* [2006], para 35.

20 Wouters 2009, p 187.

21 Wouters 2009, p 187. See also Den Heijer 2008.

22 There are several other ECHR provisions which are relevant in the asylum context. See for example Art 5 ECHR, which provides for rules for the detention of asylum applicants and Art 4 of Protocol No 4, which prohibits collective expulsion of aliens.

section 4.3.1 that the procedural guarantees following from Articles 3, 6, 13 and 35 ECHR inspire the EU right to an effective remedy in the context of CEAS.

3.2.2 The Refugee Convention

The Refugee Convention provides the most comprehensive codification of the rights of refugees at the international level'.²³ The most important right granted to a refugee is the right to be protected from *refoulement*, laid down in Article 33 of the Convention.

The relevance of the Refugee Convention for CEAS has been explicitly recognised in Article 63 (1) of the former EC Treaty and Article 78 TFEU.²⁴ Also the preamble and the texts of the Procedures Directive refer to the Refugee Convention.²⁵ The Refugee Convention itself does not contain any provisions which regard refugee determination procedures.²⁶

The Refugee Convention is most relevant for the interpretation of the criteria for qualification as a refugee laid down in the Qualification Directive, which are directly based on and are often exactly the same as those laid down in the Refugee Convention.²⁷ In particular in the last situation the Qualification Directive should be considered to have the same meaning as the Refugee Convention.²⁸

According to the preamble of the Qualification Directive 'the Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees'. The Court of Justice has referred to this recital in several cases in which it was asked to interpret provisions of the Qualification Directive, which are directly based on the Refugee Convention.

23 See the Introductory note to the Refugee Convention by the Office of the United Nations High Commissioner for Refugees (UNHCR), August 2007, www.unhcr.org and the preamble to the Convention.

24 In the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999, the European Council reaffirmed 'the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.' According to Battjes the reference to the Refugee Convention connected the term 'asylum' used in Art 63 of the former EC-Treaty closely to refugees in the sense of the Refugee Convention. Battjes 2006, p 146.

25 Recitals 2, 7, 13 Preamble and Art 2 (a) (b) and (f), Art 3 (3), Art 21 (1) (c), Art 27 (1) (b) and (d) and Art 36 (2) (a) and (4) PD.

26 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 191, refers to the fact that asylum procedures are not specifically regulated by the Refugee Convention and that, as a result, asylum procedures in State parties vary considerably. See also Staffans 2010, p 275.

27 See in particular Artt 2 (c), 11, 12 and 14 QD.

28 See A.G. Sharpston in her opinion with Case C-31/09, *Bolbol* [2010], para 92.

It is considered that the provisions of the Qualification Directive must be interpreted while respecting the Geneva Convention.²⁹

3.2.3 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights contains a list of civil and political rights, which apply to all persons irrespective of their nationality or legal status, including asylum applicants and refugees.³⁰ The Court of Justice has recognised the ICCPR as a source of inspiration for EU fundamental rights.³¹ Furthermore the ICCPR should be considered a relevant treaty in the sense of Article 63 (1) of the former EC-Treaty and Article 78 TFEU, as it contains prohibitions of *refoulement* in Articles 6 (the right to life)³² and 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment).³³ With respect to asylum procedures Article 2(3) ICCPR, which obliges the State parties to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy is most relevant.³⁴

3.2.4 The UN Convention against Torture

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) seeks to 'make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.'³⁵ In order to achieve this objective the Convention contains a set of obligations for the State parties, amongst others to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.³⁶

The Convention against Torture has not yet been recognised as a source of inspiration for EU fundamental rights by the Court of Justice. However it should be expected that the Convention will be recognised as such in the

29 See for example Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], paras 52-53 and Case C-31/09, *Bolbol* [2010], paras 37-38.

30 See Art 2 (1) ICCPR, HRC General Comment No 31 (2004), CCPR/C/21/Rev1/Add.13, para 10. See also Wouters 2009, p 362.

31 Case C-540/03, *Parliament v Council* [2006], para 37.

32 See for example HRC 20 October 2003, *Judge v Canada*, no 829/1998.

33 See for example HRC 10 November 2006, *Alzery v Sweden*, no 1416/2005.

34 See further section 4.3.1.

35 Nowak and McArthur point out that the CAT has following three aims: to establish specific obligations for States parties to prevent torture and to assist victims of torture, to require the use of criminal law and jurisdiction to fight impunity of torturers and to provide for stronger measures of international monitoring of States' compliance with the absolute prohibition of torture. Nowak & McArthur 2008, p 595.

36 See also Wouters p 427.

future, because all EU Member States are a party with this Convention. Article 3 CAT contains an explicit prohibition of *refoulement*³⁷, which is guaranteed to all individuals, including stateless persons and illegal aliens.³⁸ Therefore the CAT should be considered a relevant treaty in the meaning of Article 63 (1) of the former EC-Treaty and Article 78 TFEU. The CAT does not have an 'effective remedy provision', which is comparable to Articles 13 ECHR or 2 (3) (a) ICCPR. However the Committee against Torture has derived a right to an effective remedy from the absolute prohibition of *refoulement* laid down in Article 3.³⁹

3.2.5 The UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child (CRC) contains a set of civil, social, cultural and economic rights, which shall be ensured to each child⁴⁰ within the State parties' jurisdiction without discrimination of any kind.⁴¹ The Committee on the Rights of the Child (also referred to as ComRC) has identified four general principles of the CRC: the right to non-discrimination, the primary consideration of the child's best interests, the right to life and development and the right to be heard.⁴²

The CRC has been recognised as a source of inspiration for EU fundamental rights by the Court of Justice.⁴³ Furthermore it should be considered a relevant treaty for the purposes of Article 78 TFEU and Article 63 of the former EC Treaty for several reasons. First of all the preambles of the EU directives adopted in the context of CEAS state that the directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Article 24 of the Charter requires amongst others that the child's best interests be a primary consideration in all actions relating to children. The Procedures Directive reflects this fundamental right while stating that the best interests of the child 'shall be a primary consideration' for Member States when implementing the provisions of the directive.⁴⁴ The 'best interests' principle included in Article 24 of the Charter and the Procedures Directive is based on Article 3 CRC. Other provisions of the Procedures Directive clearly affect children's rights although

37 Art 3 CAT states that 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

38 Wouters 2009, p 435.

39 ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003, para 13.6. See further section 4.3.1.

