The Role of the European Court of Justice in Framing the Principles of Global Distributive Justice through the Area of Asylum

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To my parents, Sadrie and Eybil, for being my support and my role models

To my sister, Imren, because nothing is impossible

To my Otto, for always making me laugh

'We shall not cease from exploration
And the end of all out exploring
Will be to arrive where we started
And know the place for the first time…'

T. S. Eliot, 'Little Gidding'

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CHAPTER I
Introduction

'La court parle par ses arrêts.'[1]

'What European Court of Justice? This is the European Court of Law.' J. M.

1. At the Crossroads between Political Philosophy and Law

This work empirically studies the complete[2] asylum jurisprudence of the European Court of Justice (ECJ)[3] from a political philosophy perspective. It thereby fills a normative gap between the asylum literature on the European Court of Justice and the global justice discussions on migration, whilst improving our understanding of the relationship between the *ideal* in political philosophy and the *non-ideal* in judicial practice on the same matters. It is a work which, albeit standing on the shoulders of giants from the two disciplines, offers a unique perspective into its object of study as a result of its interdisciplinarity and empirical footing.

This work is amongst the most comprehensive empirical studies of the asylum jurisprudence of the Court because it analyses it in its entirety. It sits comfortably with a number of academic pieces that have examined the Court's jurisprudence from various angles[4] and focused their attention on a particular subset of cases or topics.[5] However, it also differs from them by virtue of drawing conclusions from looking at that jurisprudence as a whole. It is distinct from more general studies on different aspects of the European Union's asylum policy from an institutional perspective[6] that focus on the content of the right to seek asylum or on

[1] See Interview#8 with ECJ official, conducted on September 27th, 2018. Anonymised transcript is available with the author.

[2] The complete asylum jurisprudence of the European Court of Justice from its first case in asylum matters in 2005 until January 2019, as designated by the Court's own labelling system on the Curia website.

[3] Whilst the Treaty of Lisbon brought the courts of the European Union under the collective name of the Court of Justice of the European Union (CJEU), comprising of the Court of Justice, the General Court, and the specialized courts. This work focuses exclusively on the judgments delivered by the Court of Justice and will refer to it as the 'European Court of Justice' or the 'ECJ'. The addition of 'European' will be to differentiate it from other institutions such as the International Court of Justice.

[4] See for example, Cathryn Costello, Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored, *Human Rights Law Review*, Volume 12, Issue 2, June 2012, pp. 287–339; Madeline Garlick, International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR, *Refugee Survey Quarterly*, Volume 34, Issue 1, March 2015, Pages 107–130,; Hélène Lambert, 'The Eu Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom And International Law', *International and Comparative Law Quarterly*. Cambridge University Press, 55(1), 2006, pp. 161–192.

[5] See for example, Francesco Ippolito, 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to the Test?', *European Journal of Migration and Law* 17(1), 2015.

[6] See for example, Eleni Karageorgiou, 2019, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity', Nordic Journal of International Law, pp. 315-358; Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy', *International Journal of Refugee Law* 18(3), 2006, 630-651; Koen Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security, and Justice', *International and Comparative Law Quarterly*, 2010.

the role of other institutional actors[7], as well the majority of the political philosophy literature on global justice[8] and migration where the European Union does not appear. Despite its idiosyncratic nature, this thesis nonetheless finds a niche to occupy amongst those works that study the European Union from a political philosophy perspective[9], contributing to the literature in which the ECJ is cast in the leading role as the main subject of research.[10]

Although there are no studies that marry global justice discussions on migration with the European Court of Justice, there are some initiatives which bring together the former with the European Union as a whole. A particularly relevant one is the GLOBUS Research Project which combines normative and empirical research to create papers and reports that 'reconside[r] European contributions to global justice'[11]. GLOBUS offers an ongoing, in-depth study of global justice within the European Union by breaking down that topic into six thematic spheres, one of which is that of 'Migration and Global Justice'[12]. The contributions therein are informative and many of them are used as references throughout this work; yet, despite focusing on the EU, the majority of them leave the ECJ out[13] of their global justice analyses[14]. The infrequent references to, and analysis of, the EU in discussions of global justice on migration and the even rarer consideration of the Court's role when studying said phenomenon, serve to underscore the importance of this work. It is capable of filling out a normative gap in both the political philosophy and the legal literature. It is not only a comprehensive study of the asylum jurisprudence of the Court; it is also one of the few examples of scholarship which brings political philosophy and the European Court of Justice together in its examination.

2. Research Interest and Project Relevance: the Changing Nature of Forced Migration and The Rising Number of Asylum Seekers

[7] See for example, Patrick Weil and Pierre Auriel, 'Political asylum and the European Union. Proposals to overcome the impasse', *La Revue des droits de l'homme [Online], Actualités Droits-Libertés,* URL : http://journals.openedition.org/revdh/47433.

[8] Theories of global justice cover those discussions that deliberate the nature of the duties people owe to each other beyond the confines of the nation state (Brock, 2017). Hence, their 'global' nature. Both the meaning and examples of 'global justice' theories will be examined more thoroughly in Chapter II.

[9] See for example, *Journal of Global Ethics Special Issue 3: Refugee Crisis: The Borders of Human Mobility,* 2016; See for example, Nils Holtug, 'A fair distribution of refugees in the European Union', *Journal of Global Ethics*, 2016, pp. 279-288; J. Neyer, 'Justice, Not Democracy: Legitimacy in the European Union' (2010) 48 Journal of Common Market Studies 903; D. Nicol, 'Can Justice Dethrone Democracy in the European Union? A Reply to Jürgen Neyer' (2012) 50 Journal of Common Market Studies 508; For a longer debate, see Gráinne de Búrca, et al., 'Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls and Ryanair', European University Institute Working Papers (2013) (forthcoming); Andrew Williams, 'The EU, interim global justice and the international legal order' in Dimitry Kochenov and Fabian Amtenbirk (eds.), *The European Union's Shaping of the International Legal Order*, 2013, pp. 38-61.

[10] As examples of those rare occasions where the ECJ is examined from a philosophical perspective, see: Andrew T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law', *Oxford Journal of Legal Studies* 29:3, 2009, pp. 549-577; Axel Gossieres, 'What Makes Age Discrimination Special? A Philosophical Look at ECJ Case Law', *Netherlands Journal of Legal Philosophy* 43: 59, 2014.

[11] Find information on the *GLOBUS* research project at: https://www.globus.uio.no/.

[12] Find more information about GLOBUS' work on 'Migration and Global Justice' at: https://www.globus.uio.no/research/migration/.

[13] Enrico Fassi and Sonia Lucarelli (eds.), 'The European Migration System and Global Justice: A First Appraisal', full report available here: https://www.globus.uio.no/publications/reports/2017/globus-report-1-online.pdf.

[14] See also Michela Ceccorulli, 'On Protection and Justice: The Proposals for Reform of the Common European Asylum System', GLOBUS Research Paper 4/2018, where the European Court of Justice has one peripheral mention.

The changing nature of forced migration[15] has caused the international protection regime, shaped by the 1951 *Convention Relating to the Status of Refugees* (hereafter, 'the Geneva Convention' or 'the Refugee Convention') and the 1967 *Protocol Relating to the Status of Refugees* (hereafter, 'the 1967 Protocol'), to struggle under the weight of the growing number of international migrants who seek asylum. Whilst forced migration is not a new phenomenon, in 2015 there was an unprecedented upsurge in the number of asylum applications[16] by people seeking refuge in the European Union.[17] Collectively referred to as the 'refugee crisis', the events that unfolded became a flashpoint in domestic and international debate, and the number of deaths in the Mediterranean sea due to people taking the risky crossing in the absence of safe legal pathways to seek asylum led to its designation as 'the world's deadliest migration route'[18]. The news coverage highlighted rise in the number of deaths and victims of human trafficking and exploitation as a result of the efforts of thousands of asylum seekers to reach European shores.[19] The 'refugee crisis' exposed the inadequacy of the international protection regime and its inability to capture the changing nature of forced migration that had long been discussed by political philosophers[20] and lawyers[21] alike. It also gave rise to challenges at the theoretical, the EU governance, and the global governance levels. At the theoretical level, the 'refugee crisis'

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15 I use the expression 'forced migration' to delineate that type of migration which includes an element of coercion, whether by an agent or by circumstance, and includes 'refugee flows, asylum seekers, internal displacement and development-induced displacement' (Castles, 2013, p. 13) and to distance it from voluntary migration. I distance myself from the exclusive focus on persecution by a state that extends protection to individuals in need, and instead prefer Alexander Betts' idea of focusing on deprivation instead (Betts, 2013).

15 In the first nine months of 2015, half a million people arrived to Europe's Mediterranean shores, many of them Syrians fleeing the civil war in their country which had been ongoing since 2011 (UNHCR 2015). Since then, the terms 'refugee crisis' and 'humanitarian crisis' have been used actively in media and academia to designate the arrival of unprecedented numbers of asylum seekers to European shores and the insufficient responses by the international community. It is worth noting, however, that the term continued to be widely used in academia even after the number of arrivals dropped drastically. For more information on the phenomenon and the implications of the use of the term 'crisis' even after the significant drop in asylum seekers arrivals, please see, Aysel Küçüksu, 'The Budgetary Future of Migration and Development Policy in the European Union', *Istituto Affari Internazionali*, August 2019.

16 The 28 Member States of the European Union received 1.2 million asylum applications in 2015 according to the *Irregular Migration Research Database: Europe*, available here: https://gmdac.iom.int/research-database/europe%E2%80%99s-migration-crisis.

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18 Human Rights Watch, 'Mediterranean Crisis', last access date: Nov. 28th, 2019. Available at: https://www.hrw.org/tag/mediterranean-crisis.

19 See for example, the Guardian's coverage of migrant deaths, which it argues 'do not just occur at sea – but in detention blocks, asylum units, and even town centres' in 'The List: It's 34,361 and rising: how the List tallies Europe's migrant bodycount', *The Guardian*, 20 June 2018. Available at: https://www.theguardian.com/world/2018/jun/20/the-list-europe-migrant-bodycount

20 Andrew E. Shacknove, Who Is a Refugee?, *Berkeley Journal of International Law*, 1985, 95(2), 274–284; Joseph Carens, Aliens and Citizens: The Case for Open Borders, W. Kymlicka (ed.), *The Rights of Minority Cultures*, Oxford: Oxford University Press, 2014; David Miller, Strangers in Our Midst, Harvard University Press, 2016.

21 Jaya Ramji-Nogales, Moving Beyond the Refugee Law Paradigm, AJIL Unbound, 2017; Thomas Gammeltoft-Hansen, International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law. *European Journal of Migration and Law*, *20*, 2018, 373–395; Thomas Gammeltoft-Hansen, The normative impact of the global compact on refugees, *International Journal of Refugee Law*, *30*(4), 2019, pp. 605–610.

exposed the inadequacy of the international protection regime; at the EU level, it put some of the fundamental Union values to the test; at the global level, it led to the reinforcement of the distinction between migrants and refugees.

2.1. Theoretical Challenge: the Increasing Inadequacy of the International Protection Regime and the Need to Reconceptualise Forced Displacement

> *'Indeed, it may be that if we want to be equal to the absolutely novel tasks that face us, we will have to abandon without misgivings the basic concepts in which we have represented political subjects up to now […] and to reconstruct our political philosophy beginning first with this unique figure [the refugee]'*[22]

The 2015 'refugee crisis' exposed the increasing inadequacy of the international protection regime and reignited global efforts to reconceptualise its foundational tenets. A key difficulty has been the narrow, state-centred definition of a 'refugee' that hinges on the requirement for applicants seeking protection to show that they are being 'persecuted' by a state. The person entitled to international protection is hence someone who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.'[23] This definition was born out of the totalitarian regimes that Europe witnessed during the World Wars, where citizens were deprived of rights by their nation state. This explains why it focuses on the source of an applicant's harm, rather than the extent of it. However, this has the unfortunate consequence of drawing an arbitrary distinction between asylum seekers in situations of comparable, if not equal, gravity, depending on the source of it. In practical terms, it means that between two people who are equally vulnerable, it is only the one whose vulnerability is exacerbated at the hands of a state, rather than a natural disaster, famine, or life-threatening poverty, that would be granted international protection. Such a consequence fails to recognise today's reality that *deprivation*, as opposed to *persecution*, is amongst the chief reasons for people to flee their homeland.[24] Currently, protection of refugees continues to centre around state-perpetrated 'persecution' akin to that observed during the World Wars and the Cold War, despite the fact that contemporary displacement differs significantly from that witnessed in Europe in the last century. The 2015 'refugee crisis' has once again highlighted the historical and geographical contingency of the definition and reignited efforts at conceptualising it as a 'product of its time'[25] with a view to challenging and reforming it more easily.

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[22] Giorgio Agamben, We Refugees, *Symposium*, *49*(2), 1995, p. 114.
[23] See Article 1 of the 1951 Convention Relating to the Status of Refugees.
[24] Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, Oxford University Press, 2013.
[25] Ibid, p. 10.

Indeed, this has been a point discussed at length by both legal scholars and political philosophers, with an emerging consensus that there is a need for a more realistic regime with wider protections which is rooted in a re-conceptualisation of the causes of forced migration. A number of scholars have taken on the challenge. For example, Matthew Gibney argues that mass movement is more accurately attributed to:

> 'the prevalence of violent civil and international war and ethnic conflicts, to the increasing involvement of citizens in military conflict, and, most fundamentally of all, to the great difficulties involved in maintaining durable and humane state structures in conditions of economic underdevelopment and poverty […] [t]he many refugees currently fleeing civil war, ethnic conflict and political instability are only the extreme end of a rising number of the world's denizens who respond to the uneven distribution of security and welfare across states by migrating.'[26]

In his re-conceptualization Gibney seeks to draw attention to economic inequality and redistributive failures at the international level as novel causes of mass migration. Globalisation generates wealth, but it also generates increased inequality; and the movement of capital (which gravitates towards its concentration) cannot be isolated from the movement of people (which gravitates towards wealthier countries). When neither national nor supranational institutions are capable of fairly or effectively redistributing wealth, the migrant[27] becomes the physical embodiment of redistributive justice not rendered.

Other scholars, such as Alexander Betts, offer a list of similar yet novel 'drivers of external displacement' that are 'particularly related to the interaction of environmental change, livelihood collapse, and state fragility.'[28] Betts employs the term 'survival migration'[29] to refer to 'people who are outside their country of origin because of an existential threat for which they have no access to a domestic remedy or resolution.'[30] Whether conceptualized as the result of systemic failures in the workings of the global economy or the consequence of climate change, the root causes of mass, cross-border movement are neither geographically confined to Europe, nor any longer as 'relatively transient' as totalitarian regimes might appear in comparison[31]. Hence, the state-centric approach to defining the people to whom international obligations of protection are owed[32] appears increasingly inadequate. Some writers like Betts therefore argue

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[26] Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Responses to Refugees*, Cambridge University Press, 2004, p. 5.

[27] Unless explicitly noted, the term migrant is used to collectively refer to anyone who is migrating from one place to another, without necessarily crossing a border.

[28] Alexander Betts, Survival Migration: A New Protection Framework, *Global Governance*, *16*(3), p. 361.

[29] The term 'survival migration' is also valuable in avoiding the pitfalls of the 'forced migration' idea which strips migrants of their agency.

[30] Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, Oxford University Press, 2013, pp. 4–5.

[31] Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Responses to Refugees*, Cambridge University Press, 2004, p. 4.

[32] This work will use the expressions 'international protection regime' and 'refugee regime' interchangeably to designate the regime established by the 1951 Convention Relating to the Status of Refugees and the accompanying 1967 Protocol.

for the reconceptualization of the focal point of the international protection regime from 'persecution' to 'deprivation'[33]. Betts contends that:

> 'state responses to people fleeing serious human rights deprivations vary tremendously: in some cases, the migrants are protected as though they were refugees; in other cases they are rounded up, detained and deported [because] in the absence of legal precision, protection regimes are shaped by how interests and incentives play out for qualitatives within host state governments'[34].

The mismatch between the category of persons captured by the definition of refugee and the modern causes of forced migration leads to inconsistent application of the international protection regime at both the national and the international level. It produces inadequate responses to people's claims for protection and is a reminder of the need to reform the international protection regime with a view to making it a more realistic and effective one.

2.2. EU Challenge: Putting the Fundamental EU Values to the Test

In the European Union, the 2015 events transformed asylum into one of the most contentious issues at every level of governance, putting core EU values like solidarity[35], cooperation and human dignity[36] to the ultimate test.[37] Managed as part of the Area of Freedom, Security and Justice (AFSJ)[38], the governance of migration into the EU has been strained by the forces of globalisation. While certain nation states could once ignore refugees far from their borders, 'frequent and relatively inexpensive travel and communications have made possible intercontinental transportation and greatly increased the number of denizens from refugee-producing countries travelling to the West to claim admittance'[39]. Hence, the 2015 events only exacerbated the challenges of an already strained system.

At the domestic level, whole election campaigns in Member States have been won on anti-immigrant rhetoric[40], whilst at the supranational level, the principle of solidarity has suffered

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[33] See Alexander Betts, Survival Migration: Failed Governance and the Crisis of Displacement, Cornell University Press, 2013.

[34] Carling Jørgen, Review of Alexander Betts, ed., 'Survival Migration: Failed Governance and the Crisis of Displacement', *The Journal of Modern African Studies*, *52*(2), 332–333.

[35] For references to solidarity within the Area of Freedom, Security and Justice, see Article 80 and Article 67(2) of the TFEU, which states that '[I]t shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals'.

[36] See Article 2 of the TEU, which states '[T]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'; Also, Article 1 of the EU Charter of Fundamental Rights, which states, '[H]uman dignity. Human dignity is inviolable. It must be respected and protected.'

[37] See for example, Florian Trauner, 'Asylum policy: the EU's 'crises' and the looming policy regime failure', *Journal of European Integration*, 2016, 311-325.

[38] See Article 3(2) Treaty on the European Union: 'The Union shall offer its citizens an area of freedom, security and justice'; See also, Articles 67-89, Title V of the Treaty on the Functioning of the European Union. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

[39] Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Responses to Refugees*, Cambridge University Press, 2004, 2004, p. 10.

[40] The election win for the far-right freedom party FPÖ in Austria in October 2017, the rise of the anti-immigrant populist Lega party in Italy in 2018, and the continued rule of the Hungarian Civic Alliance (Fidesz) Party in Hungary are but a few examples of the rise of anti-immigrant rhetoric in different EU Member States.

damage due to the diversity of responses (or lack thereof) to the 'refugee crisis'.[41] The unprecedented number of arrivals of asylum seekers to Europe has made migration management one of the top priorities for the EU, as shown in the *White Paper on the Future of Europe*[42], the *European Union Global Strategy* (EUGS)[43], and the majority of speeches on the future of the European Union. The upsurge in asylum seeker numbers has been framed as an existential risk to the Union's functioning and has led to the increased securitization of the language around migration management as well as the designation of development funds for the purposes of deterring migration.[44] The budgetary prioritization of securing EU borders has led to disagreements between Member States because '[a]s member states cannot agree on responsibility sharing or the associated issues of intra-EU secondary movements, the overburdening of frontline states or the difference in member states' structural capacities, they have shifted their attention (and funds) to the reinforcement of the Union's external borders – an issue on which they can agree'[45]. Cooperation with EU-neighbouring countries exemplified by political agreements outside the jurisdiction of the European Court of Justice, such as the EU-Turkey statement[46], have further emphasised the Union's prioritisation of migration. However, those have grown increasingly suspect because 'the continuing "crisis" modality informing the European approach to them'[47] does not stand the test of numbers which reveal that the 'crisis' has long passed.[48]

The European Union's aspirations to promote justice at the global level[49] have also come under scrutiny. Thousands of people, including children, continue to take the perilous journey to Europe, risking their lives to escape conflict, desperate economic conditions or perpetual poverty, only to encounter restrictive measures designed to keep them away from European soil. Policies like administrative detention in abhorrent conditions and barbed wire border fences have reappeared from what was thought to be the buried totalitarian regime artillery, whilst interception and abandonment at sea have become increasingly frequent; all despite the EU's acknowledgment of the legal responsibilities owed to refugees. This paradox has revived

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[41] Please see Jean-Pierre Gauci and Eleni Karageorgiou, 'Solidarity "A La Carte": The EU's Response to Boat Migration', *Opinio Juris*, 09.08.2019, https://opiniojuris.org/2019/08/09/solidarity-a-la-carte-the-eus-response-to-boat-migration/.

[42] European Commission, 'White Paper on the Future of Europe', COM(2017)2025 of 1 March 2017. https://ec.europa.eu/commission/sites/betapolitical/files/white_paper_on_the_future_of_europe_en.pdf Last access date: March 15th, 2019.

[43] See for example, 'The European Union's Global Strategy: Three Years On, Looking Forward', European Union External Action Agency, available at: https://eeas.europa.eu/sites/eeas/files/eu_global_strategy_2019.pdf.

[44] Aysel Küçüksu, 'The Budgetary Future of Migration and Development Policy in the European Union', *Istituto Affari Internazionali*, August 2019, p. 2.

[45] Ibid, p. 6.

[46] European Union: Council of the European Union, 'EU-Turkey statement', 18 March 2016, 18 March 2016, available at: https://www.refworld.org/docid/5857b3444.html [accessed 28 November 2019].

[47] Aysel Küçüksu, 'The Budgetary Future of Migration and Development Policy in the European Union', *Istituto Affari Internazionali*, August 2019, p. 12.

[48] Ibid, p. 15.

[49] See Article 2, Treaty on European Union.

Matthew Gibney's decade-old observation of a 'kind of schizophrenia' amongst what he calls 'Western responses to migration', where 'great importance is attached to the principle of asylum, but enormous efforts are made to ensure that refugees (and others with less pressing claims) never reach the territory of the state where they could receive protection'[50]. In the context of the European Union, Sandra Lavenex has observed this 'concurrent reinforcement of protective claims and protectionist policies' and called it an example of 'organized hypocrisy'.[51] The political challenges for the fundamental EU values sparked by the 'refugee crisis' are noteworthy for setting the context within which the European Court of Justice delivers its asylum judgments.

2.3. International Challenge: The Global Compacts and Fragmentated Efforts

Amongst the most significant international efforts arising from the 2015 events was the 2016 New York Declaration for Refugees and Migrants[52] which sought to 'address the question of large movements of refugees and migrants'[53]. Subsequent negotiations[54] culminated in the 2018 adoption of the Global Compact on Refugees (GCR)[55] and the Global Compact on Safe, Orderly, and Regular Migration (GSM)[56]. In the beginning, the GCM was hailed as an important step towards the governance of migration and 'the first, intergovernmentally negotiated agreement, prepared under the auspices of the United Nations, to cover all dimensions of international migration in a holistic and comprehensive manner'[57]. However, despite the initial optimism arising from the unanimously adopted non-binding 2016 New York Declaration, the subsequent negotiations unfolded in a manner that frustrated hopes of renewed international solidarity. Unlike the GCR which was relatively uncontroversial, the adoption of the GCM was muddled in political quarrels, with a number of states withdrawing from the Compact before its final text had even been agreed on. Their rationales varied between arguments that 'the Compact would force states to admit migrants, would be a pull-factor for migration, would contravene domestic migration policies, and violate the states' sovereignty'[58]. For the European Union, the

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[50] Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Responses to Refugees*, Cambridge University Press, 2004, p. 2.

[51] Sandra Lavenex, 'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System, *Journal of Common Market Studies*, *56*(5), p. 1195.

[52] United Nations General Assembly, 'New York Declaration for Refugees and Migrants', adopted on September 19, 2016, A/RES/71/1. Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf.

[53] Ibid.