40 According to Art 1 CRC a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

41 Art 2 CRC.

42 ComRC General Comment No 5 (2003), CRC/GC/2003/5, para 12.

43 Case C-540/03, *Parliament v Council* [2006], para 37.

44 Recital 12 Preamble QD and Art 17 (6) PD.

they are not directly based on one of the rights laid down in the CRC. Article 17 PD states for example that Member States must ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the asylum application. This representative must be able to inform the minor about and prepare him for the personal interview. Arguably these provisions should be interpreted in the light of the relevant provisions of the CRC. Article 22 CRC specifically addresses the rights of refugee and asylum seeking children. Moreover, the CRC contains certain provisions which should be considered relevant for asylum procedures in particular, such as the State parties' duty to give due weight to the views of the child in accordance with the age and maturity of the child (Article 12 CRC).⁴⁵

3.2.6 Direct application of international treaties?

The Court of Justice normally uses international treaties as sources of inspiration for the interpretation of EU fundamental rights. Arguably this should be different when ruling in asylum cases. The text of Article 63 (1) of the former EC-Treaty and Article 78 TFEU suggests that the Court of Justice must apply relevant international treaties directly, instead of using them as sources of inspiration.⁴⁶ This means that the Court of Justice should test the legality of the Procedures Directive against human rights treaties and interpret its provisions in the light of these treaties. Arguably the Court of Justice may also test national measures implementing the measures adopted under Article 63 (1) directly against the relevant treaties mentioned in Article 63 (1).⁴⁷ Direct application of international treaties by the Court of Justice could also be based on references to these treaties in secondary EU legislation, such as the text and preamble of the Procedures Directive, which refer to the Refugee Convention. The Court of Justice considered in several cases that the Qualification Directive, which also refers to the Refugee Convention, must 'be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU'.⁴⁸ Furthermore the Court of Justice in *Salahadin Abdulla* and *B. and D.* seems to consider the

⁴⁵ See further Chapter 7 on the asylum applicant's right to be heard on his asylum motives.

⁴⁶ See also Battjes 2006 pp 100-101.

⁴⁷ Battjes 2006 pp 98-99.

⁴⁸ Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 53 and Joined Cases C-57/09 and C-101/09, *B. and D.* [2010], para 78. The Court based this consideration on Art 63 (1) of the EC-Treaty and recitals 13, 16 and 17 Preamble QD. See also the opinion of A.G. Sharpston with Case C-31/09, *Bolbol* [2010], para 36.

Refugee Convention and the Charter separate instruments for the interpretation of the Qualification Directive.⁴⁹

It should be noted however that it was concluded in section 3.1.1 that EU fundamental rights guarantee that the treaties mentioned in Article 63 (1) of the former EC-Treaty and 78 TFEU are fully respected. For this reason it is not likely that the direct application of those treaties would result in a higher level of protection than the indirect application of international treaties as sources of inspiration of EU fundamental rights.⁵⁰ In this study international treaties will therefore not be treated as a separate category of norms, but only as sources of inspiration.

3.3 THE WEIGHT OF INTERNATIONAL TREATIES IN THE CASE-LAW OF THE COURT OF JUSTICE

It is relevant to know whether the international treaties taken into account for the purpose of this study all have the same weight as sources of inspiration. What should be done if several relevant sources of inspiration or the views of their supervising bodies contradict each other? May the interpretation of the EU fundamental rights and general principles be based on the non-binding view of supervising bodies alone?

Arguably it follows from the specific references to the ECHR and the Refugee Convention in the Treaties, the Charter and EU legislation that these treaties have special significance. Nothing can be found in those instruments as to the relative weight which should be attached to the ICCPR, the CRC or the CAT. It will be shown in this section that in practice the ECHR is by far the most important source of inspiration for EU fundamental rights. Much less weight is attributed to other international treaties. Murray states that the ECHR

has played, and was bound to play, an increasingly central role in the Court's case law as a source from which inspiration may be drawn in fundamental rights cases, in comparison to which other international sources of inspiration referred to, such as various Council of Europe instruments and those emanating from the United Nations and the International Labour Organisation ("ILO") have played bit parts.⁵¹

The authority of a treaty's sources of interpretation

The importance of a treaty for the development of EU fundamental rights seems to relate foremost to the authority of the judgments or views of its sources of interpretation. The ECJHR's judgments are binding and provide clear guid-

49 Joined Cases C-57/09 and C-101/09, *B. and D* [2010], para 78 and Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and others* [2010], paras 53-54.

50 See also Battjes 2006, p 104.

51 Murray 2008, p 538.

ance as to the interpretation of the rights included in the Convention.⁵² This makes it a suitable source of inspiration for EU fundamental rights. Section 3.3.1 will give an overview of the use of the ECtHR's case-law by the Court of Justice.