[54] Drafts of the intergovernmental negotiations on the GCM can be found here: https://refugeesmigrants.un.org/intergovernmental-negotiations.

[55] United Nations General Assembly, 'Global Compact on Refugees', A/RES/73/12. Available at: https://www.unhcr.org/gcr/GCR_English.pdf.

[56] United Nations General Assembly, 'Global Compact on Safe, Orderly, and Regular Migration', Available at: https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf.

[57] See 'Global Compact for Migration', *United Nations*, available at: https://refugeesmigrants.un.org/migration-compact.

[58] Anne Peters, The Global Compact for Migration: to sign or not to sign? *EJIL: Talk!*, 2018. Retrieved November 29, 2019, from https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/.

process for the formal ratification of the GCM by its Member States meant that what had started out as a common project to manage migration globally, quickly tuned into 'a fiasco for the unity of EU representation on the international scene'[59]. Others have dubbed it 'a breach of loyalty'[60]. During the adoption of the GCM, three EU Member States voted against, five abstained, and one did not vote.[61] The adoption of the GCM in Marrakech was similarly characterised by a number of withdrawals motivated by state leaders alleging that its content undermined state sovereignty despite not being binding.[62] The threat to democracy and national sovereignty posed by seeking to internationally govern migration was a recurring theme in the speeches of a number of Heads of State,[63] reinforcing the importance of the distinction between refugees and migrants for the international community.

2.4. Facing the Challenges through Political Philosophy

Forced displacement is not an issue of an exclusively political or legal nature. It affects the lives and wellbeing of millions of people, and academic engagement with the issue calls for a holistic approach that looks beyond the political and legal confines. Contemplating the issues surrounding the phenomenon of forced displacement, as well as the role and responsibility of international organisations in relation to it, needs to draw inspiration from disciplines, whose abstract nature prevents them from being held hostage to temporary political whims. It is precisely because of its distance from daily exigencies that political philosophy can offer insight into the complicated power games that thrive in the absence of legal precision. Whilst those are either rendered overwhelming in a political analysis or invisible in a strictly doctrinal legal investigation, political philosophy offers wisdom accumulated at a safe distance from them. Therefore, this work approaches the functioning of the international protection regime within the context of the European Union from an interdisciplinary standpoint that combines law and political philosophy. It seeks to offer a critical analysis that is 'simultaneously inside and outside law, simultaneously technical and theoretical, legal and socio-legal'[64]. By examining the Union's

[59] Pauline Melin, The Global Compact for Migration: Lessons for the Unity of EU Representation. *European Journal of Migration and Law*, *21*(2), p. 194.

[60] Mauro Gatti, EU States' Exit from the Global Compact on Migration: A Breach of Loyalty. *EU Immigraton and Asylum Law and Policy Blog*, 2018. Available at: https://eumigrationlawblog.eu/eu-states-exit-from-the-global-compact-on-migration-a-breach-of-loyalty/

[61] For a report on the events, see: Georgi Gotev, 'Nine EU Members Stay Away from Migration Pact', *EURACTIV*, 20 December 2018, available at: https://www.euractiv.com/section/global-europe/news/nine-eu-members-stay-away-from-un-migration-pact/.

[62] Georgi Gotev, 'Marrakech UN forum adopts migration pact despite withdrawals', *EURACTIV*, 11 December 2018, available at: https://www.euractiv.com/section/justice-home-affairs/news/marrakesh-un-forum-adopts-migration-pact-despite-withdrawals/.

[63] For a detailed examination of the arguments presented by withdrawing states, please see: Anne Peters, 'The Global Compact for Migration: to sign or not to sign?' *EJIL: Talk!*, 2018. Retrieved November 29, 2019, from https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/

[64] Mariana Valverde, Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory, *Social and Legal Studies*, *18*(2), 2009, p. 153.

asylum jurisprudence from the vantage point of a more abstract discipline, this work thereby aspires to connect the Court's asylum practice to the global justice discussions on migration.

2.5. Justifying the Migration-Asylum Approach

'At least until the process of the dissolution of the nation-state and its sovereignty has come to an end, the refugee is the sole category in which it is possible today to perceive the forms and limits of a political community to come'[65]

Whilst this work examines global justice perspectives on migration, it is confined to the asylum jurisprudence of the European Court of Justice to ensure its coherence. This choice deems an explanation, which is offered henceforth. The starting puzzle of this work was whether, and if so, to what extent is the European Court of Justice cognizant of the global distribute justice debate. The Court's asylum jurisprudence was thereafter chosen as an empirical case study that could offer insight into answering said question because of its concern with non-EU nationals. This has two noteworthy practical consequences. First, this work engages with the literature within the global justice debate that discusses migration. As such, it does not directly converse with the philosophical tradition which circumvents the global justice debate and directly delves into matters of the right to asylum and the status of the refugee. My primary research interest remains the relationship between the European Court of Justice and global justice debates, with the asylum case law serving as my empirical case study. Therefore, I build upon the specific branch of philosophical literature that uniquely deals with the right to asylum and the status of the refugee not by interacting with it, but by coming to the topic of migration from a different angle. Second, although it is exclusively the Court's asylum jurisprudence that I study, it is the migration debate within global justice matters that I engage with. This work's interdisciplinarity is at the heart of the explanation for this choice. At the abstract level of political philosophy, matters of asylum are examined from within more general discussions on migration. This disallows a neat separation of the two topics from one another. At the legal practice level, the position is different. As observed during the negotiations leading to the adoption of the GCM[66], matters of migration are so politicized that the law necessarily separates the migrant from the asylum seeker, even though these statuses would be more sustainably treated as a whole. Such legal categories enable policy-making and consensus-building on matters that are highly divisive across the political spectrum. Clear categorisation between applicants, especially when dealing with certain groups is a very politically sensitive issue, and serves the separation of powers doctrine by allowing judges, lawmakers, and other stakeholders

[65] Giorgio Agamben, We Refugees, *Symposium 49*(2), 1995, p. 114.

[66] See, for example, the news coverage on the negotiations on the Global Compact for Safe, Orderly, and Regular Migration (GCM), where the controversy of the issue area eroded the unity of the EU representation on the international scene, with nine EU Member States either voting against, abstaining or not voting during the formal ratification of the GCM: <https://www.euractiv.com/section/global-europe/news/nine-eu-members-stay-away-from-un-migration-pact/>.

to know when certain jurisdictional boundaries would be trespassed. Therefore, legal practice creates categories which isolate the posted worker from the family reunification migrant, the asylum seeker, and the refugee (but to name a few), which in turn allows for separating these sub-phenomena (on the terms of the legislator) and examining the law's approach to them.

Whilst the international community accepts that obligations are owed towards refugees, the suggestion that obligations are also owed towards migrants, especially those that might not take regular paths of entry, tends to be met with distrust. This difference of perception occurs despite the fact that refugees, just like other migrants, have economic necessities and many are competent workers, whilst 'many labor migrants have protection needs, especially in transit, but also from situations in their home country that may fall short of individualized targeting for persecution or torture but still render life intolerable'[67]. In the picture painted by Ramji-Nogales, one is yet again reminded of the arbitrary distinction between different asylum seekers depending on whether they are deemed 'worthy' of protection by virtue of being persecuted by their home state. Her remark, as well as the observations made by the political philosophers seeking to reconceptualize the causes of forced displacement and the international protection regime (I.2.2.1.) are well accounted for by the temporary category of 'asylum seeker'. Cambridge Dictionary defines an 'asylum seeker' as 'someone who leaves their own country, *often* for political reasons or because of war, and who travels to another country *hoping* that the government will protect them and allow them to live there'[68] [emphasis added]. The European Commission, on the other hand, defines an 'asylum seeker' as follows:

> 'In the global context, a person who seeks protection from persecution or serious harm in a country other than their own and *awaits a decision* on the application for refugee status under relevant international and national instruments […] In the EU context, a third-country national or stateless person who has made an application for protection under the Geneva Refugee Convention and Protocol *in respect of which a final decision has not yet been taken*'[69] [emphasis added]

Both definitions are useful for the designation of an asylum seeker. In the Cambridge Dictionary one, the important elements are that an asylum seeker is someone who *often*, but not *always*, leaves their country for political reasons and that *hopes* for protection. In the EU Commission's definition, what is worthy of emphasis is the fact that an 'asylum seeker' is someone who *awaits a decision* and in respect of whom *a final decision has not yet been taken.* This temporal element is fundamental to the definition because it allows for the person that might subsequently be ruled

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[67] Jaya Ramji-Nogales, Moving Beyond the Refugee Law Paradigm, AJIL Unbound, 2017, p. 11.
[68] Cambridge Dictionary: Definition of 'asylum seeker' from the Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press, available at: https://dictionary.cambridge.org/dictionary/english/asylum-seeker
[69] European Commission, *Migration and Home Affairs: Definitions*, available at: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/asylum-seeker_en.

a 'migrant' and the person who might subsequently be deemed a 'refugee' to exist in the same category and be treated in the same way whilst their applications are under consideration. The category also permits one to differentiate those people whose cases have an element of involuntariness because they consider themselves in need of protection and other categories of migrants, whose cases are more voluntary such as students, foreign workers, family members, or others. This statement is without prejudice to the acknowledgment that the latter categories of migrants could also involve an element of coercion. It is rather an effort to isolate a particular group of migrants who believe themselves to require special considerations, and whose cases a judicial authority would be willing to examine on those premises. The 'asylum seeker' category encapsulates all people who have applied for asylum, and as such, it is bigger than the category of refugees. However, it is also different from the many mainstreamed migration applications EU Member States receive. Because a court dealing with an asylum case would ultimately have to make a pronouncement on why a person does or does not qualify for international protection, the 'asylum seeker' category offers a unique opportunity to study the rationales of the Court for doing so. It is also the most likely place for the Court to potentially engage with arguments concerning global justice or the duties of protection owed to people in need. It is therefore the asylum jurisprudence of the European Court of Justice that the subsequent chapters examine in light of global justice perspectives on migration.

3. Research Puzzle

In her instructive work on how to pursue legal research, Synne Sæther Mæhle argues that the most important aspect of any work is 'establish[ing] pursuit-worthy lines of inquiry by constructing and exploring promising lines of inquiry in search of fruitful contributions to improved understanding of law'[70]. Although this work is not exclusively legal, it sets the bar for the quality it aims to guarantee at the level championed by Mæhle. It is an interdisciplinary work, whose primary contribution is towards an understanding of the European Court of Justice, be that from a legal or from a philosophical point of view. Bridging a systematic study of ECJ practice to philosophical, global justice debates is an unexplored endeavour. Whilst there is an abundance of literature examining different accounts of global justice or the political role of the ECJ as an EU institution, there is none at the intersection of the two in asylum matters. This work addresses that gap by empirically studying the complete asylum jurisprudence of the Court through the lens of global justice theories of migration. It thereby stands at the intersection of law, politics, and philosophy and offers an innovative, interdisciplinary look at how a sophisticated international actor navigates one of the most pressing challenges of our time.

[70] Synne Sæther Mæhle, Pursuing Legal Research. *Law and Method*, 2017, p. 1.

The EU asylum jurisprudence offers a constantly evolving and intriguing subject of study with direct relevance to the European Union's role and global image. Its easily delineable contours provide the perfect conditions for coherent and reproducible research. Rather than offer a standard hypothesis-testing approach, this work pursues an open-ended, exploratory line, in studying its subject. Two different methodologies are pursued in this examination of the Court's asylum jurisprudence. First, a dogmatic legal approach involving close reading of the Court's case law and analysis of legal texts. Second, qualitative interviewing of a dozen officials at the ECJ.[71] Insights drawn from both methodologies help address the question of whether the ECJ can be said to be implicitly advancing any theory of global justice in its asylum jurisprudence. Engaging with the knowledge produced by two very different epistemic communities is not without its challenges, however. One of the main findings of this work is that there is no overlap in the lexicon employed by political philosophers when discussing migration and the one judges rely on to consider asylum cases. To overcome this hurdle, this thesis opts for establishing pathways for mutual intelligibility between the two disciplines and does so by employing a novel theory that is simultaneously an insider and an outsider to both disciplines; namely, Martha Fineman's 'vulnerability theory' (also referred to as 'vulnerability thesis').

Martha Fineman is a political and legal philosopher, which automatically makes her work an insider to the philosophical and legal disciplines. However, as her vulnerability theory has neither been applied to global justice theories on migration, not to the asylum jurisprudence of the Court, it also comes as an outsider to both. Her 'vulnerability theory' seeks to redefine the way we conceptualise human beings in the dominant liberal legal tradition. She argues that instead of seeing human beings as free, rational, invulnerable legal subjects (a definition which allows corporate entities to also qualify as legal persons), we need to see them for what they really are: universally and individually vulnerable, embodied and embedded within complex institutional and social relations.[72] Albeit intuitive, her theory is very disruptive to the existing legal system because it underlines how far legal perceptions of the human being, and consequently, the laws which are built around those perceptions, are from our lived experiences. Within the context of a topic such as migration, her theory is a welcome counterforce to the apparently static categories of people the law establishes that do not otherwise exist in reality, such as: citizen, third-country national, migrant, refugee, amongst others. Reconceptualising all people are vulnerable, her theory rekindles the tie between citizens and third-country nationals

[71] The names of the officials working at the ECJ have been anonymised at their request. Only the President of the Court, Judge Koen Lenaerts, allowed for his name to be mentioned and wherever needed, that has been done.

[72] Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, *Yale Journal of Law and Feminism*, *20*(1), 2008, 1–24; Martha Albertson Fineman, Vulnerability and Inevitable Inequality, *Oslo Law Review* 4(3), 2017, pp. 133-149.

that is rooted in their shared humanity. It also acts as a constant reminder of the power of legal fiction.

Within the context of political philosophy, and global justice, in particular, Fineman's theory offers a new source of universality upon which deliberations on the duties people owe to each other can be built. In the same vein as theories of global justice, her theory seeks to interrogate the meaning of abstract matters like freedom and equality. Being firmly 'anchored in the human condition'[73], her theory becomes a potent tool for grounding political philosophy in the lived experience of human beings. Most importantly, however, her theory takes a term that is already in common use by the European Court of Justice. This means that it can serve as a brokering agent between the two leading disciplines in this study without compromising their integrity. A detailed discussion of the theory will follow in **Chapter II**. 6. In the meantime, it is worth noting that this work will compare Martha Fineman's vulnerability theory and certain aspects of the global justice debate in order to argue that the former's application to the asylum jurisprudence of the ECJ could present a way for political philosophy to inform judicial discourse. An analysis of that jurisprudence through the lens of Fineman's vulnerability theory will have the added benefit of granting coherence to what is an otherwise inconsistent judicial practice that endows the term vulnerability with many different meanings and thereby deprives the term from its productive value. The vulnerability theory also enables a reading of the Court's jurisprudence that is rooted in considerations of philosophy that do not fluctuate with the politics of the day.

This research offers an illuminating, new framework for analysing the European Court of Justice's stance on asylum. Ideas from the global justice literature on migration provide a novel angle for describing and evaluating the jurisprudence of the Court. This study also offers a new perspective on asylum as a subject that has historically been examined not only as an internal EU matter, but also as one in which the Member State has been the central gravitational force of any discussion. By emphasizing the global consequences of EU asylum policy and allowing the individual to reclaim her or his place as the ultimate unit of concern, the global justice examination redefines the ways in which this pertinent subject can be approached.

4. Research Questions

With numerous questions on different aspects of the asylum process reaching the European Court of Justice, it is intriguing to study the Court's manner of engagement with this politically charged issue closely. Even though the Court does not talk about or explicitly employ

[73] Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, *Yale Journal of Law and Feminism*, *20*(1), 2008, p. 1–24.

any particular account of global justice in its asylum jurisprudence, that does not mean that its stance is necessarily neutral. Therefore, this work seeks to answer the following questions:

1. Are global justice discussions on migration reflected in the asylum practice of the European Court of Justice?

2. If not, how can we explain and, if possible, bridge the gap? Is it feasible to establish indirect pathways through which political philosophy can inform judicial practice?

3. To what extent does political philosophy have a tangible influence on everyday matters such as judicial decisions on asylum policy?

4. Does the Court's asylum practice differ from the remainder of its jurisprudence, and if so, what are possible explanations for the difference?

5. Methodological Considerations

Asylum policy is an important identity matter for the European Union. The Union's outer borders form the site at which its character is the most manifest because Member States unite in their common pursuit of *governing* access to the area of freedom, security, and justice that is the EU.[74] Whilst control over immigration was dubbed as 'the last bastion of sovereignty' for the nation-state as early as 2004,[75] the 2015 onset of the unprecedented number of arrivals at EU borders transformed the matter into an even more contentious object of study. Hence, examining the highly politicized asylum jurisprudence of the European Court of Justice means studying something that is at the border between law and politics, and theory and practice. Such an endeavour poses the question of how one can academically engage with the problem in a credible manner, and highlights the benefits of having two disciplines to draw on. Simultaneously, the opportunity to combine qualitative textual analysis with empirical legal research offers fertile ground for a more nuanced understanding of the Court.

Despite focusing on one legal actor, the European Court of Justice, my work requires more than simply engaging in the dogmatic legal method of reading jurisprudence and examining legal scholarship. The possibility to refer to a discipline that transcends the practical and engages the theoretical thus becomes of paramount importance. Even more so, when said discipline is political philosophy, whose permanence and abstraction have much to offer to a sphere as intimately rooted in temporary political winds as migration is. Indeed, the

[74] See Amsterdam Institute for Social Science Research, *European Asylum and Migration Governance: New Perspectives for Research and Policy*, https://aissr.uva.nl/content/events/workshops/2018/12/new-perspectives-for-research-and-policy.html.
[75] Catherine Dauvergne, Sovereignty, Migration and the Rule of Law in Global Times, *The Modern Law Review*, *67*(4), 2004.

interdisciplinary footing of my work is especially suitable for the task at hand. By explicitly referring to two diverse academic traditions such as law and political philosophy, this work highlights the points of synergy and divergence brought about by their interactions. It is an innovative piece of research, 'mak[ing] connections that others do not see, [and] shed[ding] new light from an unexpected angle on an existing problem.'[76] Its explorative, rather than hypothesis-testing nature, is best understood in the words of Mæhle, who describes original research as one using 'both traversed lines of inquiry and newly discovered theoretical landscapes *while* remaining open-minded as to whether such inquiry ultimately results in the *best* approach to answering the research question and to contributing to improved understanding of the law.'[77]

5.1. Theoretical Framework

As my thesis explicitly draws on, and contributes to, two academic traditions, I have decided that the Law in Context (LC) approach proves an appropriate choice for its theoretical framework. In its most general form, LC 'rests on the belief that legal rules and decisions must be understood in context. Law is not autonomous, standing outside of the social world, but is deeply embedded within society.'[78] It sees the political nature of law, but also seeks to uncover the ways in which 'law is socially and historically constructed, how law both reflects and impacts culture, and how inequalities are reinforced through differential access to, and competence with, legal procedures and institutions.'[79] Additionally, the appearance of neutrality that hides asymmetries of power is a theme that many Law in Context scholars return to. I identify with their commitment to uncover the processes that hide beneath law's veneer of objectivity.

This work focuses on a contextual examination of the law and its practice. Yet, context is informed by both law and political philosophy. Therefore, whilst the major contribution of this work rests on the empirical findings from the study of the ECJ's asylum jurisprudence, those findings are contextualised by reference to the Court's mandate, institutional commitments, and broader philosophical discussions of justice. Interviews conducted at the Court also serve to illuminate the Court's jurisprudence and practice. Furthermore, the study of the Court's judgments is approached in a critical manner, aimed at examining whether practices within EU asylum law might be perpetuating asymmetries and inequalities between different applicants. Political philosophy provides additional background to the philosophical questions raised by the existence of these inequalities.

Whilst this thesis operates within the broader framework established by the Law in Context scholarship, its particular theoretical commitment is to Mariana Valverde's theory on

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[76] Mæhle, Pursuing Legal Research, *Law and Method*, 2017, p. 4.
[77] Ibid.
[78] Lynn Mather, Law and Society. *The Oxford Handbook of Political Science*, (June), 2013, p. 1.
[79] Ibid.

'jurisdiction and scale'[80] and Boaventura de Sousa Santos' work on 'a scale conception of law.'[81] These works are especially suitable for an interdisciplinary engagement with topics such as asylum, where a number of different interests and legal regimes interact. Both scholars draw inspiration from contemporary social theory and critical geography in order to account for the theoretical and practical consequences of legal pluralism and nested legal systems, where 'different forms of law create different legal objects upon eventually the same social subjects.'[82]

5.1.1. The Utility of the Map Metaphor

The founding premise in de Sousa Santos' work is that,

> 'the relations law entertains with social reality are much similar to those between maps and spatial reality. Indeed, laws are maps; written laws are cartographic maps; customary informal laws are mental maps.'[83]

The map metaphor enables intuitive comparisons between the processes of map-making and legislative drafting and the use of imagery from the former to illuminate the mechanics of the latter. De Sousa Santos argues that cartography, including 'the structural features of maps and map-making as well as the phenomenology of using maps' can be insightful to the sociology of law.[84] For him, in the same tradition as maps, laws misread (or distort) reality, in order to represent it on a smaller scale. However, said distortion of reality need not automatically mean the distortion of truth because in the process of map-making, 'the mechanisms by which the distortion of reality is accomplished are known and can be controlled.'[85] De Sousa Santos lists three of those mechanisms; namely, scale, projection and symbolization.[86] He adds,

> 'Scale, projection and symbolisation are not neutral procedures. The choice made within each of them promote the expression of certain types of interests and disputes and suppress that of others. The autonomy of law as a specific way of representing, distorting, and imagining reality derives from operation of these procedures.'[87]

De Sousa stresses that these procedures are not objective and their operation alters reality and may do so in different ways, depending on the purpose the map or the law is to serve. The three tools are independent from each other and involve separate procedures and decisions. Therefore, this work will focus particularly on the mechanism of 'scale'. As it also features prominently in Valverde's work, the mechanism of 'scale' is an appropriate focal point for a theoretical framework that seeks to incorporate both de Sousa Santos' and Valverde's work.

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[80] Mariana Valverde, Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory. *Social and Legal Studies*, *18*(2), 2009, 139–157; *Chronotopes of Law: Jurisdiction, Scale and Governance*, Routledge, 2015.
[81] Boaventura de Sousa Santos, Law: A Map of Misreading. Toward a Post-modern Conception of Law, *Journal of Law and Society*, *14*(3), 1987, pp. 279–302.
[82] Ibid, p. 287.
[83] Ibid, p. 282.
[84] Ibid.
[85] Ibid.
[86] Ibid, p. 283.
[87] Ibid, p. 297.