It will be pointed out below in sections 3.3.2-3.3.4 that the EU Courts attach much less weight to non-binding views of other bodies, such as the institutions of the Council of Europe and the bodies supervising the Refugee Convention, the ICCPR, the CAT and the CRC. The Refugee Convention does not have a supervising court or any other legally binding sources for interpretation.⁵³ Guidance for the interpretation of the Refugee Convention is provided by the UNHCR⁵⁴ and the Executive Committee of the Programme of the High Commissioner (EXCOM). UNHCR has given its view on the application and interpretation of the Refugee Convention, including procedural issues, in the Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook)⁵⁵ and its guidelines on international protection. The EXCOM has issued several EXCOM Conclusions regarding requirements for national asylum procedures. UNHCR's view⁵⁶ and EXCOM Conclusions⁵⁷ are not formally binding, but they do have authority.

The implementation of the ICCPR, the CAT and the CRC is supervised by the Human Rights Committee, the Committee against Torture and the Committee on the Rights of the Child (ComRC) respectively (in this study also referred to as the UN Committees).⁵⁸ The views of the UN Committees, included in

52 According to Art 46 ECHR the judgments of the ECHR are legally binding on the State party to the case. However, the Court's judgments are also of significant importance for other State parties to the Convention. ECtHR (Plen) 18 January 1978, *Ireland v the United Kingdom*, no 5310/71, para 154 and ECtHR 24 July 2003, *Karner v Austria*, no 40016/98, para 26. See also Gerards 2009, pp 2-3.

53 According to Art 38 of the Refugee Convention the International Court of Justice (ICJ) may be requested to interpret the Convention. However, as to date no referral to the ICJ has been made. There is no other body which is competent to provide legally binding decisions on the interpretation of the Refugee Convention. Wouters 2009, p 37.

54 See for the supervising role of UNHCR the Preamble and Art 35 of the Refugee Convention and Art 8 (a) of the Statute of the office of the United Nations High Commissioner for Refugees. See also Türk 2010.

55 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992).

56 Kälin 2003, pp 619 and 625-627, Battjes 2006, p 20. According to Hathaway there is 'a traditional practice of giving particular weight to UNHCR's Handbook'. Hathaway 2005, pp 114-116. Several authors have contended that the authority of UNHCR guidelines is undermined because of their number, detailedness and varying objectives, formats and discourse. Hathaway 2005, p 118, Wouters 2009, p 42.

57 Hathaway 2005, p 113, Wouters 2009, pp 45-46. Courts and tribunals in a range of jurisdictions use EXCOM Conclusions as soft law instruments as persuasive and even authoritative sources on matters of policy, legal practice or interpretation. Deschamp & Dowd 2008, pp 22-27.

58 Art 28 ICCPR, Art 17 CAT and Art 43 CRC.

General Comments, Concluding Observations regarding State parties⁵⁹ or rulings in individual cases⁶⁰ do not bind the State parties.⁶¹ However the Committees' views on interpreting an application of the Convention should be considered an authoritative interpretation.⁶²

The following sections will examine the Court of Justice's use of documents issued by the institutions of the Council of Europe (3.3.2) and UNHCR (3.3.3) and the views of the UN Committees (3.3.4). In section 3.3.5 it will be argued that the Court of Justice should, like the ECtHR, take account of non-binding, but authoritative views of supervising bodies in its case-law.

3.3.1 The ECtHR's judgments

The expansion of the European Union's areas of competence, has resulted in the spheres of activity of the Luxembourg and Strasbourg courts progressively converging on each other. Asylum law is a very clear example of an area in which the competences of the Court of Justice and the ECtHR overlap.⁶³ It would be problematic if the two courts would develop diverging case-law on similar human rights issues. For this reason the courts need to cooperate and take each other's judgments into account.⁶⁴

The EU Courts have regularly referred to the ECtHR's case-law when applying general principles of EU law as well as the fundamental rights included in the Charter.⁶⁵ Douglas-Scott notes however that the citation of the ECtHR's case-law is a relatively new phenomenon, which started in the late 1980's with the opinions of Advocates General and only occurred in a judgment by the Court of Justice in 1996.⁶⁶ He recognises two trends: the Court of Justice has

59 See with regard to the procedure followed by the Committees: Joseph, Schultz & Castan 2004, p 19 (HRC) and Nowak & McArthur 2008, p 648 (ComAT). See for the procedure followed by the ComRC Rule 75 of its Rules of Procedure.

60 See the Optional Protocol with the ICCPR and Art 22 CAT.

61 See with regard to the HRC Battjes 2006 p 21, Wouters 2009 p 365 and Conte & Burchill 2009, p 37, with regard to the ComAT Nowak & McArthur 2008, p 777 and Battjes 2006, p 22.

62 See with regard to the HRC for example Boerefijn 1999, p 300. See with regard to the ComAT Nowak & McArthur 2008, p 12 and Wouters 2009, p 431.

63 See also Harpaz 2009, p 119.

64 See Costa 2008. The President of the Strasbourg Court stressed that there is a clear need for a coherent and effective system of human rights protection in Europe, which requires the Luxembourg and Strasbourg courts to cooperate.

65 See for example the extensive references to the ECtHR's case-law in Case C-279/09, *DEB* [2010], para 46 and further and Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat* [2008], paras 310-314, 344, 360-363 and 368. An example of an asylum cases is Case C-465/07, *Elgafaji* [2009], para 27.