5.1.2. Unpacking the 'Scale Conception of Law'[88]

In its essence, 'scale' relates to the level of detail of a particular map (or law). In cartographic terms, it is defined as 'the ratio of distance on the map to the corresponding distance on the ground.'[89] Deciding the scale of a map decides whether the map covers less land, but does so in *more* detail; or covers more land, but in *less* detail. The scale-detail dichotomy is described as follows: 'since large-scale maps represent less land on a given size sheet of paper than do small-scale maps, large-scale maps can present more detail.'[90] A simple transfer of the cartographic metaphor to the practice of law means that the lower-order a law is (e.g. a labour law), the bigger its scale will be and the more detail it will cover, and vice-versa. The higher-order a law is (e.g. international treaty), the smaller scale it will operate on and the bigger jurisdiction it would cover, albeit in less detail than a lower-order law:

> '[t]he large-scale legality is rich in details and features; describes behaviour and attitudes vividly; contextualises them in their immediate surroundings; is sensitive to distinctions (and complex relations) between inside and outside, high and low, just and unjust […] On the contrary, small-scale legality is poor in details and features, skeletonises behaviour and attitudes, reducing them to general types of action. on. But, on the other hand, it determines with accuracy the relativity of positions.'[91]

For de Sousa Santos, applying the idea of scale to the law enables a 'scale conception of law' whereby different-order laws can be conceived of as having different 'legalities' (i.e. the legal mode of operation that results, albeit often unnoticedly, from the scale a law operates on). He notes 'large-scale legality', 'medium-scale legality', or 'small-scale legality'. In de Sousa Santos' words,

> '[t]he legal developments reveal the existence of three different legal spaces and their correspondent forms of law: local, national and world legality. It is rather unsatisfactory to distinguish these legal orders by their respective objects of regulation because often they regulate or seem to regulate the same kind of social action. Local law is a large-scale legality. Nation state law medium-scale legality. World law is a small-scale legality. This concept has broad implications. First, it means that, since scale creates the phenomenon the different forms of law create different legal objects upon eventually the same social objects. They use different criteria to determine the meaningful details and the relevant features of the activity to be regulated. They establish different networks of facts. In sum, they create different legal realities.'[92]

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[88] Ibid, p. 289.
[89] Ibid, p. 283.
[90] Ibid.
[91] Ibid, p. 289.
[92] Ibid, p. 287.

Grasping de Sousa Santos' 'scale conception of law' allows mapping the legal regimes which meet in the EU asylum space in terms of their 'scale-legality'. For example, the 'scale conception of law' means that the 1951 Refugee Convention and the 1967 Protocol operate on small-scale legality (poor in detail, but good at regulating general types of action); EU asylum law – on medium-scale legality (a hybrid between small-scale legality and large-scale legality); and Member States – on large-scale legality. Already here, de Sousa Santos' conceptualisation has productive power. To begin with, it does away with the unspoken assumption that law operates on a single scale, which in turn implies that one can easily move between different laws (vertically) without experiencing any change in terms of *kind*. Different phenomena are visible in a representative light at particular scales and disappear or get distorted at others.[93] The issue arises when the operation of scale is forgotten, or normalized into oblivion by the power of jurisdiction as is the case within the dogmatic study of the law. It is when scale is taken for granted, as de Sousa notes, that critical geography becomes especially relevant to understanding the law,

> 'One of the main reasons for recommending the symbolic cartography of law its ability to analyse the effect of scale on the structure and use of law. The modern state is based on the assumption that law operates on a single scale, the scale of the state. For a long time the sociology of law accepted assumption uncritically.'[94]

By acknowledging the presence of scale one is able to interrogate the otherwise latent assumptions underlying everyday encounters with the law. Once scale is added to the equation, one becomes better at analysing the effect of scale on the structure and application of the law and more attuned to noticing the clashes between the different types of modalities laws carry. After all, the different scale-legalities would necessarily clash as they struggle to reconcile the fact that despite operating within the same space, they regard varying degrees of detail as important. As de Sousa Santos clarifies,

> 'the different legal scales do not exist in isolation but rather interact in different ways […] In such a case the regulatory purposes of the three legal scales converge in the same social event. This creates the illusion that the three legal objects can be superimposed. In fact, they do not coincide; nor do their 'root images' of law and the social and legal struggles they legitimate coincide.'[95]

De Sousa Santos allows us to see the cracks beneath the illusion of perfectly overlapping modalities and question images of apparent harmony that decision-making often projects.

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[93] Ibid, p. 284.
[94] Ibid, p. 287.
[95] Ibid, p. 288.

A 'scale conception of law' thereby has a number of noteworthy implications. To begin with, it brings forward the fact that each scales has a different *modus operandi* with different action packages and regulation patterns.[96] These qualitative differences are often rendered invisible because the operation of 'scale' is taken for granted. If not addressed in cases of legal plurality, this qualitative difference results in clashes between the heterogeneous modes of governance associated with each legality. For example, when an asylum case comes before the European Court of Justice, the governing scale is presumed to be the one belonging to the EU legality. However, utilising de Sousa Santos' work, one can begin to interrogate that presumption by acknowledging the presence of other scales, such as the ones associated with Member State laws and their international commitments, for example. Therefore, the moment we acknowledge that law does not operate on a single scale, we become better equipped at understanding legal conflicts. Exposing scale thereafter either contextualises them or surfaces as their very cause. Furthermore, his work is very important to a human rights-based analysis as it can illuminate the fact that rights one person gains at one legality can be lost when moving to a different legality. The 'scale conception of law' produces new knowledge about complex jurisdictional spaces. It provides one with the tools to question the apparent harmony or static existence of the law and to acquaint oneself with the likely possibility that the strongest conflicts might be hidden underneath what seem to be the least conflictual spaces. De Sousa Santos thereby allows one to read the apparently technical nature of the case law as a symptom of profound jurisdictional differences. Finally, the 'scale conception of law' draws attention to the phenomenon of 'interlegality'.

5.1.3. Interlegality

Another very relevant aspect of De Sousa Santos' theory on the 'scale conception of law' is his idea of 'interlegality'[97], a description of the dynamic interaction between legal orders. As de Sousa Santos' observes,

> 'socio-legal life is constituted by different legal spaces operating simultaneously on different scales and from different interpretive standpoints. So much is this so that in phenomenological terms and as a result of interaction and intersection among legal spaces one cannot properly speak of law and legality but rather of interlaw and interlegality. More important than the identification of the different legal orders is the tracing of the complex and changing relations among them. But if while doing this we forget the question of scale, we may find ourselves in the same distressing situation as a tourist who forgot to pack the voltage transformer that would enable him to use his electric razor in a foreign country.'[98]

[96] Ibid, p. 289.
[97] Ibid, p. 288.
[98] Ibid, p. 288.

Focusing on 'interlegality' enables one to break from the perception of law as static and instead concentrate on 'the dynamic relations among different scales and systems' which go beyond the simple theorisation of 'law' in general.[99] In this way, one can describe hierarchical relations between legal orders and enable 'reflexive self-awareness' amongst critical scholars, whilst steering clear of normative statements about the appropriateness of the observed order. However, such become possible upon engaging with concrete empirical evidence. As Valverde notes, '[n]ormative arguments about which scale is best make sense in concrete governance situations, in which one might indeed foresee the actual effects of choosing one scale over another, and thus make choices on the basis of concrete information.'[100] Both 'scale' and 'interlegality' are valuable tools in both descriptive and normative terms.

5.1.4. The Game of Jurisdiction

Valverde builds upon de Sousa Santos' work by arguing that differences between scales of law, or 'legalities' are not simply quantitative, but qualitative too. These substantive incompatibilities make their invisible clashes all the more insidious. She therefore argues that the 'theoretical work on 'scale' – outside and inside legal studies – could benefit from studying specifically legal mechanisms such as 'jurisdiction'.'[101] For Valverde, studying 'jurisdiction' has the potential to uncover the many 'modes and rationalities of governance that coexist in every political-legal 'interlegality' and the 'complex governance manoeuvres' that are enabled by and otherwise remain undetected under what she calls 'the legal game of jurisdiction.'[102]

What Valverde refers to as 'the legal game of jurisdiction' is the mechanisms through which jurisdiction enables one to take scale for granted. She posits that the day-to-day workings of jurisdiction 'tend to naturalise the simultaneous operation of quite different, even *contradictory*, rationalities of legal governance' with the consequence that 'taking scale for granted enables the kind of interlegality that one might call 'bad' legal pluralism (in that rights and protections gained at one scale are often invisible at other scales)'[103] [emphasis added]. Valverde claims that taking scale for granted might cost individuals their rights. Though her claim sounds abstract, it is easily imaginable through the an example from the process of asylum-seeking. Within the EU, national asylum regimes are nested within the EU asylum regime, which in turn overlaps with the international protection regime created by the 1951 Refugee Convention and its 1967 Protocol (of which all EU Member States are a party). As mentioned above, each of these three jurisdictions operates at a different legality. Member State national legal regimes operate at

[99] Mariana Valverde, What counts as theory, today? A post-philosophical framework for socio-legal empirical research, *Revista de Estudos Empíricos Em Direito*, *3*(1), 2016, p. 176.
[100] Mariana Valverde, Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory. *Social and Legal Studies*, *18*(2), 2009, p. 146.
[101] Ibid, p. 139.
[102] Ibid.
[103] Ibid, p. 142.

'large-scale legality', EU law – at 'medium-scale legality', and international law, as represented by the Refugee Convention and its Protocol – at 'small-scale legality'. This means that each of them deems different matters important and that national law affords the highest level of detail, whilst international law – the lowest. Even though they operate at different scales, these legalities overlap in the EU asylum domain and thereby govern the same people in very different ways. Indeed, rights gained at one level disappear at another. An excellent example is the EU legal category of 'subsidiary protection', which, at the EU level gives a certain set of rights to third country nationals, which do not exist for the same individual if governed the 1951 Refugee Convention or the 1967 Protocol alone. In a similar vein, the individual rights attached to the principle of *effectiveness* within EU market integration jurisprudence disappear once *effectiveness* moves to the asylum sphere.

Importantly, the 'game of jurisdiction' can differ with reference to territorial divides (the 'where' of governance) and governing authorities (the 'who' of governance); it 'also differentiates and organizes the 'what' of governance – and, most importantly because of its relative invisibility, the 'how' of governance. Jurisdiction also distributes legal authority by territory (e.g. national, regional, and supranational), subject matter (e.g. EU law vs national law) and temporality. Thus, jurisdiction sorts the 'where', the 'who', the 'what', and the 'how' of governance through a kind of chain reaction, whereby if one question ('where' or 'who') is decided, then the answers to the other questions seem to follow automatically'[104] [emphasis added]. The most important question for this study is the 'how' of governance because the answer it yields may lead to entirely different jurisdictional apparatuses to be drawn. Despite its centrality, the 'how' tends to be decided as a 'side effect of questions about what, where, and who' in most cases.[105] Indeed:

> 'the machinery of 'jurisdiction', which instantly sorts governance processes, knowledges, and powers into their proper slots as if by magic, and sets up a chain by which (most of the time) deciding who governs where effectively decides how governance will happen […] The effect of the game is that the crucial question of how governance is done ends up being decided without explicit discussion.'[106]

It is taken for granted that as soon as a conflict has been assigned to a particular jurisdiction, its particular mode of governance will mechanically apply. It will either not be the object of discussion or it will be justified *ex post facto* by the organs exercising competence over said jurisdiction. This automatic relationship between the questions that need to be addressed and

[104] Ibid, p. 144.
[105] Ibid.
[106] Ibid, p. 145.

the place where they would be addressed ('the naturalization of jurisdiction') has been around for so long that it has come to appear natural as opposed to legal, when there is 'nothing natural about [it]'[107]. Valverde therefore urges her readers to take on a more critical approach to jurisdiction by asking more questions as to 'why certain logics are applied only in certain jurisdictions' and study its effects with a scrutiny that combines high theory with attention to the 'technicalities' of the law, so as not to reduce them to invisibility.[108] Set within the context of this paper, answering Valverde's call would mean asking why the 'human rights' logic of the *effectiveness* principle is applied within the integration jurisprudence, but disappears within the asylum case law. The answer lies within an understanding of the jurisdictional clashes occurring in the EU asylum space. Most importantly, however, the very ability to pose that question is the kind of analytical sophistication that is enabled by de Sousa Santos' and Valverde's work.

5.1.5. Avoiding Sociological Reductionism

Finally, Valverde emphasizes that a holistic picture of legal processes needs a combination of methods and recourse to different angles from which to observe the law. Valverde's emphasis on the importance of not underestimating 'legal artefacts' in the face of larger phenomena like politics and power relations is echoed in my comprehensive analysis of the case law of the European Court of Justice. In recognition of the complexity of asylum governance, especially within the EU, and the puzzle this work seeks to address, I align with Valverde's theoretical commitment to observing the law both from the inside and the outside. This research project was designed around the understanding that:

> '[i]n order to avoid sociological reductionism and better understand the 'how' of legal mechanisms, analyses need to be simultaneously inside and outside law, simultaneously technical and theoretical, legal and socio-legal. Doctrinal 'technicalities' would be as important in such a study as sociological analyses of power effects.'[109]

To avoid sociological reductionism, I go beyond the methods associated with dogmatic legal scholarship. Instead, I offer a detailed legal analysis of the Court's case law that is combined with socio-legal insight gained from conducting interviews with ECJ judges and advocates general. In turn, the technical aspect of judicial decision-making is substantiated with theoretical insight from both law and philosophy. Finally, all of the conclusions drawn from the study of the Court's jurisprudence are contextualised within the political processes that underlie the complex regime management of the EU asylum system.

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[107] Mariana Valverde, What counts as theory, today? A post-philosophical framework for socio-legal empirical research, *Revista de Estudos Empíricos Em Direito*, *3*(1), 2016, p. 178.

[108] Ibid.

[109] Mariana Valverde, Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory, *Social and Legal Studies*, *18*(2), 2009, p. 153.

5.2. Research Method

Studying the highly-politicized asylum jurisprudence of the European Court of Justice, I was privileged to have access to both law and political philosophy whilst formulating my method. To reflect my research's interdisciplinary nature, I devised a mixed methodology that involved different qualitative methods. Firstly, the dogmatic legal approach (5.2.1.) allowed me to analyse the case law of the European Court of Justice and engage with the academic commentary that accompanies it. As part of it, I also conducted systematic literature reviews of academic writing spanning both law and political philosophy. Secondly, the twelve interviews (5.2.2.) I conducted at the Court allowed me to gain an understanding of the people behind the jurisprudence. The semi-structured interviewing technique that I adopted produced a coherent dataset of interviews that both spoke to one another and differed from each other by virtue of the open-ended questions I posed. This technique gave Court officials more freedom in their answers. I was able to conduct the interviews during an internship I undertook at the Court in 2018. It not only granted me access to the 'gatekeepers' of the judicial chambers, the *référendaires*, but also allowed me to gain insight into the Court's day-to-day workings, its administration, politics, and people, regardless of whether those were the individuals involved in the decision-making or those who, albeit absent from the courtrooms, grant the Court its institutional memory and continuity. The insight from the interviews has been fundamental for the direction of my research, as it brought about some unforeseen interpretations of the Court's decisions and self-perception. It was an invaluable supplement to my research, allowing a more informed engagement with the Court's jurisprudence. Not only that, but the legal dogmatic method and qualitative interviewing complemented each other by allowing me to triangulate my findings. They were fundamental to understanding the asylum jurisprudence of the ECJ; interviews clarified the direction of my research and helped me comprehend the extent of political awareness judicial actors bring to their decision-making, despite the seemingly exclusive reliance on the law they project through their judgments. The combination of methods I opted for were well-suited to the theoretical foundations of my work.

Albeit complementary, detailed examination of jurisprudence and qualitative interviewing are two very different methods. Whilst the former is a fundamental skill for any lawyer, the latter is largely alien to the legal discipline. Indeed, because of law's claim to neutrality, one is trained to think that approaching it through the dogmatic legal method guarantees objectivity. A more *subjective*, sociological approach like interviewing is therefore either seen as impractical because of its perceived inability to reveal anything that is not already available through a close analysis of the jurisprudence, or as suspect because of its revelatory nature which might harm the objectivity of law. To a positivist legal scholar, it would therefore

be counterintuitive and futile to use interviews in the study of an institution whose most important deliverable comes in the form of judgments and whose foundation rests on delivering justice impartially, as personified in the figure of the blindfolded Iustitia. Yet, in the analysis of a problem as politicized as asylum and an institution as overlooked in the asylum debate as the ECJ, the interviewing method becomes essential for a Law in Context examination of the jurisprudence of the Court that seeks to interrogate unquestioned phenomena. Far from being futile in providing insight beyond the immediate text of the judgments, the interviewing method powerfully complemented the dogmatic aspect of my research. Indeed, to a large extent, the interviews pushed against legal doctrine and the jurisprudential promise of an impartial and detached interpretation of the law. This made my findings all the more significant because of their ability to explain the 'machinery of jurisdiction' and the hidden stakes in the process of access-to-asylum decision-making in the EU.

5.2.1. Dogmatic Legal Approach

The dogmatic legal approach was ideally suited for answering the empirical aspect of my research question, namely, whether global justice discussions on migration are reflected in the asylum practice of the European Court of Justice. Relying on qualitative legal research and a close reading of the jurisprudence of the Court, my work offers a comprehensive characterisation of the Court's asylum case law. It broadens the legal and philosophical debates around judicial practice, including the extent to which abstract discussions of political philosophy are relevant to routine asylum matters before the Court.

I first selected the jurisprudence of the Court that I was most interested in – asylum. I was then able to identify 84 unique cases[110] dealing with asylum which formed the dataset for my study. I identified these cases using the official database of the ECJ entitled CURIA[111] which provides a search engine where one can isolate cases by, among other things, institution, year, topic addressed and judges presiding. CURIA presents the Court's case law in an accessible manner one is able to select the particular features that are to characterize one's dataset, whilst relying on the Court's own classification of its case law. The website also ensures the reproducibility of the process as any person who selects the same criteria should end up with the same dataset.[112] The jurisprudential part of my dataset consisted of the complete set of

[110] The number reflects the number of cases and orders as of January, 2019.

[111] See: https://curia.europa.eu/jcms/jcms/index.html

[112] The exact parameters of my database were as follows. In terms of the 'case status', I was only concerned with 'Cases closed' and in terms of the 'Court', I de-selected the 'All' category in favour of exclusively dealing with the Court of Justice. Thereafter, I left the 'Case number', 'Name of the parties' and 'ECLI' categories blank, and for the 'Documents' section only selected the 'Judgments' category. I had no particular period in mind, wanting to cover the whole jurisprudence instead, so I left that category blank as well. Finally, for 'Subject-matter', I selected 'area of freedom, security and justice' and to the category 'Text' added the word 'asylum'. For 'References to case law or legislation', I selected all three options: 'Grounds of judgment', 'Operative part' and 'Opinion'. For 'Systematic classification scheme', I selected 'Include earlier/new scheme' and for 'Authentic Language', I selected both options: 'Language of the case' and 'Language of the Opinion'. The remainder of the categories were left blank. This provided me with a total of 103 judgments.[112] I experimented with many variations of the

asylum judgments delivered by the European Court of Justice. In addition, I read the Court's 36 'immigration cases', as per the Court's classification.[113] Even though these cases did not concern asylum, it was necessary to review them to ensure that my research design had not prevented me from observing engagement by the ECJ with the process of demarcating different categories of migrants. Although the 36 cases did not contain evidence of judicial engagement with that question, consideration of the immigration cases complemented my understanding of the Court's asylum jurisprudence. Ultimately, using the Court's database improved the credibility of my research, as I was using the Court's own system of classification, but also made it reproducible for others.

Upon identifying my dataset, I read it with the purpose of dividing the cases along overarching lines of reasoning and thereby generating categories that could encapsulate different aspects of it. I approached the process of reading the case law in a dual way. On the one hand, I read different political philosophers' theories of global justice with the intention of creating a spectrum on which their writings could be placed and deriving dichotomies which could be useful for taxonomizing the Court's jurisprudence. I was able to discern a number of relevant categories. On the other hand, I allowed the case law to generate categories of its own.

5.2.2. Qualitative Interviewing

I conducted twelve qualitative interviews with judges and advocates general at the European Court of Justice. I chose interviewing as a method that would give me a more nuanced understanding of the jurisprudence and as such would align with the Critical Legal Studies school. I believed the interviews would be capable of illuminating the dynamics underlying the judicial decision-making process and the relationship between law and politics. I also expected that they would reveal an engagement with broader philosophical debates around justice that, while not explored in the texts of the judgments, could nonetheless have informed the judges' reasoning. The interviews provided me with a clearer understanding of the interaction between law and politics at the Court, but they disproved my expectation of behind-the-scenes judicial

abovementioned categories, but the abovementioned one seemed the most reliable as with any other categorization I was left with either way too many cases which had nothing to do with asylum, but still fell within the AFSJ jurisdiction of the Court (for example, 'judicial cooperation in civil matters') or with a dataset that excluded some very important cases. By simply entering the word 'asylum' in the 'Text' category of the search engine, I was therefore able to avoid both pitfalls. I was presented with all cases (even if they were concerned with judicial cooperation) as long as they contained the word 'asylum' in any part of the judgment. Upon reading all 103 judgments, however, I discovered that although some of them had the word 'asylum' present in the body of the decision, they did not concern asylum at all. The total number of these cases was 19, which left me with a new dataset of 84 asylum cases.

[113] The 36 immigration cases are those cases that do not have to do with asylum. The exact parameters of my database were as follows. In terms of the 'case status', I was only concerned with 'Cases closed' and in terms of the 'Court', I de-selected the 'All' category in favour of exclusively dealing with the Court of Justice. Thereafter, I left the 'Case number', 'Name of the parties' and 'ECLI' categories blank, and for the 'Documents' section only selected the 'Judgments' category. This time, for 'Subject-matter', I de-selected 'area of freedom, security and justice' and only selected the sub-category 'Immigration Policy'. As for the 'Text' category, I it left blank. For 'References to case law or legislation', I selected all three options: 'Grounds of judgment', 'Operative part' and 'Opinion'. For 'Systematic classification scheme', I selected 'Include earlier/new scheme' and for 'Authentic Language', I selected both options: 'Language of the case' and 'Language of the Opinion'. The remainder of the categories were left blank.

engagement with broader philosophical debates. The interviews nonetheless inspired me to think about and consider the value of justice in procedural terms.

The interviews were made possible through an internship I undertook at the chambers of one of the judges currently sitting at the European Court of Justice. The internship itself gave me a more holistic insight into the workings of the Court, allowed me to understand the different stages accompanying the delivery of a judgment, and improved the credibility of my work by improving my scholarly observations with first-hand experience of the Court's practice. Most importantly, it gave me a platform for accessing officials at the Court with a view to interviewing them. I approached finding judges who would be willing to participate in my interviews by using the snowballing technique of sampling; I identified the 'gatekeepers' (in the Court's case, the *référendaires*), approached them with my request to interview judges at their cabinets and through that process was able to obtain access to the judges I wanted to interview. I presented the same open-ended questions to all of the officials,[114] with slight variations to account for their particular position at the Court, their academic background, and their preceding answers. In that sense, I followed a semi-structured qualitative interviewing technique in order to ensure the relevance of the content generated by the interviews. The interviewing itself comprised several important procedural aspects. I was to follow the ethical guidelines provided for and followed by my two degree-awarding institutions, namely Université de Genève and LUISS-Guido Carli di Roma. The ethical guidelines have to do with receiving the consent of the interviewees, respecting their concerns with regards to the interview content and its subsequent dissemination, and, importantly, complying with their wish for the level of anonymity they would grant to the content of the interviews. In the context of interviewing Court officials, all these precautions were taken with extra care. As Court officials are public figures of high standing, whose appearance of independence must withstand the highest level of scrutiny, I had to follow even stricter guidelines to ensure their anonymity where requested. This meant double-checking any quotes or content I would be sharing in this work for the presence of any identifying details. Asking officials to sign consent forms posed its own challenge as jurists and people with legal education tend to be reluctant to, and distrustful of, the need to sign such forms. Therefore, a significant portion of the interviewing process involved establishing my trustworthiness as a person and credibility as a researcher; those were the *sine qua non* of having fruitful conversations with these high-ranking officials.

5.2.3. Establishing Links between the Two Datasets and the Overall Academic Traditions

Ultimately, my research data consisted of two datasets: (1) the asylum jurisprudence of the European Court of Justice; and (2) the qualitative interviews conducted at the ECJ. When

[114] The questionnaire I was following during my interviews is available upon request.

it comes to the jurisprudence, I chose to excluded judgments delivered by the General Court (GC), despite it sharing both location and name[115] with the ECJ. The reason for my choice was threefold. Firstly, and perhaps most importantly, asylum does not *de facto* fall within the GC's jurisdiction.[116] Secondly, the ECJ is the only EU court that can be addressed with requests for preliminary rulings, which form a significant part of EU jurisprudence.[117] Thirdly, the judgments delivered by the ECJ are the final word on any matter of EU law and, unlike GC judgments, are not subject to appeal. When it comes to the qualitative interviews, the exclusive focus on the ECJ also influenced the choice of my interviewees. I conducted qualitative interviews only at the European Court of Justice, and did not include high-ranking officials from the General Court.

With the object under examination in this study being strictly legal (in the form of ECJ jurisprudence), but the substance being highly politicized, capturing the complexity of the matter at hand required the different, but complementary datasets mentioned above. The jurisprudence was the immediate evidence of the Court's work, whilst the interviews nuanced it, albeit through the subjective prism of judicial experiences. Both datasets needed to be approached from the standpoint of a durable and abstract theory. Political philosophy was well-suited to this task because it engages with big ideas from a safe distance. Its detachment from the perils of the day allows it to say something of relevance to the present that is also more permanent than opinions influenced by con(temporary) politics. Its abstraction contrasted the more permanent preoccupation with the topic of asylum to the passing judicial engagement gleaned through the interviews. Hence, its permanence enabled a reading of the jurisprudence that was free from the transience of daily politics. In that sense, my double positionality as a legal scholar and as a political philosopher proved helpful for solving my research puzzle.

5.3. Positionality

Theorising the relationship between political philosophy and the asylum jurisprudence of the ECJ, which is at the crossroads of law and politics, is of fundamental value to my thesis. The fact that global justice discussions of migration were not at all reflected in the Court's jurisprudence on asylum, was understandable. If political philosophy and law are seen to represented two sociological fields of knowledge, then the absence of overlap is perhaps not surprising. When one belongs to a particular field of knowledge, one become socialized into using certain terms and thinking in certain ways, which often vary significantly across different

[115] This happens to be the case when the two are collectively and broadly referred to as the Court of Justice of the European Union (CJEU).

[116] For more information, see the Court's official website: https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.

[117] Urska Šadl and Yioannis Panagis, What is a leading case in EU law? An empirical analysis, *European Law Review*, 40(1), 2015, pp. 15–34.

disciplines even when there is a common subject of discussion. As one immerses oneself in one discipline, one tends to become less attuned to alternative ways of engaging with the same topic. Therefore, what appears as the most straightforward contribution of my thesis is in fact the result of the sophisticated engagement with the topic that my double positionality enabled. Although it was precisely the isolated experience of each field of knowledge that allowed me to observe the lack of overlap between the fields, the isolated experience of itself would not have been enough. It had to be complemented by intimate knowledge of both fields, which enabled me to see discussions of the topic in both fields in terms of synergies, as opposed to in isolation. It is worth acknowledging and reflecting on the fact that I myself have been socialised in particular fields of knowledge and therefore carry a certain intellectual prism through which I understand the law, political philosophy, and their interaction. I am by no means immune to the influence of the particular fields of knowledge I have been socialized in, and to a certain extent, my work is reflective of those. However, I do not see this as necessarily problematic as I refuse to equate subjectivity with bias or see it as 'a problem to be managed and a threat to the credibility of a study'[118]. Quite the contrary, I align with the so-called 'new paradigm' approach to bias which recognises that the elimination of bias is not possible. Therefore, I merely seek to be transparent about my theoretical allegiances,[119] so as to stimulate the reader's awareness of my positionality.

The research puzzle that I am trying to solve is a complex matter at the crossroads of law and politics, which seeks to grapple with the meaning of justice. My double positionality therefore places me in the precarious, but privileged position of having to strike the right balance between honouring two equally important, but quite different academic traditions, which have rarely talked to each other. I see this as a privilege because I have had the pleasure of immersing myself in two very different ways of looking at the world; an incredibly enriching and giving exercise. As a legal scholar, I have been confronted with worldviews from political philosophy that have made me a better lawyer; as a philosopher, I have been allowed to approach political philosophy from a more practical angle through my legal experience. This exercise in interdisciplinarity has allowed me to create a work that is not only informed by philosophy's normativity, but also carries a more acute sense of the practical reality of pursuing justice. As enriching as this experience has been, it inevitably had its challenges. Puritan scholars from either discipline might be disappointed in my work as they might view it as less sophisticated, in the *narrow* sense of the word, than a work that exclusively deals with either political philosophy or law. Yet, I would argue that what could be seen as a weakness is the biggest strength of this

[118] Kathryn Roulston and Stephanie Anne Shelton, Reconceptualizing Bias in Teaching Qualitative Research Methods, *Qualitative Inquiry*, 2015, p. 1.
[119] Ibid, p. 7.

work. It renders it all the more sophisticated, in the *broad* sense of the word, precisely because it is able to illuminate the synergies created by the entanglement of these two disciplines. De Sousa Santos' metaphor of scale allows one to see the difference between 'large-scale legality', which is rich in details of the immediate context and 'small-scale legality', which attaches importance to bigger features and attitudes, thereby allowing generalisations of types of action; the important element being that the two scales of legality attach different importance to different details and allow for a different type of knowledge.[120] In much the same way, working between two disciplines means that I often resorted to 'small-scale legality' as it is more adept at generating universalized knowledge; however, this does not mean that I disregarded the importance of engaging with 'large-scale legality'. It is simply more suitable to solving my research puzzle which seeks to ground idealistic normativity in practical knowledge. Indeed, if I were to take away one lesson from my experience with both disciplines, it would be that there are different ways of being normative and whilst idealistic normativity is appealing, the best normative arguments presuppose a strong knowledge of, and grounding in, the descriptive.

6. This Work's Core Findings and Contributions

Critically examining the European Court of Justice's asylum jurisprudence through a philosophical lens has been revelatory in several respects. It has led to a number of core findings which answer the research questions set for this work and can be classified as its empirical contributions. First, there is no empirical evidence of global justice discussions on migration being reflected in the asylum practice of the European Court of Justice. This casts doubts on the notion that political philosophy might exert a tangible influence on everyday practices of rendering justice, such as the ones that take place at the highest court of the European Union. As the close reading of the Court's case law reveals, the majority of judgments are decided in a very technical, matter-of-fact manner despite the large variety of topics covered. The consequences of this approach are best illustrated in the cases that are decided based on the following three rationales: the effectiveness of the asylum system, the intention of the legislature, and the objective of the instrument in question. When coupled with information gathered through interviews conducted at the Court, this empirical finding serves as evidence for important phenomena. On the one hand, these rationales testify to the Court's effort to grant democratic pedigree to its decisions and they reveal a high level of deference to the notion of Member State sovereignty as evident through the strict observation of the doctrine of separation of powers. On the other hand, they testify to the Court's difficult predicament in preserving the struggling asylum system until reform is undertaken at the legislative level.

[120] De Sousa Santos, 1987, p. 289.

Second, in light of the Court's constitutional performance in other spheres, the Court's asylum jurisprudence suggests that the ECJ is playing more of an administrative, rather than constitutional, role within asylum. The fact that the rules within the CEAS are mainly procedural, as opposed to substantive, and that technical language distances the judgments from more abstract and theoretical debates could explain why the Court is preoccupied with exclusively administrative discussions.

Third, all Court officials interviewed for this work refused to define justice in the abstract sense, and instead described it in *procedural* (as opposed to *substantive*) terms. This was a valuable revelation for my project as it cautioned against conflating matters of substantive justice with matters of procedural justice whereby the absence of a coherent account of the former (substantive justice) might eclipse the presence of the latter (procedural justice). Indeed, the gap I discovered was more consequential for the question of whether political philosophy had any influence on judicial practice than for the absolute engagement of the Court with more abstract matters of justice. Furthermore, alongside underlining a distance of *type* between political philosophers' and judges' understanding of justice, this observation also exposed a distance of *scope* between the two groups' engagement of the idea. Whilst for political philosophers, theorising justice occurs in global terms, for judges it is limited to the *personal* scope of the applicants whose cases come before it.

Fourth, this work's empirical findings can serve as the basis for a theoretical contribution to the study of the European Court of Justice, which brings the synthesis of de Sousa Santos' theory on a 'scale conception of law' and Valverde's work on 'the game of jurisdiction' to the EU asylum space. The technical language of the Court, its recurrent recourse to the principle of 'effectiveness' and the changing nature of principle's definition, can all be observed and explained from a new angle, which contributes to existing debates with nuance and sophistication. By conceptualising the CEAS as a 'site of intense interlegality', one is able to understand the contradictory ambitions that exist within the same space and produce a more nuanced understanding of Court's ongoing struggle to reconcile them. Employing the 'scale conception of law' and the theory of 'the legal game of jurisdiction', I can offer a new understanding of the Court's behaviour and opened avenues for further research.

Fifth, ideas from political philosophy can be translated into judicial practice through the concept of vulnerability which is present both in political philosophy and in judicial practice. The novel application of the concept of vulnerability as both a brokering agent between the two disciplines as well as a theorising force for the Court's jurisprudence yields a number of related findings. The cases that engage with the concept explicitly do so in a generic fashion. That is to say, that a number of cases mention the word 'vulnerability', but in those it is either not defined,

or defined very differently from one case to the next. This inconsistent practice makes vulnerability a vacuous concept and harms the principle of legal certainty. Therefore, the Court could benefit from a theorisation of the use of the word so as to give it a substantive meaning and enable coherent reliance on the concept in the future. Additionally, there are a number of cases where although there is no explicit mention of the word 'vulnerability', there are numerous references to different human rights. Some of those cases can be said to engage with the idea of vulnerability (in the form conceptualised by Fineman) implicitly. For example, whenever the Court looked at the particular circumstances of the individual and ruled that those circumstances necessitate the suspension of certain, otherwise mandatory, procedures from taking place. This differs from the standard right-based analysis because rather than looking at the individual characteristics of the person in question (e.g. age, sex, race), the Court examined the individual's changing circumstances (e.g. health, socio-economic situation). Those cases serve as examples of instances where a vulnerability analysis could have played a complementary role to the human rights analysis in a manner supplementing the familiar, rights-infringing inquiry with a how-do-systems-interfere-to-make-one-more-vulnerable examination. Under such a vulnerability-oriented analysis, an applicant could be found to be vulnerable despite no clear violations of her or his rights. This would enhance access to justice and protection for applicants who are highly vulnerable, but do not neatly fit within the definition of 'refugee'.

In light of these observations, a vulnerability analysis makes three significant contributions to the study of the ECJ's asylum jurisprudence and to efforts at connecting it to political philosophy. First, a vulnerability analysis provides a new theoretical backbone for the Court's practice within the asylum sphere. A vulnerability analysis makes its jurisprudence more coherent, safeguards the principle of legality, and allows it to benefit from the abstraction and the permanence intrinsic to political philosophy. Second, a vulnerability inquiry can act as the safety net to a human rights analysis that both the ECJ and national courts need to cast when conducting a case-by-case analysis. Third, the vulnerability of an applicant (to be established on a case-by-case basis) can, and should, counterbalance the Court's commitment to preserving the effectiveness of the asylum system. The more vulnerable an applicant becomes by virtue of one's circumstances, the greater weight her interests must heed in the balancing of her rights against the principle of preserving the effectiveness of the asylum system. In this way, the vulnerability analysis would offset the weight the Court affords to considerations of preserving the effectiveness of the asylum system.

7. Structure of the Thesis

This work is divided into six fundamentally connected parts. Whilst **Chapter I** is the foundation of the work in that it elaborates on all that is to follow, in **Chapter II** I examine the

philosophical literature of greatest relevance to this research project. As an overview chapter aimed at a diverse audience, it follows the familiar maxim of 'sacrific[ing] in detail what it hopes to gain in breath of survey' in order to contextualise the work for the reader.[121] The chapter is divided into two parts. In the first part, I describe the most relevant discussions from within global justice theories on migration and synthesise the principal dichotomies which underpin them. I pay special attention to the idea of humanitarianism (II.3.; II.4.), as it can be framed as a minimum level of responsibility that both statists and cosmopolitans agree is shared by everyone towards everyone. In the second part (II.5.), I unpack Martha Fineman's 'vulnerability thesis' which acts as the central gravitational force for my project. I argue that the 'vulnerability thesis' is almost identical to the idea of humanitarianism found in political philosophy, but it has the advantage of being more attuned to the realities of legal practice and is already present in the language the European Court of Justice used in its jurisprudence.

In **Chapter III,** I contextualise the European Court of Justice and its role within the CEAS. The ECJ is a unique institution with many idiosyncrasies which set it apart from standard judicial bodies. In **Chapter IV**, I present the first part of my empirical findings. I establish that there is no overlap between the asylum jurisprudence of the European Court of Justice and the substantive principles espoused by global justice discussions on migration. The claim is contextualised by reference to the qualitative interviews I conducted in the Court. Despite its practical, day-to-day engagement with asylum matters, the Court is completely removed from broader narratives or discussions about asylum such as those undertaken in political philosophy. I make the claim that the Court has adopted an administrative, passivist role within the area of asylum, which is characterised by a focus on the technicalities of the relevant legislative instruments before it. I substantiate it by reference to an empirical analysis which establishes 'effectiveness' as a recurrent rationale in a significant part of ECJ asylum jurisprudence, often buttressed by references to the 'intention of the legislature' and the 'objective of the instrument' in question. I analyse the language of a number of cases to illustrate the diversity in the types of claims that reach the Court and thereby underline the peculiarity inherent in its constant return to the same rationale. I conclude that with the majority of judgments being decided in a very technical, matter-of-fact manner, the Court exhibits deference to Member State sovereignty and wishes to grant democratic pedigree to its decisions. In light of the fact that the Court has 'acquired a certain celebrity for dynamic interpretation', my findings portray the ECJ as having assumed an administrative, as opposed to constitutional, role within this particular area of law.[122] The technical language employed by the Court in its asylum jurisprudence distances itself from

[121] Paul Craig & Grainne De Burca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2011.
[122] Kay Hailbronner & Daniel Thym, Introduction: EU Immigration and Asylum Law: Constitutional Framework and Principles for Interpretation, In K. Hailbronner & D. Thym (Eds.), *EU Immigration and Asylum Law. Commentary, 2nd Edition*, 2016, p. 7.

more abstract and theoretical debates and therefore hints at one of the reasons why the gap between political philosophy and judicial practice might exist. With the help of the interviews, one is made aware of the significant difference between the ideals of *procedural* and *substantive* justice and how those ideals factor into the Court's decision-making.

The gap between global justice theories on migration and the European Court of Justice's jurisprudence on asylum is used as the platform for **Chapter V**, where I offer an explanation for why Martha Fineman's 'vulnerability thesis' is a suitable vehicle for bridging the gap between the *ideal* in global justice theories on migration and the *non-ideal* in the Court's practice within the field. I argue that the Court shows a measure of engagement with certain applicants' vulnerability, by either *explicitly* referring to the concept or *implicitly* engaging with the idea. In the first part of this chapter, I examine explicit references to vulnerability in the jurisprudence of the ECJ. Based on my empirical findings I argue that the concept of vulnerability already appears with relative frequency in the Court's asylum jurisprudence, but is deployed in an incoherent and inconsistent manner. Therefore, I reason that Martha Fineman's 'vulnerability thesis' can be used to grant coherence to the Court's invocation of an otherwise vacuous concept. In the second part of this chapter, I examine the Court's *implicit* engagement with the idea of vulnerability. I use cases with numerous references to human rights to illustrate how vulnerability can act as a safety net to a human rights analysis because the latter does not necessarily capture all people in dire need of protection. In the third part of this chapter, I offer a close analysis of a number of cases which are examples of effectiveness being juxtaposed with vulnerability in the Court's asylum jurisprudence. I use those cases as a platform from which to argue that there is space for a counternarrative to 'effectiveness', which would bring the individual applicant back into focus in the Court's jurisprudence through the concept of vulnerability.

In **Chapter VI,** I summarise the main arguments of my research and conclude that by reiterating Martha Fineman's vulnerability thesis as the brokering agent for bridging the gap between political philosophy and legal practice in a familiar way that neither requires taking a huge leap of faith, nor making a compromise for any of the stakeholders involved. I proceed to outline avenues for future research. Those centre around my claim that the concept of vulnerability is well-suited to engagement with the topic of migration because it is an antidote to 'other'-ing. I also discuss other benefits of incorporating Fineman's vulnerability thesis into everyday judicial practice by highlighting that its application need not be limited to the Court's migration practice or to third country nationals. Quite the contrary, because of its universal applicability, the Court can have recourse to the vulnerability thesis in all cases involving human beings, regardless of whether those cases concern migration or another subject, and regardless

of whether they pertain to third country nationals or EU citizens. Finally, I draw attention to the ability of the vulnerability thesis to capture disadvantages that systematically accumulate as a result or structural interactions that cannot be gleaned through the mere application of certain identity categories. Martha Fineman's vulnerability thesis allows one to see how systems interact to confer privileges or disadvantages to people in a manner not readily visible through the identity paradigm that dominates today's legal discourse.

CHAPTER II

State of the Art: Global Justice Theories on Migration and Martha Fineman's 'Vulnerability Thesis'

The idea of justice is the focal point of many disciplines, not least, ethics, law, legal and political philosophy, where the many discussions have given rise to a number of different conceptions of it, all of them competing for our attention. The many descriptions that have arisen can, according to David Miller's encyclopaedic entry on justice, be boiled down to a 'core definition' in terms of form.[123] He refers to the *Institutes of Justinian*, 'a codification of Roman Law from the sixth century AD, where justice is defined as "the constant and perpetual will to render to each his due"'.[124] In this definition, he sees four fundamental attributes of justice. First, an emphasis on 'each' in the expression 'to *each* his due' highlights the individual aspect of justice, in that it has to do with the treatment afforded to *every* individual.[125] This does not exclude rendering justice for groups, but in those circumstances, he sees each group being treated 'as though it were a separate individual'.[126] Second, in accentuating 'due' in 'to each his *due*', Miller draws attention to how duties of justice differ from duties of charity because justice is demanded, whereas charity is pleaded for; in that sense 'justice is a matter of claims that can be rightfully made against the agent dispensing justice, whether a person or an institution'.[127] Third, justice is seen as the opposite of arbitrariness, by ensuring that like cases are treated alike. This aspect of justice is most often embodied in the principle of the rule of law. Fourth, justice requires an agent (whether that be a person, an institution, or a state) that delivers justice; such an agent can also cause injustice by an omission. Although Justinian's formula is important, it offers a *formal*, rather than a *substantive* definition of justice, as if to confirm Miller's observation that 'no comprehensive theory of justice is available to us'.[128] Whilst defining justice in *substantive* terms is an important endeavour, engaging with the many thinkers which have taken on the challenge throughout history, like Aristotle, Aquinas, Justinian or Hume, is beyond the scope of this work.[129] What is important is to note that whilst *substantive* theories of justice (which fit within Justinian's formula) deal with the duties of justice within the confines of a community,

123 David Miller, 'Justice', *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), 2017.
124 Miller, 2017; Gillian Brock, 'Global Justice', *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), 2017.
125 Note here that utilitarian approaches qualify this element by treating the collective whole as a unit, which allows them to justify policies that might not necessarily be just to certain individuals (as long as they will produce the greatest good for the greatest number of people).
126 Miller, 2017.
127 Ibid.
128 Ibid.
129 For those interested in histories of justice that go beyond simply reciting what different thinkers have said, please refer to: Alasdair MacIntyre, *Whose Justice? Which Rationality?*, London: Duckworth, 1988; Samuel Fleischacker, *A Short History of Distributive Justice*, Cambridge, MA: Harvard University Press, 2004; David Johnston, *A Brief History of Justice*, Oxford: Wiley-Blackwell, 2011.

the expression 'theories of global justice' designates a rapidly-growing field of political philosophy that seeks to answer questions arising from expanding these discussions of justice beyond the borders of the nation-state.[130]

The substantive discussions of justice, which can be built upon the formal foundation offered by Justinian, have sought to elaborate 'what we owe one another, what obligations we might have to treat each other fairly in a range of domains, including over distributive and recognitional matters'.[131] Such discussions had for a long time fallen squarely within the confines of the nation-state, but cross-border phenomena such as accelerated globalisation, growing economic integration, digital revolution, and anthropogenic climate change have extended these discussions to the global arena. Not only that, but the topics covered within global justice debates have expanded significantly, with a number of questions being at the forefront of deliberations, such as: What responsibilities do we owe to people beyond our borders? What ideals should direct international action? How could we effectively alleviate the remarkable inequality that characterises our world? Should prosperous developed countries open their borders more charitably than they currently do? Is the *status quo* of global economic arrangements fair and if not, how can it be altered in a more just manner? Theories of global justice seek to answer similar questions and therefore help us understand our world and our responsibilities in it better.[132] As the questions themselves have diversified, so have the topics covered by them proliferated. The subsequent discussions will therefore focus on one particular area; namely, migration. Within political philosophy, the subject of migration is often explicitly situated within the context of the pervasive and extreme inequality that characterizes our world and the limits on human freedom it imposes. Whether it is represented by poverty,[133] wealth disparity, hunger, or limited access to development,[134] public goods or else, this inequality has many faces and '[m]any of these deprivations can be observed, in one form or another, in rich countries as well as poor ones'.[135] It is a symptom of a failure to redistribute wealth and goods justly and it is an important driver behind the unprecedented mass migration we are witnessing globally today.

The international community has tried to tackle both inequality and mass movement, often without acknowledging their intimate connections. On the one hand, well-intended initiatives like the United Nations' Sustainable Development Goals (SDGs), and the preceding Millennium Development Goals (MDGs) have sought to address the crippling inequalities

130 Brock, 2017.
131 Ibid.
132 Ibid.
133 Thomas Pogge, *World Poverty and Human Rights*. Blackwell Publishing, 2002.
134 Amartya Sen, Development as Freedom, *Oxford University Press*, 1999.
135 Sen, 1999, p. xi.

between people and nations. On the other hand, the Global Compact on Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM) have tried to increase international cooperation in matters of migration. Despite mobilising the international community to acknowledge these problems, however, such initiatives have not only failed to comprehend the issues as structurally inherent in the multilateral global system,[136] but have also kept inequality and migration artificially separated in a manner undermining any efforts at sustainably addressing the consequences of their intersection. The sheer size of the phenomenon[137] and the life-threatening circumstances often associated with it have highlighted the human cost[138] of the inexistent or insufficient paths to legal migration, the growing inadequacy of the global refugee regime due to its inability to protect all vulnerable people who are displaced, and the arbitrariness of the categorical differentiation between a migrant and a refugee. They have also drawn attention to the huge gap between theory (as represented by the global justice debates in political philosophy) and practice (as represented by the legal protection regime). This work will be an effort towards bridging this gap because, albeit distanced from practice, political philosophy has a lot to contribute to manners of upholding justice. Not held hostage to temporary political whims, it is a discipline that has much to say about both the theoretical and the practical aspects of asylum. Therefore, applying a global justice perspective to the jurisprudence of the European Court of Justice will offer an innovative reading of its asylum practice.

This is no easy task, however. A thorough understanding of any such endeavour requires a grasp of the most basic concepts from both political philosophy and the EU judicial tradition. It necessitates setting out the many dichotomies (and their integral spectra) that in one way or another frame the domain of the former and the many structural idiosyncrasies that capture the uniqueness of the latter. As reiterated above (I.2.), it is important to reflect on the fact that the philosophical examination will look at global justice discussions on migration as a whole. This is because the epistemic community behind those discussions that engage with matters of asylum do so within the greater framework of migration. Hence, at this abstract-level engagement with asylum and migration, the two topics cannot be disentangled from one another. This is different once one delves into legal practice, where matters of migration are so politicized that the legal area is riddled with tens of categories which allow judicial and law-making authorities to compartmentalise a phenomenon that could be treated as one. Following

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136 Sen, 1999.