66 Douglas-Scott wrote in 2006 that the Court of Justice had referred to Strasbourg case-law in over 20 cases. The Advocates-General had at that moment made over 60 references and

in recent years referred to the case-law by the ECtHR more frequently than before. Furthermore, he states that while the earlier references to Strasbourg case-law tended to be brief and unexpansive, the more recent references tend to be more reliant on it as a ground of justification, especially if they are made by Advocates General.⁶⁷ He states that references to Strasbourg case-law continue to be relatively brief, but tend to cite Strasbourg more unqualifiedly as an authority. Scott-Douglas points at a lack of coherence and method when the Court of Justice refers to the Strasbourg case-law.⁶⁸

The ECtHR's case-law as minimum standard

The Court of Justice has not explicitly pronounced itself on the weight which should be attached to the case-law by the ECtHR.⁶⁹ It has never explicitly accepted that it is bound by this case-law.⁷⁰ However the Court of Justice usually ensures that the level of protection offered by EU fundamental rights is not lower than that offered by the ECtHR's case-law.⁷¹ In some cases the Court stressed that its interpretation is fully compatible with the ECHR, including the case-law of the European Court of Human Rights.⁷² The Court of Justice strongly reacts to the Strasbourg Court's findings as regards interpretation and level of protection.⁷³

Although the Court of Justice has shown that it does not offer less protection than the ECtHR under the ECHR, the Court finds that it is free to offer

the Court of First Instance had made about 20. Douglas-Scott 2006, p 644. See also De Witte 1999, p 878.

67 Douglas-Scott, p 645. See also Murray 2008, p 538.

68 Douglas-Scott 2006, p 656.

69 Douglas-Scott 2006, pp 649 and 651, Harpaz 2009, pp 109-110.

70 The CFI stated however in Case T-69/04, *Schunk and Schunk Kohlenstoff-Technik v Commission* [2008], para 32: '[T]here is nothing which would justify the Court of First Instance giving a different interpretation of the principle of legality, which is a general principle of Community law, from that resulting from the Strasbourg Court's case-law.' Bronckers states that the EU Courts use the ECtHR's case-law to 'bolster the persuasive force of their own rulings'. Bronckers 2007, p 601.

71 Battjes states that the EU Courts 'quite scrupulously test against Community principles in full accordance with the criteria laid down in the provisions of the European Convention as well as the relevant Strasbourg case-law'. Battjes 2006, p 94. See also Douglas-Scott 2006, p 650 and Spielmann 1999, p 770. See also section 3.1.

72 See Case C-465/07, *Elgafaji* [2009], para 44, in which the Court stated: 'It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR.'

73 Gerards states that she expects an extension of the scope of the rights laid down in the ECHR in the Strasbourg context, to be reflected in the Luxembourg case-law. Gerards 2008, pp 667 and 672.

its own divergent jurisprudence of EU law.⁷⁴ Advocate General Maduro stated in his opinion in the *Elgafaji* case that ‘Community provisions, irrespective of which provisions are concerned, are given an independent interpretation which cannot therefore vary according to and/or be dependent on developments in the case-law of the European Court of Human Rights’.⁷⁵ He added that the interpretation of the Convention by the ECtHR is a dynamic interpretation, which is always changing. He argued that it is not for the EU Courts to determine the interpretation of Article 3 ECHR which prevails. However he did recognise in this same opinion that

although the case-law of the Strasbourg court is not a binding source of interpretation of Community fundamental rights, it constitutes none the less a starting point for determining the content and scope of those rights within the European Union. Taking that case-law into account is, moreover, essential to ensure that the Union, founded on the principle of respect for human rights and fundamental freedoms, will contribute to extending the protection of those rights in the European area.⁷⁶

Similarly Advocate General considered in his opinion in *Samba Diouf* that

the right to effective judicial protection, as expressed in Article 47 of the CFREU, has, through being recognised as part of European Union law by virtue of Article 47, acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR.⁷⁷

The independent interpretation of EU provisions thus only seems to result in broader (and not more limited) protection than under the ECHR.⁷⁸

Several examples can be found in the Court of Justice’s case-law in which the Court adopted a more generous interpretation of a fundamental right than the ECtHR. Douglas Scott refers to the judgments in *Carpenter*⁷⁹ and *Akrich*,⁸⁰ in which the Court gave a very generous interpretation of the ECtHR’s judgment in *Boultif*.⁸¹ Some commentators refer to the Court of Justice’s judgment in *Parliament v Council*, in which the Court of Justice recognised a ‘right to live

⁷⁴ Harpaz 2009, p 112. He states that the Court of Justice has a deferential approach, according to which the Court relies on ECHR provisions and follows the judgments of the Strasbourg Court.

⁷⁵ Opinion of A.G. Maduro in Case C-465/07, *Elgafaji* [2009], para 19.

⁷⁶ The Court of Justice itself seems to suggest in *Elgafaji* that the interpretation of the scope of EU provisions which correspond to rights laid down in the ECHR (i.e. Article 15 (b) QD) does have to be carried out on the basis of the ECtHR’s case-law. Case C-465/07, *Elgafaji* [2009], para 28.

⁷⁷ Opinion of A.G. Cruz Villalón in Case C-69/10, *Samba Diouf* [2011], para 39.

⁷⁸ This also follows from Case C-465/07, *Elgafaji* [2009], para 28.

⁷⁹ Case C-60/00, *Carpenter* [2002].

⁸⁰ Case C-109/01, *Akrich* [2003].