137 The United Nations Refugee Agency (UNHCR) states that there are 70.8 million forcibly displaced people worldwide, of whom 29.4 million are asylum seekers. For more information, see: <https://www.unhcr.org/figures-at-a-glance.html>.

138 According to statistics from the International Organisation for Migration's *Missing Migrants Project* 32,000 people have died along migratory routes around the globe since the launch of the project in 2014. For more information, see: <https://missingmigrants.iom.int/>.

the 2015 'refugee crisis' which has re-sparked debates about the duties owed to refugees and asylum seekers, it is asylum cases that are most likely to echo ideas from political philosophy. Hence, the empirical chapters will examine the asylum jurisprudence of the European Court of Justice, whilst it is the state of the art on migration from a global justice perspective that is presented below. For ease of discussion, I have taxonomised the different accounts of global justice around the difference between statism and cosmopolitanism. This distinction is nowhere near exhaustive. Quite the contrary, to a certain extent, it is reductionist, and not reflective of the many eclectic positions in between. Some people are cosmopolitans and some are statists, whilst others are neither. Others yet, hold opinions that are evolving with time. However, condensing the enormously diverse debates on global justice and migration requires certain pragmatic choices to be made, and whilst the statism vs. cosmopolitanism distinction appears arbitrary (and as any subjective structure, it is), it is also a necessary one. It allows for taxonomising the subsequent discussions and is especially useful within the context of the European Union, which is an important point of reference in this work.

The crux of the difference between statist and cosmopolitan considerations of justice is one of *scope* and of *ground*. The *scope* of global justice duties concerns at what point such duties expire and usually, borders act as a reference point. Therefore, according to the *scope* of duties of justice, thinkers can be separated into statists and cosmopolitans (although the distinction is not neat). The *ground* of justice, on the other hand, establishes an additional qualification concerning whether thinkers find themselves endorsing a *relational* or a *non-relational* approach to justice.[139] Under the *relational* view, duties of justice are extended on a membership-based approaches, which are 'associative and stress the meaning of a relation that keeps the subjects of justice united by common links'.[140] Under the *non-relational* view, justice is not contingent upon human relations and interactions. Instead, duties of justice arise because of different sources such as natural prerogatives, suffering, humanity, or else.[141] Whilst statism is usually relational, cosmopolitanism can both be relational and non-relational, though it is most often the latter. Additionally, even though relational approaches to justice might impose a limit on duties of *justice*, that does not mean that the thinkers who endorse them, do not recognise other, lower threshold duties, such as duties of *humanitarianism*. Those will be examined in greater detail below (II.4.). Within these overarching debates, the international migrant, as a human being

[139] Sebastiano Maffetone, Normative Approaches to Global Justice, In M. Telo (Ed.), *Globalisation, Multilateralism, Europe: Towards a Better Global Governance?* Routledge, 2014, p. 127.
[140] Ibid.
[141] Ibid.

who crosses borders,[142] and thereby connects different bordered communities,[143] occupies within this debate. Whenever inequality between states persists, it is the absence of global justice that forces people to move and ask to benefit from the distributive justice of the receiving country (with the question of whether they legally qualify as beneficiaries of international protection being irrelevant to the substance of the issue). Migrants, who are forced to move,[144] thus become the personification of global justice not rendered. This pushes their fate to the forefront of relevance for discussions of global justice.

This debate becomes especially interesting when applied to the context of the European Union, which is neither really a state, nor a completely cosmopolitan project. Instead, it has a cosmopolitan nature inside the Union borders, and a statist nature outside of them. In fact, as a *sui generis* legal order[145], the European Union boasts an unconventional mix of statist and cosmopolitan policies. Those are combined with strong 'ambition[s] to promote justice at the global level',[146] as evidenced by constitutionally entrenched aspirations such as the following,

> '[T]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'[147].

Importantly, Article 18 of TFEU, which has been around since the 1957 Rome Treaty, has a distinct cosmopolitan flavour. It states that,

> '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.[148]

The purpose of introducing Article 18 TFEU was to forbid 'any discrimination on grounds of nationality' and thereby lead to the equal treatment of all EU citizens.[149] This was to then enable

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[142] This observation is with no prejudice to internally displaced people who also consist a very important population within overall debates on migration.

[143] Lea Ypi, Borders of Class: Migration and Citizenship in the Capitalist State, *Ethics and International Affairs*, *32*(2), 2018, pp. 141–152.

[144] The qualification that it is migrants, *who are forced to move*, that embody distributive justice not rendered allows me to draw a distinction between forced migration and voluntary migration. Whilst the latter phenomenon involving family reunification, tourism, work migration and other phenomena, it is on the non-voluntary aspects of it that this work will focus.

[145] As an international organisation of Member States whose sovereignty is reiterated and compromised to varying degrees, the European Union represents a unique legal system of institutions, principles and mechanisms governed by international and national law. In Case C-26/62 *Van Gend en Loos*, the Court of Justice ruled that 'the Community creates a *new legal order* in international law in favour of which States have restricted their sovereign rights, albeit in limited areas, and which subjects are not only member States but also their citizens' (see para. 3 of judgment summary). The same approach was developed in Case C-6/64 *Costa V. ENEL*, which emphasized that, 'by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply' (see para. 3 of judgment summary).

[146] Erik Oddvar Eriksen, Three Conceptions of Global Political Justice, *GLOBUS Research Paper* 1/2016, p. 2.

[147] See Article 3 of Treaty on European Union (TEU).

[148] See Article 18 of Treaty on the Functioning of the European Union (TFEU).

[149] Clemens Kaupa and Friedl Weiss, *European Union Internal Market Law*, Cambridge University Press, 2014, p. 98.

the effectiveness of the free movement of people (and especially workers[150]) within the Union, which is one of the four fundamental freedoms[151] and therefore, one of the pillars of the EU.[152] The implementation of this article translated into an extensive ECJ jurisprudence where the Court worked to teleologically developed the right to freedom of movement for persons within the EU. This was a manifestly cosmopolitan move on the Court's part, albeit confined to a set number of neighbouring countries. Despite the Court's commitment to protecting the right to freedom of movement and freedom from non-discrimination for EU nationals, however, its practice changes once one examines its asylum jurisprudence, as this work will demonstrate. This begs the question why did the Court do so much to develop free movement of persons within the EU, but is doing so little to protect at least the human dignity[153] of the migrants and asylum seekers that reach its borders. Perhaps the answer lies in the abovementioned paradox of simultaneously boasting statist and cosmopolitan policies that consciously or not, inform the institutional behaviour of EU instances such as the ECJ. This could be a suitable explanation for the different roles the ECJ takes on in its case law. The European Union's curious hybrid nature cannot be denied and is at the forefront of this work.[154] It also reaffirms the advantage of positing Valverde's work on jurisdiction and de Sousa's work on interlaw and interlegality as the theoretical framework guiding the discussion. Both authors' works shine a light on the conflicts inherent in the co-existence of nested regimes and enable grappling with the paradox of having statist and cosmopolitan policies within the same institutional framework easier to understand.

1. Outlining the Chapter

It is not far-fetched to surmise that influencing the practice of rendering justice will figure amongst the aspirations underlying political philosophy's engagement with the relationship between justice and migration. Such an ambition would have the European Court of Justice amongst its prime targets for impact because of the Court's large jurisdiction[155],

[150] See Article 45, *Chapter 1, Title IV: Free Movement of Persons, Services and Capital* of the *Treaty on the Functioning of the European Union.*

[151] See *Title IV: Free Movement of Persons, Services and Capital* of the *Treaty on the Functioning of the European Union.*

[152] (Ball, 2013, p. 238)

[153] Human dignity is a constitutionalised value in the EU order, whose importance is highlighted by its position as Article 1 of the *EU Charter of Fundamental Rights.*

[154] The focus on the European Union in this work on global justice is not a project of epistemological imperialism. Instead, the focus on the EU serves to contextualise the European Court of Justice, whose engagement with theories of global justice this work seeks to measure. For discussions on Eurocentrism in the operation of international law, please see examples of TWAIL scholarship, with a succinct overview of their agenda being available in, Gathii, James Thuo (2019). 'The Agenda of Third World Approaches to International Law (TWAIL)'. Jeffrey Dunoff and Mark Pollack (eds) *International Legal Theory: Foundations and Frontiers*, Cambridge University Press.

[155] The jurisdiction of the ECJ currently spans 28 Member States and more than 500 million EU citizens, as well as a wide variety of topics.

significant legitimacy[156] and authority in the international community.[157] Yet, an empirical study of the Court's asylum jurisprudence reveals the absence of a straightforward link between political philosophy and the Court in this domain. This frustrates the legitimate expectation that the most theoretical engagement with justice would, in one way or another, be connected with its most practical manifestation. Yet, the prospect of establishing a link between the two emerges through Martha Fineman's theory of vulnerability. It appears as a promising brokering agent in the quest of bridging the gap between philosophical theory and legal practice; therefore, this work will be tasked with substantiating the claim that Fineman's theory of vulnerability is the missing link in translating theories of global justice on migration to the European Court of Justice's practice within the field of asylum.[158]

This chapter proceeds in four, subsequent steps. First, it examines the state of the art on migration debates [159] within global justice theories. This chapter is indispensable to understanding the many concerns which political philosophers have addressed in their deliberations and the multiple opportunities for the Court to echo these discussions that nonetheless failed to happen. The large extent of political philosophers' engagement with the topic therefore reveals just how unexpected the fact that none of these conversations have resounded in the Court's practice is. Second, this chapter engages with the idea of humanitarianism (and owing humanitarian duties) as the lower-threshold alternative to owing duties of justice. For some statists, humanitarian duties can be met through the provision of humanitarian assistance, whilst for others, they can only be met through opening their borders to certain people. Third, the subsequent discussion studies the relationship between humanitarianism and the idea of human rights before posing humanitarianism as a more encompassing basis for refugee protection, which can be a viable alternative to the current refugee regime. Fourth, it presents Martha Fineman's vulnerability thesis as the 'legal twin sister' to its philosophical equivalent found in the idea of humanitarianism. This work argues that although not entirely equal, the duties owed under humanitarianism have functionally similar

[156] R. Kelemen, The court of justice of the European Union in the twenty-first century, *Law and Contemporary Problems*, 79(1), 2016, pp. 117-140.

[157] K. J. Alter, L. R. Helfer, and M. R. Madsen, How Context Shapes the Authority of International Courts, *Law and Contemporary Problems*, 79(1), 2016, pp. 1-36; Kelemen, 2016.

[158] The idea of vulnerability, albeit not in Fineman's articulation of it, was a prominent actor in a landmark case before another supranational court, namely the European Court of Human Rights. In *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011), the Court concluded that 'the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources, access to sanitary facilities, and without any means of providing for his essential needs' (para. 263).

[159] Although looking exclusively at the asylum jurisprudence of the ECJ, this work refers to the global justice debates on migration. The semantic choice is underpinned by practical considerations in both cases. When it comes to global justice debates, the discussions on asylum is nested within the discussions on migration and the two cannot easily be disentangled from one another. As for the asylum jurisprudence of the Court, that was easily discernible and did not require reaching out to the much greater and much more diverse, but also chaotic, jurisprudential practice on migration whose sub-topics greatly varied from the rights to students, to family reunification, to the right to work, amongst many others.

effects to the consequences of applying Fineman's vulnerability thesis. Yet, because unlike humanitarianism, vulnerability is abundantly present in the lexicon of ECJ judges, it is better fitted for the purpose of bridging the gap between political philosophy and the practice of the European Court of Justice.

2. How Does Migration Feature in Global Justice Theories?

'The accident of being born in a poor rather than a rich country is as arbitrary a determinant of one's fate as the accident of being born into a poor rather than a rich family in the same country'[160]

There are many political philosophers who have pondered the most appropriate ways of addressing the issues of global justice in tandem with those of migration;[161] some even seeing the endeavour as irrelevant in certain circumstances. A number of excellent books have taken on the challenge and reframed the issues surrounding migration as questions of political philosophy. Their noble pursuit has been to illuminate the philosophical implications of the difficult conversations that have come about with the increasing movement of peoples across borders. One such example is David Miller's 2016 book entitled *Strangers in Our Midst: The Political Philosophy of Immigration*. It presupposes the value of the current nation state order and operates from within it to examine the considerations that should be involved in the balancing act between the rights of immigrants and the legitimate concerns of citizens. It also draws a distinction between refugees and economic migrants as two different categories of immigrants, who have different sets of rights.

As early as his introduction, Miller posits one of the central concerns for political philosophers, namely 'whether states are obliged to weigh the interests of *all* human beings *equally* when deciding upon their policies, or whether they are legitimately allowed to give more weight to the interests of their own citizens. And if they are indeed allowed to attend first to their own citizens, what are the limits to this partiality?' [emphasis added].[162] If the answer favours citizens, Miller frames it as 'compatriot partiality', defined as the action of paying more attention to one's compatriots than to outsiders.[163] The framing of the question itself is also revealing. His presupposition of the nation state as the basic political unit delineating our societies thereafter moulds his answers to subsequent questions of political philosophy. It shows that Miller takes the notion of the nation state for granted, allowing it to escape any suspicion, and also reveals his subscription to the statist end of the global justice spectrum.

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[160] Thomas Nagel, The Problem of Global Justice. *Philosophy and Public Affairs*, *33*(2), 2005, p. 119.
[161] Miller, 2016; Christopher Wellman, and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?*, Oxford: Oxford University Press, 2011; Carens, 1995.
[162] Miller, 2016, p. 11.
[163] Ibid.

In terms of addressing the question of migration, operating within the cosmopolitan framework is impractical for Miller. He claims that 'the immigration *issue* would either disappear altogether or at least become much less pressing in a world that was configured quite differently from our own […] There would be no immigration in the sense in which we understand it […] Nobody would enjoy a fundamental change of status by virtue of migration'.[164] To support his claim that immigration would be irrelevant to cosmopolitanism, he makes two alternative suppositions. First, that separate states would no longer exist in favour of a world government, which to his mind would cause the elimination of migration 'as we know it' thereby negating the fundamental change of status people currently enjoy upon moving. Second, that states would remain the 'basic sources of political authority', but the world would be 'distributively just', reducing mass movements and leading to 'no refugees, and no one seeking to escape poverty'.[165] Objectively handled, these two suppositions do not offer two alternative versions of cosmopolitanism under which immigration would not be an issue, as both would be simultaneously necessary for his claim to hold true. One cannot 'solve' the immigration question by prescribing that the world become *either* stateless *or* distributively just; quite the opposite, one would need both conditions working simultaneously for that to happen. Therefore, presupposing a stateless world which nonetheless continues to be distributively unjust, whether by virtue of unequal access to natural resources in particular regions of the world, uneven distribution of investments and employment opportunities, or something else, could still bear witness to big waves of migration (albeit internal, as opposed to cross-border) and therefore still render addressing migration, albeit internal, as practically relevant. As long as the world continues to be 'distributively unjust', neither presupposing the cosmopolitan, nor the statist framework would render the consideration of the migration question obsolete. However, if both conditions he mentions are simultaneously satisfied, then, arguably, his impracticality critique would apply with equal force to the statist framework as it does to the cosmopolitan one. After all, he himself notes that for John Rawls, a celebrated statist, the self-contained nature of the nation state makes considerations of migration obsolete. For example, John Rawls's seminal work, *A Theory of Justice*, does not engage with the issue of immigration at all.[166] It presupposes instead that the principles of justice which he formulates are to apply within a fixed-membership, 'well-ordered' society, where 'no one enters from without, for all are born into it to lead a complete life'.[167] Indeed, his later piece, *The Law of Peoples*, only cursorily treats migration.[168] Upon examining the principles which should define the interaction between states,

[164] Ibid, p. 21.
[165] Miller, 2016, p. 17.
[166] J. Rawls, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971, section 2.
[167] Rawls, *The Law of Peoples*. Harvard University Press, 1999, p. 323.
[168] Miller, 2013, p. 3.

he notes that contemporary causes of large-scale immigration would become obsolete in a world ruled by the principles he has formulated, saying 'the problem of immigration is not, then, simply left aside, but is eliminated as a serious problem in a realistic utopia'.[169] Therefore, a more accurate 'practical' argument against adopting a cosmopolitan framework would be to say that because cosmopolitanism is not as proximate a description of our current reality as statism is, it remains more suitable for working from a theoretical, rather than a practical, standpoint. Indeed, Joseph Carens, a celebrated cosmopolitan, recognizes that.

Joseph Carens' work, *The Ethics of Immigration*, which Miller describes as 'the most comprehensive treatment of immigration from a cosmopolitan perspective to date' pays tribute to our statist reality through its structure.[170] The book is divided into two parts, the discussion within each being based on a different end of the global justice spectrum. Although a fervent cosmopolitan, for the first, longer part of the book, Carens sets his cosmopolitan identity aside and temporarily adopts the predominant statist conviction that states are justified in exercising control over their borders and showing preferential treatment to their citizens. He does that in recognition of our modern-day statist reality where state borders do exist and are seen as a legitimate space for the exercise of state sovereignty. In order to make any statements of significance for public policy, he asserts, he needs to operate within a statist framework. It is therefore only towards the conclusion of his book that he reclaims his cosmopolitanism and presents the case for open borders and cosmopolitanism. It is important here to draw attention to the idiosyncratic position of Carens from the cosmopolitan/statist dichotomy standpoint. As mentioned before, Carens' ideas come together in a stance which might be best described as bringing together cosmopolitan and statist theoretical commitments. Because he realises that at this point in history a borderless world is an unrealistic utopia, he agrees to operate within the nation state paradigm, without identifying himself as a statist. By recognising the legitimacy of borders (in practice, but not by conviction), he technically becomes part of the statist camp. Yet, in this scenario, his appeal for the opening of borders makes him a 'moderate' or 'weak' statist. Therefore, he has two ideological personas. From an ideal theory perspective, he is a cosmopolitan, but from a non-ideal one, he is a moderate statist; a curious position, which, according to Miller, undermines the credibility of Carens' arguments. However, it is hardly unusual or disingenuous for a thinker to loosen her ideological convictions for the purpose of catering to reality. It is a valuable step in the process of transiting from being an 'armchair philosopher' to being one capable of offering practical advice, informed by the present reality. As Matthew Gibney says, 'ensuring that normative prescriptions meet the test of *practical*

[169] Rawls, *The Law of Peoples*, p. 323.
[170] Miller, 2016, p. 18.

relevance' is an important endeavour.[171] He espouses a key dichotomy of his own; namely that between ethical force (or value) and practical relevance (or agency). For him, political theory needs to work towards providing states with adequate responses to extraordinary events such as the ones created by the unprecedented movement of people since 2015. Value and agency need to interplay in a manner that 'combines empirical and theoretical elements in an attempt to bring considerations of values and agency together'.[172] Though subscribing to different ends on the statist/cosmopolitan spectrum, Carens and Gibney would agree on the importance of saving the viewpoints of political theorists from practical irrelevance. Ultimately, 'when one is dealing with an issue as politically controversial and morally important as asylum, there are compelling reasons for paying close attention to the interconnections between values and agency'.[173] Therefore, in coming back to the question posed by the title of this section, this work argues that as long as we live in a world that is neither as perfectly statist (and distributively just) as Rawls would have it, nor as perfectly cosmopolitan (and stateless) as Pogge would like it to be, the question of migration will continue to be relevant.

There is one final thing to note before proceeding. Whilst the overall issue of migration is not rendered obsolete within the cosmopolitan framework, the differentiation between a refugee and an immigrant is. This necessarily begs the question whether this work's entertainment of the differentiation makes it a statist one. I will try to escape subscribing my work to any of the espoused paradigms. Instead, much like Carens and many other writers, I will continue to use the separate categories simply because they reflect the current state of affairs when it comes to immigration policy. We live in a statist world, where the category of 'refugee' exists, requires, and receives special attention by states, international regimes and organisations, including the European Union. A work based on EU asylum policy therefore demands that the concept of 'refugee' is entertained as coherent, relevant and worth discussing.

3. Statism vs. Cosmopolitanism and Other Dichotomies that Underpin Global Justice Debates

There are a range of normative approaches to the question of global justice, all of which essentially try to answer the question: do we owe duties as a matter of *justice* beyond our borders? It is a polemic question that has attracted the attention of numerous political philosophers and given birth to a number of dichotomies that underpin the global justice discussion, including, but not limited to: statism vs. cosmopolitanism, duties of justice vs. duties of humanitarianism, and migrant vs. refugee. The following chapter will be devoted to clarifying these dichotomies and thereby introducing readers with a non-philosophical background to the fundaments in

[171] Gibney, 2004, p. 18.
[172] Ibid.
[173] Ibid, p. 16.

global justice discussions. It will also offer an explanation for the central role that the nation state, as both a concept and a reality, plays in theory and practice. It is, after all, the nation state that: as a sovereign entity, defines its regime of immigration to a large or exclusive extent; and, as a concept, frames the international refugee regime. A study of asylum would be otherwise impossible without first understanding why, under certain philosophical traditions, it is acceptable for refugees to be treated differently to other immigrants and the answer to this question is closely connected to which of these two philosophical outlooks one subscribes to.

The great variety of approaches to the question of global justice also often have a different central focus. Based on their *scope*, accounts of global justice can be placed along a spectrum ranging from statism to cosmopolitanism, which lie on its either end. The scope of global justice obligations for a cosmopolitan are therefore universal, covering all human beings, whereas for a statist, they are limited, covering only those finding themselves within the borders of the same nation state. Based on their *ground*, the normative approaches to global justice can be characterised as either relational or non-relational. The former, relational approach, requires that the subjects of justice have some sort of relationship to each other before they can have a credible claim to being owed a duty of justice, whilst the latter, non-relational one, dismisses the need for any links between them. Therefore, rather than making the application of justice principles contingent on membership of a particular group and imposing a limit there, non-relational approaches 'usually limit the nature of intervention'.[174] Understanding the different accounts of distributive justice becomes easier with these two criterions set out. The *ground* criterion allows for elaborating on the *scope* one, as statism is always relational and, in the most common case, limits duties of justice to state membership, whilst cosmopolitanism can both be relational and non-relational. Should cosmopolitanism be relational, it needs to extend beyond supranational bodies.[175] Therefore, if the ends of the global justice spectrum are to be precisely defined, they would respectively be (relational) statism and non-relational cosmopolitanism.[176]

In general terms, at one end of the spectrum lie cosmopolitans like Thomas Pogge, who answer the question posed at the start of this section in the positive and believe that there is a duty of *justice* owed to all human beings and that we should all live in a borderless world. In that sense, for cosmopolitans, the distinction between a migrant and a refugee cannot be upheld.[177] On the other side of the spectrum lie statists like John Rawls, who are strongly in favour of borders and generally propose that a duty of *justice* is owed only to those within the confines of

[174] Maffetone, 2014, p. 127.
[175] Ibid.
[176] It is worth noting here that this delineation is based on Western theories of global justice, which fit within the school of analytical philosophy. This choice is without prejudice to the utility of other possibilities.
[177] The dissolution of the two separate categories necessarily leads to either everyone being considered a 'migrant' and therefore being subject to rejection (even if persecuted in her or his country of origin), or everyone being a 'refugee' and being subject to acceptance (even if pursuing entrance into a country on purely economic terms).

those borders usually because of a contractual element, whether implicit or explicit, that united citizens to the institutions of their nation state. For Rawls, this is the so-called 'political obligation' which morally binds citizens to obey the laws of their state whenever they are 'reasonably just' states. The duty of justice is therefore only present in liberal democracies which afford sufficient freedom and human rights' protection to citizens.[178] Allen Buchanan espouses a similar argument whereby the duty to obey the law is consequent upon the 'natural duty' to make rights-protecting institutions available to others. Therefore, if a state does not adeptly satisfy this protective function, it cannot be owed obedience.[179] Whatever statists' rationale for establishing duties of justice for citizens might be, it is important to emphasise that the hitherto discussion has concerned duties of *justice*. Here, I stress the word 'justice' because statist differentiate between duties of full-blown justice and other, lower-order duties. Therefore, while statist might not believe that citizens owe full-blown duties of justice being owed beyond a nation state's borders, that is not to say that they might not recognise other duties falling short of justice as capable of existing across national borders.[180]

Although cosmopolitans would argue in favour of a borderless world and a world government, the existence of borders is a fact of life. Recognising it generates a double set of dichotomies: one between open borders (argued for by cosmopolitans) and closed borders (argued for by statists), which I will address cursorily and one between duties of justice and duties of charity or humanitarianism. Interestingly, though 'mainstream' statists believe in closed borders, there is a 'moderate' or 'weak' statist faction, which at times argues in favour of open borders. It is within the confines of this moderate view that we see an overlap between cosmopolitans like Joseph Carens and statists like Thomas Nagel. From an ideal theory point of view, Carens identifies as a cosmopolitan and believes in a borderless world. However, he also recognizes our Westphalian reality and therefore argues that if his ideal theory were to land in our practical reality, he would be a weak statist. He would make peace with national borders not because he believes in them, but simply because they are there, and would subsequently argue in favour of open borders. Thomas Nagel, on the other hand, is a statist in that he believes in borders and in owing duties *as a matter of justice* exclusively to those falling within the same national borders. However, he still believes in owing duties to those beyond one's national borders; he just thinks those duties are not owed as a matter of *justice*, but as a matter of

178 Rawls, 1971, p. 334.

179 Allen Buchanan, Justice and Charity, *Ethics 97*(3), 1987, pp. 558–575.

180 It is important here to acknowledge that despite being the most famous statist in political philosophy, John Rawls is also what is termed an 'universalist' and acknowledges a limited number of scenarios in which national state boundaries lose their inviolability. He sets an exhaustive list of 'core' human rights that are universal and so basic that state interference with them cannot be tolerated by the international community and can rightly justify deterrent measures against a transgressing nation state such as economic sanctions or military intervention. Those rights include the right to subsistence, to security, to personal property, to formal equality before the law, freedom from slavery, protection of ethnic groups against genocide, and to a certain extent, the liberty of conscience.

humanitarian concern or charity. Matthew Gibney aligns with Nagel in that he also believes that humanitarian duty is the best way to describe the duty owed to people beyond one's borders. In turn, both Thomas Nagel and Matthew Gibney align with John Rawls in recognising the existence of duties differing from justice owed beyond national borders. Therefore, it is very much worth acknowledging that the statist-cosmopolitan dichotomy applies to scenarios strictly concerning duties of *justice*. This leads us to our third dichotomy, which is that between humanitarian duties and justice duties as the two possible ways to view the duties owed to people beyond the nation state borders. The difference between the two types of duties, according to Allen Buchanan, rests with the fact of the enforceability of the latter in stark contrast to the unenforceability of the former.

The existence of borders is also closely connected to matters of migration and seeking asylum. In the final part of this chapter, I will examine the philosophical rationale behind distinguishing between different kinds of migrants and present a range of definitions offered from within political philosophy for who should qualify as 'refugee'. Defining 'migrants' and 'refugees' is a neat way to bridge the disciplines of political philosophy and law as judicial practice in different international regimes has adopted certain definitions for each and, in that sense, manifested the exercise of a philosophical choice (albeit unconsciously). Whether we realise it or not, nowadays the difference between a refugee and other imposed migrant-related categories hinges on nothing more than the idea of 'persecution' by a state, even though many asylum seekers who do not qualify for refugee status because they are not being persecuted by a state might be in a situation of equal gravity or consequence to someone who does. It is in those particular cases that it becomes easiest to notice the ideological and political reasons underlying the artificial distinction, which is nonetheless unquestioningly relied on within the judicial process. This necessarily means that, even if unknowingly so, judges operate within an implicit philosophical framework which presupposes a fundamental difference between refugees and other types of migrants. As consequential as this distinction is for the rights of the immigrants who reach a nation state's borders, it cannot be left without a thorough examination. Therefore, in the remainder of this chapter, I outline the main rationales behind the categories in a bid to situate the topic of migration within the greater debate on global justice. In the final part of the chapter, I unpack Martha Fineman's 'vulnerability thesis' which acts as the central brokering agent between the two disciplines underpinning this project.

3.1. Statism

> 'However imperfectly, the nation-state is the primary locus of political legitimacy and the pursuit of justice, and it is one of the advantages of domestic political theory that

> nation-states actually exist […] with the need for collective action on a global scale, it is very unclear what, if anything, could play a comparable role'.[181]

> '[s]overeign states are not merely instruments for realizing the preinstitutional value of justice among human beings. Instead, their existence is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that they do not have with the rest of humanity, an institutional relation which must then be evaluated by the special standards of fairness and equality that fill out the contents of justice'.[182]

In the statists' accounts of global justice, the nation state is the ultimate unit of reference. It is the building block of the international community, and its borders provide the confines beyond which, allegedly, a duty of justice has no place. The reasons, it is claimed, are the idiosyncratic characteristics of the nation state, which make it a unique form of human association. Different statists advance different, unique reasons for why the state is unlike any other human formation, but examining these justifications is unnecessary for advancing the aims of this work (unless one wanted to prove that a duty of justice had to be extended beyond the state on the terms of the statists' positions themselves). What is worth noting again, however, is that although statists' refusal to endorse a global approach to duties of justice may betray a certain sense of scepticism as to its plausibility, they mostly endorse the utility of humanitarian rationales and charity for supporting those less fortunate, even when those are beyond the confines of the state.[183] For Maffettone, this compromise serves as an opening for a more realistic alternative to the utopian world offered by cosmopolitanism.[184] This endorsement of the idea of providing humanitarian assistance beyond the state can serve as a bridge between political philosophy and EU practice as the Union is currently the biggest donor of humanitarian aid in the world. It seems then, that in foreign policy terms, the EU can be said to be pursuing a moderate statist line. That would, however, place it in a precarious, incoherent position whereby within the EU, it pursues a cosmopolitan line because duties of justice transcend the national borders of Member States, but beyond the EU, it follows a more statist line because it limits itself to solely recognising the duties of humanitarian assistance.

3.2. Cosmopolitanism

For David Miller, cosmopolitanism is an increasingly vague term which may represent an identity, a political proposal, or a moral standpoint (the latter two being distinct and yet, most

[181] Nagel, 2005, p. 113.
[182] Ibid, p. 120.
[183] Ibid; See also John Rawls's 'duty of assistance' and his idea of 'basic rights', Thomas Nagel's 'humanitarian concern or charity', or Matthew Gibney's 'humanitarianism'.
[184] Maffettone, 2014, p. 128.

frequently, associated).[185] A cosmopolitan identity denotes a person with no professed allegiances to any particular place or culture. The political proposal represents the firm belief in the need of a world government or expressed as an equal regard for all people of the world, irrespective of whether they are one's compatriots or not.[186] Finally, the moral standpoint insists on the equal moral worth of all human beings. For Thomas Pogge, being a cosmopolitan involves three fundamental beliefs. The first one bestows individual human beings with the status of 'ultimate units of concern'.[187] He calls this '*individualism*' and contrasts it with positions which first and foremost favour 'family lines, tribes, ethnic, cultural or religious communities, nations, or states' amongst others. The second one is '*universality'* which means that the 'status of ultimate unit of concern attach[es] to *every* living human being *equally*' and the final one is '*generality*', which is to mean that the status is to be valid in the eyes of everyone.[188] Human beings are the ultimate units of concern not just for their fellow citizens, fellow religionists or any other group that they share a link with, but for everyone.[189]

Cosmopolitanism exists on a wide spectrum. In Miller's interpretation of its strongest conception, all the most fundamental duties we owe to our fellow humans are identical, meaning that we should treat all people in the same manner irrespective of our affiliation to them.[190] Although in practice, the exact shape of our responsibilities towards them might vary with the particular needs they have, we would still need to show exactly the same concern for each of them.[191] Since any display of partiality would contradict strong moral cosmopolitanism, treating one's compatriots differently to the citizens of other nations, which is at the heart of current nation state practices, would immediately come under fire from a cosmopolitan perspective. As Miller rightly points out, this fact makes strong moral cosmopolitanism implausible and unattainable because it automatically dismisses any opportunity for treating our families, friends and close ones differently than we would other people who we might have never met before.[192] He notes,

> '[i]f recognizing the equal worth of human beings excludes showing any sort of preference for those close to us, then our everyday behaviour would need to change radically, and few have been willing to embrace that conclusion, since it appears to mean giving up much of what we do that gives values to our lives. Our relationships to families and friends involve giving special

185 Miller, 2016.
186 Ibid.
187 Ibid.
188 Thomas Pogge, *World Poverty and Human Rights*, Blackwell Publishing, p. 175.
189 Ibid.
190 Ibid.
191 For an EU legal equivalent of this cosmopolitan notion, see Article 9 of the Treaty on European Union (TEU), which states that, '[i]n all its activities, the Union shall observe the principle of the equality of its citizens, who *shall receive equal attention* from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it' [emphasis added].
192 Miller, 2016, p. 22.

> consideration to their wishes and their needs when deciding how to use our time and our resources'.[193]

Indeed, the demands of strong moral cosmopolitanism are unattainable for individuals; yet, the principle might still hold some plausibility for the nation state. Yet, statist would disagree with the notion because the state is there to represent the wishes of its citizens. The unique bond that arises between them by virtue of legal, fiscal, and other institutions justify, in the eyes of statists, the state's differentiation between citizens and outsiders.

From a purely practical perspective, strong cosmopolitanism might indeed face a few hurdles in reaching its full potential at nation state level because its inability to reflect the reality of our current order. Instead, weak cosmopolitanism might offer a more plausible avenue in terms of policy because it involves a duty to show equal *consideration* to all human beings. In this version, the nation state would have the responsibility to weigh the effect of its policies on those beyond its borders.[194] That is to mean that the impact on non-nationals would not be rendered irrelevant simply by virtue of them not being nationals. Yet, weak cosmopolitanism does not mention the exact weight that is to be attached to the interests of the affected non-nationals; it simply demands that some explanation must be provided to them if such inequality is to result.[195] This wide spectrum of actions that cosmopolitanism demands in its different forms has caused Miller to call it 'profoundly ambiguous' from a moral standpoint and to further add:

> In its strong form, it readily excludes any preference for one's compatriots, but by simultaneously ruling out other forms of partiality that are integral to a worthwhile human life, it becomes hard to accept. In its weak form, by contrast, it reduces to a broad humanitarianism that does not rule out anything much at all beyond repugnant ideologies that regard some human lives as of no value. The interesting question is whether we can find some intermediate view that gives reasons for rejecting strong cosmopolitanism but has more to say about our obligations to people outside our own community than weak cosmopolitanism provides'.[196]

In pursuit of answering his own questions, Miller goes on to examine whether the special relationships between people can give rise to special obligations, and if so, in what context.[197] Strong cosmopolitans themselves use the idea of the 'division of moral labor', which is tied to the idea of reciprocity and is consistent with recognising the moral equality of all human beings as long as one showing special concern for certain people is happening simultaneously with others doing the same.[198] This idea is very weak, particularly because from its very postulation

[193] Ibid, p. 23.
[194] Ibid.
[195] Ibid, p. 24.
[196] Ibid.
[197] Ibid.
[198] Ibid.

we know that there are plenty of people who, unfortunately, never end up being anyone's object of concern. Not only that, but it is hardly the case that the love and particular concern we display for our friends and family are conditional on other people being shown the same.[199] Yet, Miller's critique of the weak form of cosmopolitanism fails to be nuanced. It is not accurate to say that in its weak form, cosmopolitanism 'does not rule out anything much at all beyond repugnant ideologies that regard some human lives as of no value'.[200] This may be true in its effects, but not at all with regard to its justification which sees every individual as the ultimate unit of concern.

Ultimately, the truth is that strong cosmopolitanism and its principles make high moral demands both of humans and of states. For someone with strong humanistic ideals, it would make the most convincing backbone for her ideal theory. Yet, as previously mentioned, statism remains the more accurate account for moulding current duties as it captures our present Westphalian reality in a much better way then cosmopolitanism does. However, it is worth remembering the successes of the EU project and its semi-cosmopolitan nature, in light of which the implementation of cosmopolitan ideals in current times does not seem completely hopeless or impossible. And as Miller notes, weak cosmopolitanism has significant overlap with broad humanitarianism, which can in turn be reconciled with statism. Therefore, humanitarianism, with all its demands can serve as the sphere of overlap between statists and cosmopolitans.

4. The Philosophical Duty of Humanitarianism

As mentioned above, although statists do not believe in the existence of duties of *justice* beyond the nation state borders, they do not necessarily deny the existence of other, less stringent duties. Those have been given different names, such as: the duty of humanitarianism, the duty of charity, the duty of universalism, the duty to protect basic rights. This duty is examined in greater detail below because it takes into consideration the vulnerability of applicants seeking protection without limiting its deliberation to those people who fit the 'persecution by a state' requirement. It thereby carries the potential for establishing protection for a wider set of applicants than the current international protection regime and does so on three accounts. First, it requires greater consideration for the moral claims of people beyond the borders of a nation state. Second, it does not hinge on the increasingly obsolete concept of 'persecution'. Third, it does not exhibit distance-based bias. Fourth, the duty of humanitarianism limits the abuse of the principle of *non-refoulement* and offsets its current artificial opposition to the principle of resettlement. Finally, the philosophical duty of humanitarianism not only holds

[199] Ibid, p. 24.
[200] Ibid.

the potential to offer protection to a wider group of people than the current refugee regime, but is also intimately connected to the legal idea of vulnerability to which this work will later come back to.

4.1. The Duty of Humanitarianism as Opposed to the Duty of Justice

To understand humanitarianism, one can study Thomas Nagel's seminal work, *The Problem of Global Justice,* which has been as divisive as it has been important amongst political philosophers. In discussing the question of the duties of justice, the work presents the nation state as a unique form of governance which generates unique '*sui generis*' responsibilities between the state and its citizens and between the citizens themselves. In his own words,

> 'given that [the state] exercises sovereign power over its citizens and in their name, those citizens have a duty of justice toward one another through the legal, social, and economic institutions that sovereign power makes possible. This duty is *sui generis*, and is not owed to everyone in the world, nor is it an indirect consequence of any other duty that may be owed to everyone in the world, such as a duty of humanity. Justice is something we owe through our shared institutions only to those with whom we stand in a strong political relation. It is, in the standard terminology, an *associative* obligation' [emphasis in original text].[201]

For Nagel, the boundaries of the state set the boundaries of 'the full standards of justice', regardless of how arbitrary those boundaries may or may not be.[202] This is mainly because he does not see the duty of justice as a phenomenon predating the creation of the state; quite the contrary, he sees is as a consequence of it. For Nagel, state sovereignty is essential for the existence of duties of justice within the state, and subsequently the absence of global sovereignty is the central reason why the duties owed beyond the state are not ones of justice. Yet, he does not completely disregard all responsibilities beyond the nation state's borders. He sees merit in recognising that there are certain 'noncontingent, universal relations in which we stand to everyone' because they protect the most fundamental of interests and impose the slightest of burdens.[203] He claims that the duties created by these relations are governed by 'minimal humanitarian morality' and apply in our relation to 'all other persons'.[204] They are a humanitarian 'duty of rescue toward people in dire straits all over the world'.[205] In Nagel's writings, we see this idea of 'prepolitical human rights',[206] which precede the nation state and therefore precede justice too. It is by virtue of them that we owe a humanitarian duty of assistance to people beyond our borders. In much the same way, whatever duties institutions or fellow individuals

[201] Thomas Nagel, The Problem of Global Justice. *Philosophy and Public Affairs*, *33*(2), 2005, p. 121.
[202] Ibid.
[203] Ibid, p. 122.
[204] Ibid, p. 131.
[205] Ibid.
[206] Ibid, p. 132.

might owe to a human being precede the emergence of the nation state or of justice. They exist simply by virtue of our inherent and universal vulnerability. Therefore, in terms of pedigree, Nagel's humanitarian duties echo Fineman's vulnerability thesis. They also seem to be reflected in Article 1 of the European Union Charter of Fundamental Rights which says that '[h]uman dignity is inviolable. It must be respected and protected.'

Humanitarian duties can be owed without a special duty of justice being owed too and that is why certain asylum seekers can benefit from them, '[i]n extreme circumstances, denial of the right of immigration may constitute a failure to respect human rights or the universal duty of rescue […] The most basic rights and duties are universal, and not contingent on specific institutional relations between people. Only the heightened requirements of equal treatment embodied in principles of justice, including political equality, equality of opportunity, and distributive justice, are contingent in this way'.[207] Carens and Gibney also argue in favour of the humanitarian duty in the shape of a positive duty of assistance in pursuit of avoiding severe human suffering or the violation of basic rights.[208] Similarly, for Rawls, the relations amongst 'peoples' can sometimes necessitate developmental assistance when hostile conditions prevent such peoples from 'having a just or decent political and social regime'.[209] I will summarily refer to this duty as the 'duty of humanitarianism'.

Humanitarianism is, in that sense, a paradox because, at its core, is the manifestation of the idea that certain human rights apply to everyone equally, but simultaneously it is the bi-product of the statist idea that there are a set of rights which only apply to a certain group of people, can only exist within the confines of the nation state, and activate the duties of justice. Within the greater context of people in need of assistance, humanitarianism offers a justification for enabling these rights for them, whilst within the more confined context of asylum, it presents a plausible alternative for wider protection than the one currently offered by the international refugee regime.

4.2. The Duty of Humanitarianism and International Protection

Statists and cosmopolitans strongly diverge on the matter of whether to categorize migrants, and if so, how. Nils Holtug provides the humanitarian argument as one reason for accepting refugees and argues that in its 'modest version', it may 'imply that our obligations, with respect to admitting refugees, pertain only to the protection of human rights, where human rights are based on basic needs' whereas in its more 'ambitious versions' it 'may be based on, for example, the utilitarian aim of maximizing total welfare or the (global) egalitarian aim of

[207] Ibid, p. 130.
[208] Carens, 2013; Gibney, 2004, p. 233.
[209] John Rawls, Kantian Constructivism in Moral Theory, In S. Freeman (Ed.), *Collected Papers*, Harvard University Press, 1999, p. 37.

bringing about global equality'.[210] Since the philosophers on the cosmopolitan side of the spectrum believe in no frontiers, they dissolve the distinction between migrant and refugee and their engagement with the question of migration is limited to the idea of freedom of movement.[211] Therefore, exploring the different ways of defining who is entitled to international protection or can qualify as a 'refugee' involves operating under statist (or weak cosmopolitan) theoretical assumptions. Indeed, philosophers subscribing to the statist worldview share the opinion that there are different categories of migrants and refugees are a special type by virtue of the *basis* of their admission claim. Most significantly, this basis allows them to be seen and legally construed as different to 'economic migrants', the latter of which, it is argued, cannot claim a threat to their human rights as the reason for their admission.[212]

Building up the definition of refugee requires setting up some other definitions too. For Matthew Gibney, there is a useful differentiation to be made between refugees, asylum seekers, economic migrants and family migrants.[213] Although rooted in strongly political and ideological convictions, this distinction is one that is at least implicitly endorsed by the general practice in the current international order. Interestingly, the most unconventional conceptual distinction that Gibney provides is that between a refugee and an asylum seeker. Though there are many people who would currently qualify as refugees (even as they are still in their home countries), Gibney claims that states should categorise as asylum seekers only those refugees who actually reach their borders.[214] Once at the state border, the abstract mass of people who would qualify as refugees even though there are thousands of miles away from the state in question become the asylum seekers who are deemed as relevant for the state's concern and engagement. Paradoxically, once at the state border, asylum seekers could hypothetically include economic and family migrants too because to qualify as an asylum seeker one only needs to *claim* to be a refugee.[215] Therefore, in certain cases, the category of asylum seeker can be simultaneously narrower and broader than that of a refugee.

In the current international order, states have stricter and more immediate obligations towards asylum seekers who are refugees than they do to any other type of immigrant.[216] Under

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[210] Nils Holtug, A Fair Distribution of Refugees in the European Union, *Journal of Global Ethics*, *12*(3), 2016, p. 270; Not all political philosophers are supporters of the argument for humanitarian duties to people beyond the state borders. Therefore, some base their claims in favour of admitting refugees of on the right to freedom of movement, whereby states would have a negative duty not to interfere with the basic right of refugees to cross borders into countries where they might be safe from the abuse of their most fundamental rights (see, for example, Kieran Oberman, 'Immigration as a Human Right', *Migration in Political Theory*, eds. Sarah Fine and Lea Ypi, 32-56).

[211] This observation applies to very strong cosmopolitans such as Thomas Pogge. More nuanced views exist amongst weak cosmopolitans like Joseph Carens whose view overlaps with that of weak statists such as David Miller.

[212] Holtug, 2016, p. 270.

[213] See Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees,* 2005. Cambridge University Press.

[214] Gibney, 2004, p. 9.

[215] Ibid.

[216] Ibid, p. 10.

the so-called principle of *non-refoulement*, states owe a duty of care to refugees not to send them back to the country from which they escaped and in which they continue to face an immediate danger. The current regime is largely ruled by the 1951 Convention (hereafter, 'the Refugee Convention') and its 1967 Protocol (hereafter, 'the Refugee Protocol') Relating to the Status of Refugees. The former defines the term 'refugee' and sets out the rights and the legal obligations associated with the status. Attached to the refugee status is also the fundamental principle of international law called *non-refoulement*, which forbids a country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution based on the criteria set out in the Refugee Convention. The status itself applies to anyone, who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country' (Article 1). This definition outlines three central aspects to qualifying as a refugee: (1) being outside one's country of origin, (2) being persecuted, and (3) facing said persecution due to one of the five reasons listed above. The most important of these three criterions is the idea of 'persecution' by a state.

As Gibney observes, the emphasis on persecution is very tightly related to the definition's Cold War origins, when Western states viewed refugees as the 'product of oppressive, totalitarian regimes, like that which existed in Nazi Germany and those forming in the communist states of Eastern and Central Europe that preyed on certain sections of their citizenry. Refugees were thus seen as the product of a certain kind of political rule in which the normal responsibilities of a state to its citizens were deliberately and directly violated'.[217] That is to say, refugees were and continue to be viewed in 'primarily state-centric terms'.[218] Yet, although necessitating the involvement of the state, the idea of 'persecution' has been interpreted in a wide manner. This has enabled instances without the *direct* involvement of the state to also fall under the definition; as long as the state in question had the ability to offer protection, but did not do so, it meant that it 'openly or tacitly colluded in the persecution'.[219] Indeed, a narrower reading of the term would enable to exclusion of many people from international protection. Those forced out of their homeland due to life-threatening situations like war, generalized violence, or natural disasters would have no access to it.[220] Therefore, to qualify under the current, broader interpretation of the 'persecution' requirement, the person in question should not be able to avail herself of the state's help to protect her human rights.

[217] Miller, 2016, p. 78.
[218] Gibney, 2004, p. 6.
[219] Ibid.
[220] Miller, 2016, p. 79.