⁸¹ ECtHR 2 August 2001, *Boultif v Switzerland*, no 54273/00.

with one's close family'⁸² and stated that it follows from the Family Reunification Directive⁸³ that applications for family reunification should be examined with a view to promoting family life.⁸⁴ Both formulations seem to offer more protection than the standing case-law by the ECtHR under Article 8 ECHR.⁸⁵ In the cases mentioned the Court has not given any reasons for a broader interpretation.⁸⁶

Possible situations of the Court of Justice providing a lower level of protection than the ECtHR

Three situations may be distinguished, in which the Court of Justice has adopted or may adopt a different view on a human rights issue than the ECtHR, which results in a lower standard of protection. First of all the Court of Justice may have to apply existing Strasbourg case-law to a new situation, on which the Strasbourg court has not yet ruled. Then, the Court of Justice has to give its own interpretation of an EU fundamental right which is corresponding to a right laid down in the ECHR. In this kind of situations it has occurred that the Court of Justice adopted a different, more restrictive view on the content of such a right, than the ECtHR in later case-law.⁸⁷ The Court of Justice showed to be prepared to reconsider its own case-law in view of subsequent developments in Strasbourg.⁸⁸

Secondly, the ECtHR may change its line of case-law concerning an issue after a judgment of the Court of Justice on the same issue. As Maduro noted in his opinion with *Elgafaji* that the interpretation of the Convention by the Strasbourg court is dynamic and is changing over time.⁸⁹ This is the result of the fact that the ECtHR considers the Convention to be 'a living instrument',

82 Case C-540/03, *Parliament v Council* [2006], para 52.

83 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

84 Case C-540/03, *Parliament v Council* [2006] para 88.

85 Boeles 2006. Kunoy & Mortansson point out that Art 4 of the Family Reunification Directive, by contrast to Art 8 ECHR, imposes precise obligations, with corresponding individual rights, on the Member States, since it requires them to authorise family reunification in certain cases without being left a margin of appreciation. Kunoy & Mortansson 2010, p 1825. See also Case C-404/92P, *X v Commission* [1994], para 17, where the Court of Justice held that the right to respect for private life, embodied in Art 8 of the ECHR and deriving from the common constitutional traditions of the Member States includes in particular a person's right to keep his state of health secret. See Spielmann 1999, pp 775-776.

86 Bulterman argues that the Court of Justice has to reason why a specific human right which can be found in the ECHR should be given a more favourable interpretation when it is applied as a fundamental principle of EU law. Bulterman 2008, under 5.3.

87 Douglas-Scott refers to *Orkem* and *Hoechst*. Douglas-Scott 2006, p 645.

88 Costa 2008. See also Murray 2008, p 543.

89 He stated: 'In terms of the dynamic interpretation, it must be noted that the interpretation of Article 3 of the ECHR has not been linear and that the European Court of Human Rights currently gives a broader content and therefore scope to that article. Moreover, it is necessary for the interpretation of that provision to evolve and it should not, therefore, be fixed'.

which must be interpreted in the light of present-day conditions.⁹⁰ It may therefore occur that the ECtHR adopts a broader view on a certain issue than the view of Court of Justice, which was based on the 'old' case-law by the ECtHR. On the basis of Article 52 (3) of the Charter and the standing case-law of the Court of Justice it is likely that also in this situation the Court of Justice will reconsider its case-law to the subsequent developments in Strasbourg.

Thirdly it is possible that the Court of Justice misunderstands the ECtHR's case-law and as a result adopts a different view than the ECtHR. Arguably the Court of Justice misunderstood the ECtHR's judgment in *NA v the United Kingdom* in its ruling in the *Elgafaji* case.⁹¹ In this case the Court of Justice considered that the serious harm as defined in paragraphs (a) and (b) of Article 15 QD, which are based on Articles 2 and 3 ECHR and the ECtHR's case-law, requires a clear degree of individualisation of the risk to serious harm. However the ECtHR had ruled less than a year before the judgment in *Elgafaji*, in *NA v the United Kingdom* that Article 3 ECHR may also apply in extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.⁹² Therefore under Article 3 ECHR in a situation of extreme general violence no 'individualisation' is required. Although the Court of Justice referred to *NA* in its judgment it did not seem to recognise this. Errors like the one in *Elgafaji*, should be considered as incidents, which do not detract from the fact that in principle the Court of Justice abides by the ECtHR's case-law. The error in *Elgafaji* did not result in a lower level of protection than that guaranteed by the ECtHR.⁹³

3.3.2 Council of Europe documents

Texts adopted by the Institutions of the Council of Europe have played a marginal role in the EU Courts' case-law. The CFI referred to guidelines by the Committee of Ministers in *Sison* in order to support its position that a right to an effective remedy should be provided in particular in the context of measures to freeze the funds of persons or organisations suspected of terrorist activities.⁹⁴ In *Parliament v Council*, the European Parliament invoked two

⁹⁰ See for example ECtHR (GC) 4 February 2005, *Mamatkulov and Askarov v Turkey*, no 46827/99, para 121.

⁹¹ Case C-465/07, *Elgafaji* [2009]. See for example Spijkerboer 2009.

⁹² ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 115.

⁹³ According to the Court of Justice Art 15 (c) QD does cover risks of serious harm which result from the general human rights situation in the country of origin.

⁹⁴ Case T-47/03, *Sison v Council* [2007], paras 157-158, see also Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 111 and 135. In Case C-421/09, *Humanplasma GmbH* [2010] the reference in the applicable EU legislation to a specific Council of Europe document was the reason to take it account.