However broadly 'persecution' may be construed, the Geneva Convention definition has been viewed as narrow by a number of authors, and even the EU has developed a more encompassing approach towards asylum applicants when deciding on who should benefit from its protection. Currently, the European Union grants asylum to those applicants that are either fleeing persecution *or* serious harm.[221] The difference in protection afforded solely under the international protection regime of the Geneva Convention and its Protocol and the European Union serves as evidence of the two regimes' clashing jurisdictions resolved in a more favourable manner for those asylum seekers that make it to the EU. The EU's extended definition affords protection to a wider set of asylum seekers. Under the Qualification Directive[222], an asylum applicant can be recognized as a refugee *or* as a beneficiary of subsidiary protection. It defines the beneficiary of subsidiary protection as 'a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2)[223] does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'[224]. In turn, 'serious harm' is defined as '(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'[225]

The subsidiary protection category represents an acknowledgment that the 1951 Refugee Convention definition does not offer sufficient protection to asylum seekers and, in that sense, is a manifestation of a half-way answer to the abovementioned critique espoused by political philosophers. The writers criticizing the Geneva regime think that the central concern

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[221] See European Commission, *A Common European Asylum System: Factsheet*, 2014. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf.

[222] 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.

[223] Article 17 ('Exclusion') of Qualification Directive reads as follows: 1. A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:
(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he or she has committed a serious crime;
(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.
2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

[224] See Article 2(f) of 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.

[225] See Article 15 of 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.

surrounding an asylum application should be whether an applicant's human rights are at a serious risk if she stays in her country of origin, irrespective of whether the risk is caused by any of the five grounds set out by the Convention. For Michael Dummett, 'all conditions that deny someone the ability to live where he is in minimal conditions for a decent human life ought to be grounds for claiming refuge somewhere'.[226] Others claim that a distinction between those human rights at risk due to persecution and those at risk due to poverty or natural disaster which might be equally unmended by the state, is too arbitrary. For Andrew Shacknove, refugees are 'persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible'.[227] The focus of this definition therefore is the refugee and her vulnerability, as opposed to the cause of it.[228] Shacknove has also argued against correlating refugeehood with migration, stating instead that one need not cross any state boundaries to be a refugee.[229] For Carens, too, 'from a moral perspective, what is most important is the severity of the threat to basic human rights and the degree of risk rather than the source or character of the threat'.[230] Miller finds Shacknove's definition too broad because it fails to show why emigration from the origin society is the best remedy to the situation the asylum seeker finds herself in.[231] The underlying assumption of his critique is that most states who see themselves as protectors of human rights would prefer to provide aid rather than admit people when trying to fulfill their obligations, making this a 'reason for restricting refugee status to those who cannot be helped except by taking them in'.[232] He therefore finds a middle ground between Shacknove's definition and his own critique, taking refugees to be people 'whose human rights cannot be protected except by moving across a border, whether the reason is state persecution, state incapacity, or prolonged natural disasters'.[233] Despite being a statist, Miller offers a definition for 'refugee' which is very generous. It goes way beyond the current international protection regime and the extended protection afforded by the European Union. The concern underlying all of the abovementioned critiques to the current regime seems to be the idea that the *extent* of a person's suffering should be considered as more important than the actual *source* of that person's suffering. Indeed, amongst other things, this work would argue that the international migration regime needs serious revision and that one viable way to do so would be through refocusing our attention away from the source and towards the extent of the

[226] Gibney, 2004, p. 4.
[227] Shacknove, 1985, p. 277.
[228] Michael Dummet, *On Immigration and Refugees*, Routledge Publishing, 2000, p. 37.
[229] Shacknove, 1985, p. 283.
[230] Carens, 2014.
[231] Miller, 2016, p. 80.
[232] Ibid.
[233] Ibid.

suffering through a vulnerability analysis. Such a revision would not do away with the idea of having different degrees of protection afforded to applicants and it would preserve the state's sovereign right to decide who should be allowed to enter its borders. It would, however, be more successful in evaluating applicants' real need for protection and in providing it to them. This would be possible through introducing Martha Fineman's idea of 'vulnerability' to the international protection regime.

Ultimately, regardless of the breadth or the narrowness or the refugee definition endorsed by the different philosophers or by the various international protection regimes, there is an overarching consensus that refugees are a special category of immigrants. Through the base for their claims and the subsequent rights that they are granted, they can be differentiated from both the categories of 'economic migrants' and 'family migrants'. In mixed flows of 'irregular' arrivals, the 'economic migrant'[234] category arises upon the state distinguishing between those asylum seekers whose claims are defined as 'legitimate' by virtue of the persecution element involved in their application and those whose claims are defined as 'illegitimate', often because their claim rests on economic, as opposed to persecution, grounds. Even though both categories of people could be claiming asylum and thus be collectively referred to as 'asylum seekers', the 'legitimate' asylum seeker, i.e. the refugee, is deemed as such because she faces life-threatening circumstances anchored in being persecuted, whereas the 'illegitimate' asylum seeker, i.e. the economic migrant, is 'driven to seek entrance by (often only slightly) less pressing considerations, such as the desire to improve a low standard of living'.[235] This poses a two-fold problem. First, it portrays the refugee as removed from the labour market, thus exacerbating the conceptual differentiation between 'worthy' and 'unworthy' migrants. Second, it merely cares about the source of the vulnerability, neglecting the extent of it, which might render a 'refugee' and an 'irregular migrant' equally vulnerable. Of course, migrants taking on 'regular' paths to accessing a host country are often also economic migrants, but that fact seems to be overseen or, at the very least, absent from public discussion.

As Gibney points out, economic migrants might be placed on a wide spectrum of need, some arriving out of desperation due to appalling conditions of poverty in their countries of origin, whilst others simply moving to take up lucrative employment offers.[236] However, those 'economic migrants' which seek asylum because they believe the dreadful conditions in which

[234] It should be said here that there is no official category of 'economic migrant' that one qualifies under; instead, it is part of the nomenclature used in state rhetoric and academic writing to name those asylum seekers whose primary reason for arriving at a nation state's borders is to improve their economic standing. The category itself lacks nuance and has garnered increasingly negative connotations due to its fervent utilization by right-wing politicians and media in an accusatory manner. No such baggage is associated with the usage of the term in this work, where its sole purpose is to denote a group of asylum seekers in a conventional way.

[235] Miller, 2016, p. 81.

[236] Gibney, 2004, p. 11.

they live should grant them asylum are shunned, ostracized, and dismissed as 'illegitimate', whereas those 'economic migrants' who arrive to take on lucrative deals of employment are welcomed with open arms. In any case, the distinction between economic migrants and refugees is often drawn with the justification that their claims have differing moral force and carry a different level of urgency. Yet, the wide spectrum of cases that the term 'economic migrant' covers makes for an intriguing observation. Under several of the wider definitions of 'refugee' offered above, a certain portion of the people who would be considered economic migrants under the current regime could qualify as refugees. Certain levels of poverty are so violent, merciless, and life-threatening that seeking to escape them might not be much different from seeking to escape persecution. Yet, being covered the different definitions does not necessarily mean that an applicant should be granted refugee status; instead, it means that she should be helped. For Gibney, for example, violent famine conditions would best be addressed by delivering humanitarian help to the refugees where they are as opposed to by resettling them.[237]

The 'family migrant' category covers those applicants who wish to enter a country in order to join a family member who is already there. Whenever their request is granted, the favourable answer does not derive from a right that they have, but from the right of their family member who is already inside the country in question. Mentioning this category is important because '[f]amily migration constitutes the bulk of all new settlements in many Western countries'[238] and this reveals a sort of bias towards them. Therefore, as Gibney rightly points out, 'if residence in liberal democratic states is a scarce good, the distribution of which raises questions of justice, we can't ignore the question of how states should rank the claims of family entrants against those of refugees'.[239] Indeed, 'the total volume of new admissions for residence in Western states is made up of three major groups: economic migrants, family reunion cases and refugees. We need to consider the kind of weight given to resettled refugees in this mix'.[240] Going back to Gibney and his humanitarianism, he argues that the serious consideration of the claims of refugees requires states to be treating them at least equally to those of other claimants. Although this is not a controversial statement in theory, it might lead to quite controversial consequences in practice. After all, there is not even one Western state where refugees currently make up one-third (or more) of all incoming migrants. As Gibney remarks,

> 'We can thus conclude that the more even allocation of admission places between the three different groups of entrants demanded by humanitarianism would result in refugee intakes rising, sharply in some countries and prodigiously in others. And it is significant that reaching this conclusion does not involve accepting any of the following propositions: (1) that the claims of

[237] Ibid.
[238] Ibid, p. 13.
[239] Ibid, p. 14.
[240] Ibid.

> refugees are *more important* than those of immediate family members or economic migrants; (2) that states should increase the *total* number of entrants they currently accept; (3) that determining the *absolute* integrative ability of individual states is the only way of responding to their different resettlement capabilities. The tens of thousands of new refugee places that would be made available demonstrates that even adherence to the seemingly modest principle of humanitarianism would have profound implications for the distribution of protection'.[241]

Ultimately, the differentiation drawn amongst immigrants is an arbitrary and artificial one. In a world where the plight of refugees is so difficult to separate from the much bigger issue of a world rife with economic inequality both amongst individuals and between states, and one in which people are dying just as often from hunger and poverty as they are from persecution, it is misleading and unjust to portray certain applicants as more deserving of the acceptance and protection of well-off states than others. Indeed, the distinction derives from background theories and claims that are deeply politically and ideologically rooted. Therefore, whenever a court judges a case by viewing the applicant as a refugee as opposed to an economic migrant and vice versa, that court is implicitly operating within an artificial framework that is closer to politics than it is to justice. It is presupposing both a definition for each category and a distinction so fundamental between the two that it garners the need for a completely different treatment being granted to each. Although this work will not engage in passing a normative judgment on the existence of said distinction, it will underline that it is a distinction whose acknowledgment is vital to a credible engagement with asylum law from a global justice perspective. At the end of the day, most authors who endorse the distinction would probably justify it along the lines offered by Gibney who notes that 'in a world characterized by great scarcity of entrance places, it makes sense to prioritise claimants for entrance; and in a conflict between the needs of refugees and those of economic migrants, refugees have the strongest claim to our attention'.[242] That does not change the outdated and state-centric definition of a 'refugee', however, and should not thwart efforts towards achieving a more generous definition that might additionally cover people whom we would otherwise dismiss as 'economic migrants' today.

[241] Gibney, 2004, p. 242.
[242] Ibid, p. 243.

5. How the Humanitarian Duty Offers Wider Protection for *Particularly* Vulnerable[243] Migrants

For Matthew Gibney, the humanitarian duty enables liberal democracies to show greater concern for the moral claims of refugees.[244] It also leads to a duty to address the causes of refugee generation, regardless of how difficult and multi-faceted as any such action would be.[245] The humanitarian duty might also allow a more sophisticated and in-depth look into the claims of certain immigrants escaping poverty. However, one needs to also keep in mind the obscuring and satiable effect of the current refugee regime. Indeed, though it might initially strike as compromising justice, Gibney's vision of humanitarianism offers increased state responsibilities to refugees. Starting to build his case, Gibney calls the Western response to asylum seekers an 'organised hypocrisy' and underlines the fact that 'liberal democratic states publicly avow the principle of asylum, but use fair means and foul to prevent as many asylum seekers as possible from arriving on their territory where they could claim its protections'.[246] Despite dating back to 2004, Gibney's observations could not hold truer today. With legally questionable agreements like the EU-Turkey Statement of 2016[247] and humanitarian crisis situations like the Aquarius incident,[248] Gibney's 'organised hypocrisy' accusations from 2004 sound prophetic in 2019. Upon exposing Western responses to asylum seekers, he then draws attention to the fact that any credible approach to the refugee system needs to 'take seriously *both* the claims of citizens *and* those of refugees'.[249]

In his ideal scenario, humanitarianism would involve nation states accepting as many refugees as they can without causing harm to the most important rights associated with the liberal and democratic character of the state; that is to say that states would have a duty to assist refugees whenever the costs of doing so would be very low.[250] He additionally proposes a preference for resettlement over the abuse of the principle of *non-refoulement* through externalisation of asylum practices and detention that we are witnessing today. Finally, Gibney points out three strong advantages to the humanitarianism he so fervently defends. The first one is that 'humanitarianism *concentrates* the responsibilities of states', in the sense that it distils

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[243] The emphasis on 'particularly' is a conscious choice aimed at underlying Fineman's approach to vulnerability as being universal. Since all people a vulnerable and there is no state of invulnerability, some people simply become more vulnerable than others, i.e. they are *particularly* vulnerable. The insistence on this qualification is important because it prevents vulnerability from being assigned and the results of a political choice, which often has the unintended consequence of denying agency to the person being picked out and framed as vulnerable.

[244] Gibney, 2004, p. 212.

[245] Ibid, p. 260.

[246] Ibid, p. 259.

[247] European Council, 'EU-Turkey Statement', Press Release, 18 March 2016. Available at: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[248] See Melanie Fink, 'The Aquarius incident: navigating the turbulent waters of international law', *EJIL: Talk!,* 14 June 2018. Available at: https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/.

[249] Gibney, 2004, p. 229.

[250] Ibid, p. 230.

state duty to exclusively being owed to people who are in great need, whilst also catering to the idiosyncrasy of the nation state and the attachment of ethical importance to its interests.[251] In other words, the *de minimis* requirements of humanitarianism can serve as one of the justifications for its utility and applicability within the current international context. This idea overlaps with Shacknove's observation that the costs of a state helping outsiders is inversely proportional to its responsibilities with regards to said outsiders.[252] The second advantage is the flexibility of the principle upon being applied to different states, adapting to their political commitments and particular characteristics at any given time. This makes 'the principle […] less vulnerable to the kinds of unintended consequences resulting from fluctuations in social, political and economic forces, which confound other attempts to theorise state responses'.[253] The third and final advantage he lists is that 'humanitarianism is *cautious* in the demands it makes of states'.[254] Once again, the state has room for manoeuvre. All three advantages of Gibney's humanitarianism centre around reducing state inconvenience and an additional integral part of this effort is Gibney's emphasis on the idea of 'costs'. He describes costs as outside the control of the state and misleadingly portrays them as passive actors who are completely influenced by politics and incapable of reshaping the environment and political sentiment in which they find themselves.[255] Unfortunately, this focal point makes his humanitarianism rather conservative because it fails to recognise states, as represented by their governments, as the powerful agents who are capable of modelling their surrounding space that they are. They have the ability to mould the way in which public opinion views the costs of catering to refugee claims and the amount of those being accepted without harm to the society, making 'the conception of 'costs' at the heart of humanitarianism partly a social and political construct'.[256] Therefore, states have the additional responsibility of 'reshaping the political space in which they find themselves in ways more conducive to the reception of refugees and asylum seekers'.[257] Even though humanitarianism is at first sight a weaker principle than that of justice, Gibney's exploration of it shows how it can be used to garner more responsibilities from the current international nation state order without leaving it with costs it is not able to shoulder. When it comes to the question of migration, humanitarianism could serve as the 'more humane' alternative to the current refugee regime for the reasons mentioned above. Such a conclusion flows not from the consequences for the existing regime's current beneficiaries, but from the consequences for those who are left outside of its protection due to its strict definition. Indeed, a migration regime

[251] Ibid, p. 230.
[252] Ibid, p. 234.
[253] Shacknove, 1988, p. 134.
[254] Gibney, 2004, p. 234.
[255] Ibid.
[256] Ibid, p. 244.
[257] Ibid.

based on broad humanitarianism would not only serve as an acceptable common ground to both cosmopolitans and statists, but would also be consequential for those people who cannot avail themselves of the protection available under the current international regime.

When it comes to humanitarianism, an essential aspect of its practice, at least in philosophical terms, involves the central importance it attaches to the concept of resettlement. Under the international refugee regime, resettlement is accepted as one of three durable solutions available to refugees alongside voluntary repatriation and local integration.[258] All three solutions aim at ensuring a life of dignity and peace for their beneficiaries. Even though all three are equally important, this work will exclusively focus on the idea of resettlement as it is one that is covered extensively within the realm of political philosophy and is closely tied to the practice of *non-refoulement* which has caused a lot of tension in EU asylum policy. Resettlement is defined by the UNHCR as 'the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against *refoulement* and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country'.[259] Although the definition would see resettlement as one of the three natural steps consequent on *non-refoulement*, a different relationship exists in practice.

For Gibney, the reality of state practices has artificially created an opposition between the practices of resettlement and *non-refoulement.* In order to make his case, he examines the 'dubious' ethical implications of the latter principle; namely, that it 'see[s] states as having a stronger obligation to refugees at their territorial boundaries than they do to those at risk far from their borders'.[260] Indeed for Gibney, 'humanitarianism has no respect for distance; it is owed to all refugees on the basis of need alone'.[261] Examining Gibney's espousal of humanitarianism places the reader in the curious position of questioning one of the holiest state practices under international law. Additionally, one finds oneself acknowledging the fact that despite placing a much weaker duty on states than a duty of justice would, humanitarianism ultimately manages to improve the protection afforded to vulnerable people under the current international regime. The truth is that *non-refoulement* is an important state obligation and one that is an essential part of rights' protecting practices for refugees. However, nation states' increasingly deterrent practices and efforts at out-sourcing their borders, especially in the

[258] Ibid, p. 244.
[259] UNHCR, *UNHCR Resettlement Handbook*, Geneva, 2011, p.3. Retrieved from http://www.unhcr.org/resettlementhandbook.
[260] Ibid.
[261] Gibney, 2004, p. 240.

European Union, have significantly altered its shape. Whilst historically, putting the duty of *non-refoulement* on a pedestal made sense because the current technology for rendering assistance to people far from a state's borders was not available, today the bias in favour of people who have made it to a state's borders as opposed to those who have not is no longer as justifiable as before.[262] Instead, '[u]niversal obligations to refugees can now be exercised universally'[263] in a manner which Gibney argues should see resettlement as a preferable option to *non-refoulement* when the two are competing with one another. In his words:

> 'The changing capabilities of states have taken on even more significance in recent years because the negative consequences of the way *non-refoulement* currently operates are so stark. Distributing refugee claims on the basis of proximity gives rise, as we have seen, to enormous disparities in state burdens, inefficiencies in resource allocation exemplified by the fact that much of the money spent on the world's refugees goes into operating determination systems in Western states, and a bias in favour of those refugees with the contacts, resources and youth to embark upon hazardous journeys to the richer states […] Resettlement, under the right conditions, might be a way of ensuring that those most in need of protection receive it, regardless of location'.[264]

Yet another set of Gibney's observations from more than a decade ago ring true on many levels today. Ever since the unprecedented arrival of asylum seekers to European shores in 2015, we have only gathered more support for Gibney's standpoint. Border states of the European Union like Greece and Italy have had to take on an extraordinarily large burden in processing asylum claims and resettling refugees because of systems like the one governed by the Dublin regulations, whist the subsequent crisis framing of the situation has proven ripe ground for the rise of right-wing parties. The 'member state responsible' rule whereby the first state of arrival is also the one responsible for taking on an asylum claim has also proven itself inefficient as evidenced by the secondary movements of refugees to Member States other than the one in which they have been granted asylum. Such secondary movements which undermine the Union's current asylum system would not occur under a resettlement practice which takes into account refugees' existing ties to certain countries and communities. Finally, a resettlement system that does not exclusively favour those asylum seekers that make it to a country's borders would also undermine and eventually eradicate human trafficking networks and save people from the life-threatening journey of making it to the Union's shores. Ultimately, what Gibney is trying to do is not undermine the principle of *non-refoulement*, but draw attention to the questionable practices the commitment to it has led. Therefore, he urges states to slowly shift their focus in favour of resettlement as it is a less arbitrary practice which does not reveal a bias against those who, for

[262] Ibid.
[263] Ibid.
[264] Ibid.

one reason or another, are less likely to reach a state's borders despite being in equal need of protection. Indeed, Gibney manages to skilfully underline the shortcomings of the refugee protection regime through his critique of both the off-shoring tactics employed to avoid compliance with the principle of *non-refoulement* and the 'border bias' exercised in favour of those refugees who make it to the borders of a potential host state. He therefore very skilfully underlines the shortcomings of the state-centred *practice* of the refugee regime before moving onto exposing those already inherent in the state-centred *definition*. Unlike humanitarianism, however, the principle of vulnerability, when recognised as a source of responsibilities for a nation state's institutions, would apply to those people who make it to the borders of a country.

6. Unpacking the Legal Twin Sister of Humanitarianism: Martha Fineman's 'Vulnerability Thesis'

Martha Fineman is a legal theorist and political philosopher, whose work, much like that of global justice philosophers, has long 'grappled with the limitations of equality',[265] but has simultaneously insisted on keeping a more practical edge. In the following pages, I will unpack her theory of vulnerability and present it as a practical tool for engaging with the issues surrounding the topic of migration for political theorists, legal scholars and judges alike. Keeping in mind the lack of overlap between the Court's asylum jurisprudence and global justice theories of migration, I also reiterate the theory of vulnerability as the most appropriate brokering agent for bridging the existing gap. Upon espousing the theory's main tenets, I argue that both political philosophers and the ECJ already engage with the idea of vulnerability which makes the aforementioned endeavour a realistic proposal, since the intuitive familiarity of the actors with the idea eliminates any need for taking a huge leap of faith or making a compromise for any of the stakeholders involved. I conclude this part by arguing that the application of the theory of vulnerability has a number of additional advantages. Its application does not need to be limited to the Court's migration or asylum jurisprudence or to considerations involving third country nationals; quite the contrary, it can be applied to *all* of the Court's jurisprudence in *all* scenarios that involve natural (as opposed to legal) persons, whether they be EU citizens or not. Last, but not least, in an area especially susceptible to the pitfalls of unconscious biases, prejudice and discrimination, it is the antidote to 'other'-ing because it is a constant reminder of the universality of vulnerability.

6.1. Defining 'Vulnerability'

The word 'vulnerability' is frequently used in both everyday language and judicial pronouncements, albeit with differing meaning, which has made it more akin to a vacuous concept. Simultaneously, '[w]ithin the legal literature, there is a tension between group-based

[265] Fineman, 2017, p.1.

and universality-based deployments of vulnerability' because '[o]n the one hand, vulnerability is often used to analyse specific populations; on the other hand, Martha Fineman has developed a vulnerability thesis that is expressly universal in its scope and "post identity"'.[266] The former group-based, politically assigned, and often fluctuating instrumentalization of vulnerability is expressly rejected by Fineman, who argues that the continued association of vulnerability with particular (and often marginalised) identities will only work to maintain the 'liberal[267] myth that, "normally," people are self-sufficient, independent, and autonomous' which 'has led to an impoverished notion of what the function of the state is and has moreover legitimized rampant inequality'.[268] The ambition behind Fineman's theory of vulnerability is to create a concept that allows arguing for 'a more responsive state and a more egalitarian society' and developing 'a more complex subject around which to build social policy and law'.[269] To this purpose, she reconstructs the *political* subject as the *vulnerable* subject in law and defines vulnerability as follows,

> '[a]lthough it is often narrowly understood as merely 'opennes to physical or emotional harm,' vulnerability should be recognised as *the* primal human condition. As embodied beings, we are universally and individually constantly susceptible to change in our well-being. Change can be positive or negative – we become ill and are injured or decline, but we also grow in abilities and develop new skills and relationships. The term 'vulnerable,' used to connote the continuous susceptibility to change in both our bodily and social well-being that all human beings experience, makes it clear that there is no position of invulnerability – no conclusive way to prevent or avoid change'.[270]

Vulnerability is universal, constant, continuous, and anchored in the human condition.[271] It is also inevitable and never not present. We are all 'embodied and embedded' beings interconnected by our vulnerability which calls for building new institutions and revisiting the role of existing ones based on ethical considerations that emphasise interconnectedness. They are to be responsive to our vulnerability and to recognise the potential for suffering inherent in our vulnerability. In the words of Mary Neal,

> '[v]ulnerability speaks to our universal capacity for suffering in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) […] Second, I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds'.[272]

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[266] L. Peroni & A. Timmer, Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law, *International Journal of Constitutional Law*, *11*(4), 2013, p. 1060.
[267] References to the term 'liberal' in Fineman's work are references to the American understanding of the word which presents an individual as an autonomous, rational subject.
[268] Peroni & Timmer, 2013, p. 1060.
[269] Ibid.
[270] Fineman, 2017, p. 142.
[271] Fineman, 2008, p. 1.
[272] M. Neal, "Not Gods but Animals": Human Dignity and Vulnerable Subjecthood, *Liverpool Law Review*, *33*(177), 2012, pp. 186–187.