Committee of Minister Recommendations in support of its appeal.⁹⁵ However, the Court did not include these recommendations in its judgment.⁹⁶ The Advocates General have referred to recommendations of the Committee of Ministers and the Parliamentary Assembly in some of their opinions.⁹⁷

3.3.3 UNHCR documents and Excom Conclusions

In its case-law the Court of Justice has not yet (explicitly) taken account of, or made reference to UNHCR's view, although it did have opportunity to do so.⁹⁸ Several cases concerned the interpretation of provisions of EU law, which were directly based on the Refugee Convention. Furthermore in some of these cases the applicant relied on UNHCR's view.⁹⁹ Finally UNHCR issued statements in the context of these cases in which it set out its views on the questions referred to the Court of Justice.¹⁰⁰ In *Salahadin Abdullah* the Court of Justice adopted a different interpretation of the cessation clauses provided by the Qualification Directive than that proposed by UNHCR.¹⁰¹

The Advocates General have paid more attention to UNHCR documents in their opinions. A.G. Sharpston considered in the *Bolbol* case concerning the criteria for excluding Palestinians from refugee status that 'the UNHCR occa-

95 Recommendation No R (94) 14 of the Committee of Ministers of the Council of Europe to Member States of 22 November 1994 on coherent and integrated family policies and Recommendation No R (99) 23 of the Committee of Ministers to Member States of 15 December 1999 on family reunion for refugees and other persons in need of international protection.

96 Case C-540/03, *Parliament v Council* [2006], para 33.

97 See for example A.G. Léger in his opinion with Case C-353/99 P, *Hautala* [2001], para 62, A.G. Kokott in her opinion with Case C-105/03, *Pupino* [2005], para 55 and A.G. Jacobs in his opinion with Case C-270/99 P, *Z v Parliament* [2001], para 40.

98 The Government of the United Kingdom has argued before the Court of Justice that the UNHCR Guidelines are not binding on Member States as a matter of international law and have not been incorporated into Community law. See the opinion with Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 36.

99 See for example the opinion with Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 32.

100 See with regard to the Procedures Directive: UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures, issued in Case C-69/10, *Samba Diouf* [2011], 21 May 2010, available at www.unhcr.org.

101 The Court ruled that refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted'. According to UNHCR the cessation clauses should only apply when the applicant is effectively protected in his country of origin, which entails more than the absence of a fear of persecution, namely alrespect for human rights, including the right to a basic livelihood. See UNHCR Statement on the "Ceased Circumstances" Clause of the EC Qualification Directive, issued in Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], August 2008, para 4.1.2, available at www.unhcr.org.

sionally makes statements which have persuasive, but not binding, force'.¹⁰² In her opinion she disagreed with the interpretation put forward by the Office of the UNHCR because she was guided primarily by the clear text of the provision of the Refugee Convention, which has not been amended in over 50 years. She stated: 'In contrast, it seems to me that the UNHCR's reading has varied over time, reflecting the intractable nature of the Palestine problem.'¹⁰³ A.G. Mengozzi wrote in his opinion with *B. and D.* which concerned the interpretation of the EU criteria for excluding a person from refugee status that guidance for interpreting provisions of the Qualification Directive which have their origin in the text of the Refugee Convention is provided by the EXCOM conclusions, the UNHCR Handbook and UNHCR's Guidelines on International Protection. He also referred to the fact that UNHCR's view is not always clear, as UNHCR documents sometimes contradict each other.¹⁰⁴ A.G. Mengozzi in this opinion made extensive references to UNHCR documents, such as the UNHCR Handbook and Guidelines as well as the document specifically drawn up by UNHCR for the purposes of the case before the Court of Justice.¹⁰⁵

3.3.4 The views of the UN Committees

The views of UN Committees have played a minor role in the Court of Justice's case-law.¹⁰⁶ The Committee only ruled on the relevance of the Human Rights Committee's view in its judgment in *Grant*.¹⁰⁷ So far the Court of Justice has not addressed the relevance of General Comments or Concluding Observations of the Human Rights Committee, or of the views of the Committee against Torture or the Committee on the Rights of the Child in its case-law. The considerations in *Grant* may however also apply to those sources of interpretation.

In *Grant* the applicant argued before the Court of Justice that Article 119 of the former EC-Treaty, which prohibited discrimination on the basis of sex, should include discrimination on the basis of sexual orientation.¹⁰⁸ She referred to a view of the Human Rights Committee in an individual complaint,

102 A.G. Sharpston, Opinion with Case C-31/09, *Bolbol* [2010], para 16.

103 A.G. Sharpston Opinion with Case C-31/09, *Bolbol* [2010], para 76.

104 A.G. Mengozzi, Opinion with Joined Cases C-57/09 and C-101/09, *B. and D.* [2010], para 43.

105 In the opinions with Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 32 and Case C-465/07, *Elgafaji* [2009], the A.G. did not take UNHCR's view into account.

106 Butler & de Schutter 2007, pp 282-283.

107 Case C-249/96, *Grant* [1998], paras 44-47.

108 Ms Grant was refused travel benefits for her female partner by her employer, while those benefits were granted to persons of opposite sex, who were married or involved in a meaningful relationship.

according to which the term 'sex' mentioned in the prohibitions of discrimination laid down in Articles 2 (1) and 26 ICCPR includes 'sexual orientation'.¹⁰⁹

The Court of Justice reiterated first of all that the Covenant is one of the international instruments relating to the protection of human rights, of which the Court takes account in applying the fundamental principles of EU law. However, it considered that the Human Rights Committee is not a judicial institution and that its findings have no binding force in law. It furthermore noted that the Human Rights Committee's view did not in any event appear to reflect the interpretation so far generally accepted of the concept of discrimination based on sex which appeared in various international instruments concerning the protection of fundamental rights. In this regard it referred to the ECtHR's case-law, which stated that homosexual relationships did not fall within the scope of Articles 8 and 12 ECHR.¹¹⁰ Furthermore the Court took into account that the laws of the Member States generally did not treat same-sex relationships the same as marriages between persons of opposite sex. The Court concluded that the Human Rights Committee's view could not constitute a basis for the Court to extend the scope of Article 119 of the former EC Treaty, to include sexual orientation. Butler and de Schutter state that the *Grant* case underlines the lack of faith that the Court of Justice places in the interpretations of international human rights law issued by the monitoring bodies responsible for supervising the correct implementation of these treaties. In their view the Court of Justice ignores the generally accepted view that the UN monitoring bodies' interpretation of the treaties should be treated as authoritative.¹¹¹

One may conclude from this judgment that the view of the Human Rights Committee (or the Committee against Torture or the Committee on the Rights of the Child) alone cannot provide sufficient basis for extensive interpretation of a Treaty provision. However the Court did not exclude that those views may inspire the Court in future cases.¹¹² This could be the case especially where they corroborate the case-law of the ECtHR and/or other treaty bodies

109 HRC 31 March 1994, *Toonen v Australia*, no 488/1992. The Court of Justice remarks that the HRC confined itself, as it stated itself without giving specific reasons, to 'noting ... that in its view the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation'. Case C-249/96, *Grant* [1998], para 46.

110 Spielmann notes however that the Court of Justice omitted to have a close look at the ECtHR's case-law on Art 8 ECHR, in particular the so-called 'positive obligations' theory imposing concrete action on public authorities. Spielmann 1999, p 774.

111 Butler & de Schutter 2007, pp 284-285.

112 The fact that Advocates General have referred to the views of the HRC in several opinions may indicate that the UN supervising bodies' views may be taken into account by the Court in future cases. See the opinions of A.G. Ruiz-Jarabo Colomer with Case C-436/04, *van Esbroeck* [2006] (interpretation of the *ne bis in idem* principle) of A.G. Kokott with Case C-540/03, *Parliament v Council* [2006] (the right to family life) and the view of A.G. Mazák with Case C-357/09 PPU, *Kadzoev* [2006] (possibilities of detention of asylum applicants).

and/or the interpretation stemming from the laws of the Member States.¹¹³ The Court of Justice may be more willing to follow the UN Committees' views when interpreting secondary EU legislation than when determining the meaning of a Treaty provision.

3.3.5 Should non-binding documents be taken into account?

There are strong arguments that the non-binding views of the institutions of the Council of Europe, UNHCR and the UN Committees should be taken into account by the Court of Justice. The weight which should be attached to those views depends on their quality of reasoning.¹¹⁴ Most importantly it would be inconsistent for the Court of Justice to recognise a treaty as a source of inspiration, while ignoring the views of the body supervising this treaty which are generally considered to be an important subsidiary means of interpretation of those treaties. Furthermore systematic interpretation of a fundamental right may be facilitated by a comparative analyses of international or regional human rights treaties, which include a similar right.¹¹⁵ An interesting development in this regard is the current trend in the ECtHR's case-law to use 'soft law standards' as a source of interpretation.¹¹⁶ Potentially this may prompt the Court of Justice to do the same, in particular when interpreting EU fundamental rights corresponding to rights recognised in the ECHR.

The ECtHR, when interpreting the rights laid down in the Convention takes into account 'any relevant rules and principles of international law applicable in relations between the Contracting Parties'.¹¹⁷ In *Demir and Baykara v Turkey* the ECtHR considered that in interpreting the Convention it

can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States

¹¹³ See also Butler & de Schutter 2007, p 283. They state that it emerges from the Court of Justice's cases that the Court will rely primarily on the ECHR and while it may draw on other treaties to complement its analysis, it may not draw on them where they appear to go beyond the ECHR, except when there appears to be some support for this in the EC or EU Treaty.

¹¹⁴ See Battjes 2006, p 22.

¹¹⁵ Wouters 2009, p 12, Nowak & McArthur, p 12.

¹¹⁶ See Barkhuysen & Van Emmerik 2010.

¹¹⁷ ECtHR (GC) 29 January 2008, *Saadi v United Kingdom*, no 13229/03, para 62. See also ECtHR 12 March 2003, *Öcalan v Turkey*, no 46221/99, para 190, in which the Court 'reiterates that it must be mindful of the Convention's special character as a human-rights treaty and that the Convention cannot be interpreted in a vacuum. It should so far as possible be interpreted in harmony with other rules of public international law of which it forms part'.

may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

The ECtHR has mentioned many different sources which may be relevant, including the ICCPR, CAT, CRC¹¹⁸ and the Refugee Convention.¹¹⁹ In its case-law the Court regularly refers to non-binding documents such as views in individual cases¹²⁰ or General Comments and Concluding Observations of UN supervising bodies.¹²¹ The ECtHR also takes into account UNHCR documents, such as the UNHCR Handbook,¹²² EXCOM conclusions and Guidelines.¹²³ Council of Europe documents, such as the recommendations, resolutions or guidelines of the Committee of Ministers and the Parliamentary Assembly were taken into account in several cases, among which some asylum cases.¹²⁴ The ECtHR does not seem to have developed clear guidelines for using non-binding documents for its interpretation of the Convention. Its case-law does not show when such documents should be taken into account and the weight which should be granted to them.¹²⁵ The Court seems to regard the views adopted by supervisory bodies to international treaties a relevant consideration for the ECtHR. However, it does not always follow such views.¹²⁶

118 ECtHR (GC) 12 November 2008, *Demir and Baykara v Turkey*, no 34503/97, paras 69-86.

119 ECtHR 28 October 2010, *Fawsie v Greece*, no 40080/07, para 38.

120 See ECtHR (GC) 29 January 2008, *Saadi v United Kingdom*, no 13229/03, paras 31-32. In ECtHR 12 March 2003, *Öcalan v Turkey*, no 46221/99, paras 60-62 and 203, the ECtHR used the view of the HRC to support its ruling that the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible under Art 2 ECHR.

121 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 110 and 178, ECtHR (GC) 23 June 2008, *Maslov v Austria*, no 1638/03, para 83 jo 37-38, ECtHR 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, no 13178/03, para 40 and ECtHR 10 February 2011, *Soltysyak v Russia*, no 4663/05, para 51.

122 ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 73.

123 ECtHR (GC) 29 January 2008, *Saadi v United Kingdom*, no 13229/03, paras 34-35. The Court rejected a narrow interpretation of Art 5 (1)(f) ECHR amongst others because such interpretation would be inconsistent with EXCOM Conclusion no 44 (XXXVII), 1986, the UNHCR's Guidelines and a Recommendation of the Committee of Ministers of the Council of Europe.

124 ECtHR 26 April 2007, *Gebremedhin v France*, no 25389/05, para 58, ECtHR (Adm) 2 December 2008, *K.R.S. v United Kingdom*, no 32733/08, ECtHR 23 October 2008, *Soldatenko v Ukraine*, no 2440/07, para 30.

125 See also Barkhuysen & Van Emmerik 2010, pp 834-835.

126 In ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 110 and 178 for example the Court did not follow the HRC's view that emergency measures must be of a temporary nature. In ECtHR (GC) 29 January 2008, *Saadi v United Kingdom*, no 13229/03, it does not seem to follow the HRC's views regarding detention of aliens under Art 9 ICCPR.

3.4 THE RELATIVE WEIGHT OF INTERNATIONAL TREATIES AS SOURCES OF INSPIRATION

It should be expected on the basis of the Court of Justice's existing case-law that, also in the context of asylum procedures, the Court of Justice will attach by far most weight to the ECHR and the ECtHR's case-law when looking for inspiration for the interpretation of EU fundamental rights. This is not only the result of the 'special significance' granted to the ECHR by Article 6 (3) TEU and the Charter. It is also due to the fact that the most important source of interpretation of the ECHR, the judgments of the ECtHR, are binding upon the State parties to the ECHR and constitute an extensive body of case-law. The non-binding recommendations and resolutions issued by Council of Europe institutions have played a marginal role in the EU Courts' case-law.

In asylum cases the Refugee Convention also seems to have a special status as a source of inspiration, because of its explicit recognition as a 'relevant treaty' in the asylum context by Article 63 of the former EC-Treaty and Article 78 TFEU as well as the preambles and texts of the EU measures adopted under this provision. The Court of Justice interprets EU asylum legislation and expectedly also EU fundamental rights in the light of the Refugee Convention. However this is difficult if the relevant provisions of the Refugee Convention need interpretation, because the Convention lacks a supervising body, which is competent to provide legally binding decisions on the interpretation of its provisions. With regard to procedural issues the Refugee Convention does not provide much guidance, as it does not contain any provisions which regard refugee determination procedures. The Court of Justice can only rely on (non-binding) UNHCR documents and EXCOM conclusions when examining the procedural requirements following from the Refugee Convention. However those documents have so far not played any visible role in the Court of Justice's case-law. In fact the Court of Justice itself arguably has become the most important source of interpretation of the Refugee Convention.

The potential impact of the UN treaties on the development of EU fundamental rights, including the right to effective judicial protection, seems to be limited. This is due to the fact that the Court is clearly hesitant to take into account the non-binding views of the UN supervising bodies, which may provide guidance as to the interpretation of those treaties. The UN Conventions have played a minor role in the Court of Justice's case-law. It should be concluded from *Grant* and the lack of references to the non-binding views of UN supervising bodies that the Court of Justice is not easily prepared to follow those views. This seems to be specifically the case when this view is not sustained by ECtHR case-law, the constitutional traditions of the Member States or potentially non-binding views of other supervising bodies.

It should however not be excluded that the non-binding views of institutions of the Council of Europe, UNHCR and the UN Committees will serve as sources of inspiration in future (asylum) cases. It was even argued in section

3.3.5 that the Court of Justice should take into account these authoritative views and attach weight to them according to their quality of reasoning. Such practice would correspond with the current trend in the ECtHR's case-law to use 'soft law standards' as a source of interpretation.

Consequences for the way this study is conducted

In this study international treaties are not treated as a separate category of norms, which should be directly applied by the Court of Justice in the asylum context. They are only used as sources of inspiration for the EU right to an effective remedy. As was explained in section 3.1.1 this has expectedly no consequences for the way the EU right to an effective remedy will be interpreted.

For the purpose of finding the content and meaning of the EU right to effective judicial protection for the asylum context the following assumptions will be used as to the relative weight which should be granted to the different sources of inspiration included in this study.

- The ECHR and the ECtHR's case-law have most significance as a source of inspiration for EU fundamental rights.
- Where the ECtHR's view is corroborated by the non-binding views of other supervising bodies, an even more solid basis for the interpretation of EU fundamental rights is provided.
- Where the ECtHR's case-law and the non-binding view of another supervising body conflict, the Court of Justice is arguably inclined to follow the ECtHR.

The Court of Justice does not seem to be prepared to adopt a far-reaching interpretation of an EU fundamental right on the basis of the non-binding view of one supervising body alone.

If the views of more supervising bodies (e.g. Human Rights Committee, Committee against Torture and UNHCR) agree, the Court of Justice may be more inclined to follow these views.

In this study the ECHR and the ECtHR's case-law will thus play a central role as a source of inspiration for the interpretation of the EU right to an effective remedy. Where the ECtHR's case-law is clear on a certain issue, the non-binding views of other (supervising) bodies will only be briefly addressed. Where the ECtHR's case-law does not set (clear) requirements, more attention will be paid to such non-binding views. The weight which is attached to these non-binding views depends on their quality of reasoning. This study will be reluctant to base the interpretation of the EU right to an effective remedy on non-binding views only.