The dependence aspect quoted above is consequent upon our embeddedness, whereas the penetrability aspect to our embodiedness. The embeddedness has the immediate consequence of making vulnerability a relational concept as people become vulnerable as a consequence of their inevitable dependency on others.[273] Therefore, it supplements the attention we pay to the individual by positioning her/him in a social context.[274] In that sense, Fineman's theory is complemented by Sen's acknowledgment that 'there is a deep complementarity between individual agency and social arrangements'[275] because 'the freedom of agency that we individually have is inescapably qualified and constrained by the social, political, and economic opportunities that are available to us'.[276] Sen's work provides an additional neat bridge between Fineman's vulnerability theory and theories of global justice. With justice often incorporating the duality of equality and freedom, Fineman's contextual approach allows re-conceptualising both terms' meaning. Equality for Fineman is 'equality in context',[277] whereas freedom is aligned with Sen's following observation, '[i]t is important to give simultaneous recognition to the centrality of individual freedom *and* to the force of social influences on the extent and reach of individual freedom. To counter the problems that we face, we have to see individual freedom as a social commitment'.[278] By aligning with Sen's understanding of freedom, Fineman's work once again emerges as a viable brokering agent between political philosophy and law.

Through the shared nature of vulnerability, Fineman seeks, in a rather cosmopolitan fashion, to urge others to always be conscious of, and guided by, our inherent similarity as opposed to our difference because any distinction that might be worth acknowledging is one of degree, not kind. However, 'vulnerability' also needs to be reclaimed from the way it has been captured by discussions of public responsibility and has been designated as something that is attributed through the political process in a manner that strips away its subjects from agency. Fineman draws attention to this issue in a very succinct manner,

> '[i]n discussions of public responsibility, the concept of vulnerability is sometimes used to define groups of fledgling or stigmatized subjects, designated as 'populations'. Vulnerability is typically associated with victimhood, deprivation, dependency, or pathology. For example, public health discourse refers to 'vulnerable populations,' such as those who are infected with HIV-AIDS. Groups of persons living in poverty or confined in prisons or other state institutions are often labelled as vulnerable populations. Children and the elderly are prototypical examples of more sympathetic vulnerable populations'.[279]

[273] (Peroni & Timmer, 2013, p. 1059.
[274] Fineman, 2008, p. 13.
[275] Sen, 2009, p. xii.
[276] Sen, 2009, p. xi.
[277] Fineman, 2017, p. 136; p. 138.
[278] Sen, 2009, p. xii.
[279] Fineman, 2008, p. 1.

In reference to this quote, perhaps the most significant aspect to Fineman's theory is her reclaiming of the term 'vulnerability' in a manner which removes it from the politically charged act of attributing it and also cleanses it from its limited and often negative undertones. In the author's own words, her work on vulnerability allows her to 'focus on a concept or term in common use, but also grossly under-theorized, and thus ambiguous. Even when the terms is laden with negative associations, the ambiguity provides an opportunity to begin to explore and excavate the unarticulated and complex relationships inherent but latent in the term'.[280]

The pivotal paradox of vulnerability is that it is simultaneously universal and particular due to our embodied nature; being embodied, we are all vulnerable, but because of the different physical characteristics we might have, we experience our shared vulnerability in a manner particular to us. The corporeal nature of the theory also pivots the ideas of harm and suffering to the centre-stage of many vulnerability accounts,[281] reminding the reader of humans' permanent liability to harm, whether it be bodily, economic, psychological, institutional or other. The institutional harm is particularly central to Fineman's theory as she argues that a vulnerability analysis is better at addressing substantive inequality than a non-discrimination analysis is because it can capture the 'webs of economic and institutional relationships'[282] which contribute to the differing level of advantages and disadvantages we accrue within our lifetime.

Through my work, I would like to propose and illustrate Fineman's theory as the missing piece in the puzzle of narrowing the gap between global justice theories on migration and the European Court of Justice's practice on asylum. Her theory is capable of conversing both with political philosophy and with judicial practice. In the former case, the conceptualisation of the universal and inherent vulnerability of all human beings offers a new source of universality based on which the conceptualise our duties to all human beings in dire straits, irrespective of their geographical location (within our outside the borders of the state we live in), their relationship to us (compatriot or not), and of the source of their exacerbated vulnerability (the focus is shifted from the *source* to the *extent* of their vulnerability). In that sense it is very close to the idea of humanitarianism. Additionally, the vulnerability approach qualifies some of the fundamental goals of pursuing justice such as equality and freedom. Instead of pursuing equality as an abstract idea, Fineman argues for pursuing 'equality in context', which is not exclusively anchored in the identity of a person (such as their age, gender, ethnic background, or other), but additionally allows for keeping in mind the circumstantial aspects of a person's situation. Equally, when applied to the pursuit of freedom, Fineman's theory neatly builds upon Amartya Sen's emphasis that both 'individual freedom *and* the force of social influences on the extent and the reach of

[280] Ibid, 2008, p. 9.
[281] Peroni & Timmer, 2013, p. 1058.
[282] Fineman, 2008, p. 269.

individual freedom' need to be taken into account.[283] As for judicial practice, it is through the presence of the idea of vulnerability in the Court's vocabulary that one is able to establish a quick link to Fineman's theory. It is in its unique ability to converse with both disciplines that Fineman's vulnerability theory arises as an excellent candidate for bridging the gap between them. It is the author's aim to have successfully convinced the reader of this unconventional choice's appropriateness by the end of this work.

6.2. Theorizing the 'State' in a Vulnerability Analysis

'the ultimate objective of a vulnerability analysis is to argue that the state must be more responsive to, and responsible for, vulnerability'.[284]

The idea of the 'state' takes a major role in Fineman's development of her 'vulnerability thesis' and she foresees a much more active in the structuring of life role for it. She claims that she pursues,

> 'the development of a theory based on human vulnerability in which *the state is theorized as the legitimate governing entity* and is *tasked with a responsibility* to establish and monitor social institutions and relationships that facilitate the acquisition of individual social resilience. The theory is based on a descriptive account of the human condition as one of universal and continuous vulnerability' [emphasis added].[285]

Fineman's state is responsible for enhancing human resilience, which is in turn the only protection against the negative consequences that might flow from our vulnerability. Looking more into her rather unconventional conceptualisation of the state is therefore vital to understanding her work. It is, however, also relevant to the work of global justice theorists, who constantly engage with the idea of the nation-state (whether to confirm or deny its relevance) and for legal scholars, who might doubt the consequence of her theory for the *sui generis* legal order that is the European Union. Fineman describes the 'state' as follows,

> 'the 'state' referred to in this analysis is not necessarily the nation-state. The term is used to refer to an organized and official set of linked institutions that together hold coercive power, including the ability to make and enforce mandatory legal rules, and that is legitimated by claim to public authority. In form the 'state' could be locally, nationally, transnationally, or internationally organised'.[286]

This definition of the 'state' leaves a lot of room for manoeuvre for statists, cosmopolitans, and EU legal scholars alike. Fineman's theory is not limited to the Westphalian nation-state, although one can easily apply it within that context.

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[283] Sen, 2009, p. xii.
[284] Fineman, 2008, p. 9.
[285] Fineman, 2017, p.1.
[286] Fineman, 2008, p. 13.

In her description of the current role it has taken on in our everyday lives, Fineman theorises the 'state' as 'restrained'. However, she posits her 'vulnerability thesis' to motivate its transformation into a more 'responsive' one to be driven by the pursuit of ensuring and improving human resilience. She sees the state as the 'ultimate legitimate repository of coercive power' and the 'only realistic contender' in the pursuit of countering entrenched self-interest whose unfettered control of the free-market, she argues, has contributed to an unequal society.[287] She therefore posits the idea of resilience as complementary to, and necessary for, addressing human vulnerability and seeks to theorise a state motivated by improving human resilience. She argues that a vulnerability analysis would deliver substantive equality through focusing on the 'institutional practices that produce identities and inequalities in the first place'.[288]

6.3. Assets, Asset-Conferring Institutions, Resilience and Systems Addressing Vulnerability

Fineman starts the discussion of resilience in addressing the political repercussions of re-framing the political subject as the vulnerable subject. She uses the idea of resilience as the focal point of her answer to the question she presents as the natural consequence of the vulnerability thesis, namely: 'What should be the political and legal implications of the fact that we are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration?'.[289] Her answer lies in a more informed institutional focus, which allows for supplementing the consideration of the individual subject and her vulnerability with an understanding of her social context.[290] In her analysis, Fineman chooses to focus on those institutions created and maintained by the state and argues that there are 'interlocking and overlapping, creating the possibility of layered opportunities and support for individuals, but also containing gaps and potential pitfalls'.[291] She subsequently calls the collective interaction of these institutions 'systems', which she sees as capable of lessening vulnerability. Here, Fineman's theory builds largely upon Peader Kirby's elaboration on systems addressing vulnerability, which he discusses at length in his book *Vulnerability and Violence*. There, he argues that together and on their own, these institutions can provide us with 'assets', which are broadly defined as advantages, coping mechanisms, and resources that 'cushion us when we are facing misfortune, disaster, and violence'.[292] The assets provided by social organisations and institutions Kirby distributes amongst three broad categories: physical, human

[287] Ibid, p. 6.
[288] Ibid, p. 16.
[289] Ibid, p. 6.
[290] Ibid, p. 12.
[291] Ibid, p. 13.
[292] Ibid, p. 13.

and social assets.[293] The cumulative effect of these assets is called 'resilience' and it goes hand in hand with the idea of vulnerability.

The engagement with the idea of 'assets' enables one to see institutions as asset-conferring. All of the above categories described by Kirby and endorsed by Fineman are,

> 'analytically helpful in constructing a vulnerability analysis in that [they] illuminate the link between asset accumulation by individuals and the creation and maintenance of societal institutions. The nature of this relationship, coupled with the fact that asset conferring institutions initially are brought into legal existence only through state mechanisms, places such institutions within the domain of state responsibility. As asset-conferring entities, these institutions distribute significant societal goods and should be more specifically regulated; normatively, this state involvement requires that the state be vigilant in ensuring that the distribution of such assets is equitable and fair. Together with the concept of the vulnerable subject, understanding the state's relationship to asset-conferring institutions gives us a vocabulary for arguing that the state should be held accountable for ensuring equality in response to individual and institutional vulnerability'.[294]

By applying Fineman's thesis to the Court's jurisprudence, I will be examining its responses to different levels of vulnerability and thereby illuminating to what extent it is either perpetuating or alleviating applicants' vulnerabilities. I will also be bridging the Court's practice to the wider philosophical tradition of global justice by establishing a novel avenue through which philosophers can apply their different conceptions of justice, with their varying understandings of freedom and equality to the Court's jurisprudence. My work is therefore making global justice discussions on migration and judicial practice within asylum mutually intelligible. In addition, whilst I will not proceed to subject other EU institutions to an analysis that questions their robustness in ensuring individual resilience, it is worth noting that bringing Fineman's vulnerability thesis to the table can additionally contribute to studies of public governance.

6.4. Added Value of the Vulnerability Thesis

Studying the migration jurisprudence of the Court, a number of cases seem to consider applicants' vulnerability both *explicitly* and *implicitly*. Albeit inconsistent, references to the language of vulnerability have allowed the Court to already establish contact with the idea. Therefore, the concept proves as a useful heuristic device to study the legislation applied by the

[293] Ibid.; Broadly speaking, physical assets refer to those physical or material goods (such as wealth and property), which define our current quality of life; human assets are the 'innate or developed abilities to make the most of a given situation' broadly understood as human capital or capabilities with health and education being excellent examples for the category; social assets refer to the networks of relationships which provide us with support and strength, whether they be the family or a trade union (Monnet, 1978, p. 417).

[294] Peter Kirby, *Vulnerability and Violence: the Impact of Globalisation*, London: Pluto Press, 2006, p. 55.

Court and its decisions. It is also a powerful instrument for re-framing and unifying all of its existing legislation involving particularly vulnerable subjects, such as LGBTQIA+ applicants, minors, and applicants with mental health issues. It would allow examining the suffering of applicants whose cases entail economic considerations in a manner placing them on equal footing with those whose rights have been deprived by the state. Perhaps most significantly, adapting this theory to judicial practice (albeit exclusively within the context of migration jurisprudence) will have overwhelming repercussions within other areas of judicial practice. Its applicability irrespective of nation-state borders would also be of significance within the unique EU institutional context. Equipping judges with 'vulnerability' as an important measure would enable its use within domestic legislation too. EU citizens are also vulnerable and re-framing the political subject as the vulnerable subject will have far-reaching consequences for third country nationals and EU nationals alike.

By virtue of being universal and constant, vulnerability applies to everybody, whether within or outside the nation-state's borders and is therefore, the antidote to 'other'-ing. It accounts for difference in legal and political cultures; it is not confined to a particular point in time, but is instead continuous; it takes account of the role of the market economy and pre-empts any misuse of her theory to further market ends by limiting its application to all real, as opposed to legal, subjects; it includes all social and institutional relationships. The theory can be used as the cornerstone for revisiting and revising the existing migration regime (**Chapter II.5.**); it can speak with equal intelligibility to political philosophers (Set within the context of this paper, answering Valverde's call means asking why the 'human rights' logic of the *effectiveness* principle is applied within the integration jurisprudence, but disappears within the asylum case law. The answer then lies with an application of the 'scale conception of law' and an understanding of the jurisdictional clashes occurring in the EU asylum space. This presents the opportunity to of conceptualising the change as the consequence of changing scales, clashing jurisdictional 'logics'. Indeed, the changing definition of 'effectiveness' is evidence of moving from a human rights-based logic of derivative rights within the internal market to this 'concurrent reinforcement of protective claims and protectionist policies'[295]-logic applicable within the asylum regime. The discussion is also an excellent example of rights emerging and disappearing when one moves between jurisdictions within the same geographical space and enables a new understanding of the Court's behaviour.) and to judges (**Chapter IV**, **Chapter V**); and last, but not least, it can provide the theoretical flesh to the Court's otherwise naked use of the concept in jurisprudence (**Chapter V**).

[295] Sandra Lavenex, 'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System, *Journal of Common Market Studies*, *56*(5), p. 1195.

6.5. Caveats to the Application of the Vulnerability Thesis to the International Protection Regime

There are a few caveats that needs to be mentioned before the analysis can continue. Firstly, regardless of whether the vulnerability thesis becomes the basis of an international protection regime or starts informing the human rights analysis of the ECJ within the asylum sphere and beyond, the truth remains that as long as the international protection regime continues to be premised on, and activated upon, asylum seekers' arrival at the borders of a destination state, the international protection regime will never grant protection to those who are, as a matter of fact, the most vulnerable, but by virtue of said vulnerability, are unable to make the journey. With dangers lurking at every corner of an asylum seekers' journey, immigration 'becomes a game with the deck stacked in favour of the hardiest, savviest, and luckiest migrants, or simply those so desperate that they are willing to put their lives and often the lives of their families at risk'.[296] That is not to say that those who make the journey are not vulnerable, or vulnerable enough to be granted protection, but that one of the central premises of the current protection regimes fundamentally and pre-emptively undermines any endeavour to protect the most vulnerable.

Secondly, the idea of vulnerability already occupies a prominent role in the popular imagination surrounding the international protection regime. Although never explicitly mentioned in the 1951 Geneva Convention or the 1967 Protocol, the idea has captured the popular imagination in the binary between 'worthy' (vulnerable) refugees and 'unworthy' (not vulnerable) economic migrants. As Ramji-Nogales notes, '[t]he power of refugee law creates and reinforces this distinction, somewhat ironically given that the Refugee Convention recognizes that refugees would become part of the labour force in their destination state'.[297] This is precisely the kind of nuance that is enabled through Fineman's vulnerability analysis, which can capture the many, also non-economic, reasons which can force a person to seek asylum, such as climate change, hunger, mental health, and destitution. Ultimately, the refugee/economic migrant binary, which is an anyway 'gross oversimplification that is amenable to a variety of strategic uses'[298] can be dismantled through a Fineman-style vulnerability analysis, whose universality would do away with its more biased, and assigned use, whereby it is granted to the refugee, but denied to the migrant.

Third, the non-critical and non-reflective use of the term 'risks reinforcing the vulnerability of certain groups by essentializing, stigmatizing, victimizing, and paternalizing

[296] Fineman, 2008, p. 13.
[297] Ramji-Nogales, 2017, p. 10.
[298] Ibid.

them'.[299] Even though the cautioning advice is given within the context of the use of the 'vulnerable-group reasoning' of the European Court of Human Rights, it is still very relevant for ensuring a reflective and critical application of the idea of vulnerability. A very important aspect of preventing those risks is for the Court,

> 'to always make sure that it does not apply vulnerability as simply a "label" (a label easily turns into a stigma), but as a "layered" concept […] The focus should be on the various circumstances that *render* certain groups vulnerable, not on which groups *are* vulnerable. The Court (ECtHRs) should insist on and strengthen its contextual inquiry to determine whether a group may be vulnerable or not. This approach will help avoiding a reified conception of group vulnerability, as the focus is expanded towards the social and historical forces that originate, maintain, or reinforce the vulnerability of a group'.[300]

Indeed, Peroni and Timmer's emphasis on looking at an applicant holistically in order to establish how she or he is particularly vulnerable is the more effective way of applying the idea of vulnerability and is most in line with Fineman's aim to see all the complex causes that come together to render an individual particularly vulnerable even beyond their identity. This would help 'avoid trivializ[ing] the abilities of persons who belong to an otherwise vulnerable group' and preserve their agency.[301]

[299] Peroni & Timmer, 2013, p. 1070.
[300] Ibid, p. 1074.
[301] Ibid.

CHAPTER III

The European Court of Justice and the Common European Asylum System (CEAS)

As a precursor to the empirical findings in **Chapter IV** and **Chapter V**, the following chapter is tasked with summarizing the main characteristics of the Court's practice within asylum and illuminating it through explaining the context of the Court's idiosyncratic nature, its interpretative tradition, and the self-perception of the judicial actors gleaned through interviews conducted at the Court. I rely on my empirical findings from the in-depth study of the ECJ's asylum jurisprudence to posit that the Court has approached it with an administrative attitude, characterized by overwhelming concern for the technicalities of the system. Yet, by referring to information from the interviews undertaken at the Court, I claim that even in the most overzealous engagement with the mechanics of the legislative instruments before it, the Court has always perceived itself as upholding the principles of procedural justice. I question this self-perception by interrogating the fine line between upholding procedural justice and having an uncritical attitude towards the wording of legislative instruments because of their democratic pedigree. I conclude this chapter by bringing forward a number of potential explanations for the Court's administrative behaviour that go beyond institutional arrangements and organisational politics.

The chapter is divided into two parts: the idiosyncrasies of the ECJ as a supranational court (Part I) and the idiosyncrasies of the CEAS as a field of overlapping legalities (Part II). Part I proceeds in three steps. First, I inspect the Court's unique role within the EU institutional framework (III.1.). Second, I outline the Court's idiosyncratic mandate, taking the opportunity to focus on its unique relationship with the EU legislature (III.2.). Third, I pay special attention to the role of the Treaties for contextualising the role taken on by the Court (III.3.). In Part II, I rely on de Sousa Santos' and Valverde's ideas to frame EU asylum's multilevel governance structure as a site of intense 'interlegality' (III.4.) before moving onto the interpretative techniques used by the Court (III.5.). Here, I pay attention to the increasingly prominent role of the EU Charter of Fundamental Rights in the Court's jurisprudence and reflect on the significance of this development.

Part I: The Idiosyncrasies of the ECJ

1. The Court's Unique Role within the EU Institutional Framework

The European Court of Justice is one of a kind. It has the characteristics of both a national and a supranational judicial body; it is both an extension of national courts and a supreme court of its own. Its decisions are consequential for a huge number of constituents and its jurisdiction is growing due to the number of Member States (usually) increasing and the topics covered by its mandate constantly diversifying. It has been studied by many prominent legal scholars, often with the intention of uncovering the extent of its transformative political power.[302] Therefore, contextualising the ECJ cannot happen without examining its idiosyncrasies in more detail.

The unique institutional setup of the European Union has far-reaching consequences for the European Court of Justice, which emerges as the *de facto* 'principal' in its relationship with the EU legislature, where the latter is the 'agent'.[303] A number of prominent scholars have long argued that the EU institutional framework has led to a 'politics under law'-type setup.[304] Though tempting, any direct comparisons between a nation state and the EU, as well as between a national constitutional court and the ECJ, should always be qualified. The difference between the structure of the EU and that of the nation state is not only of type, but also of extent; it translates into a 'politics-steering' role for the ECJ that is 'unique, yet within the logic of European integration more coherent than it may at first seem'.[305] In its everyday practice, the Court can be 'politics-steering',[306] it can occupy Member States' role in the periods between Treaty changes, and it can be credibly designated as having ownership of the Treaties.[307] Yet, it is not unrestricted in these roles, and as my work will show, controversial areas such as asylum, which touch on sensitive issues like Member State sovereignty, have pushed the Court towards playing a more administrative, and ultimately deferential role. Davies' opinion is further qualified by recent studies which show that the codification vs. override dichotomy, familiar from national approaches to judicial decision making, is incapable of grasping the complexities of

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[302] Karen Alter, Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice. International Organization, 52(1), 1998, 121-147; M. A. Pollack, 'The New EU Legal History: What's New, What's Missing?', *American University International Law Review*, 28 (5), 2003, pp. 1257-311. Höpner and Schäfer, 2012).

[303] G. Davies, The European Union Legislature as an Agent of the European Court of Justice, *Journal of Common Market Studies*, *54*(4), 2016.

[304] K. A. Armstrong, 'Legal integration: theorizing the legal dimension of European integration'. *JCMS: Journal of Common Market Studies* 36(2), 1998, pp. 155-74, p. 163; L. J. Conant, *Justice Contained, Law and Politics in the European Union*. Ithaca: Cornell University Press, 2002, p. 15; M. Rasmussen, Rewriting the History of European Public Law: The New Contribution of Historians. *American University International Law Review,* 28(5), 2013, 1187-1223, p. 1195; Dorthe Sindbjerg Martinsen, Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union, *Comparative Political Studies*, 48(12), 2015, p. 29.

[305] Davies, 2016, p. 848.

[306] A. Stone Sweet, *Governing with Judges : Constitutional Politics in Europe*. Oxford University Press, 2000; Davies, 2016.

[307] A. Stone Sweet & T. Brunell, The European Court of Justice, State Noncompliance, and the Politics of Override. *American Political Science Review, 106*(01), 2012, pp. 204-213.)

current EU politics.[308] Instead, it needs to be complemented by the additional conceptualisation of modification and nonadoption as additional political responses capable of 'attenuat[ing] unwelcome jurisprudence and constrain[ing] the legislative effect of judicial decisions'.[309] Therefore, whilst it is not inaccurate to claim that ECJ decisions are influential for policy outputs and 'new, Court-generated status quo' can 'limit the policy options available to politicians', it is important to be aware of the wider context of the European Union and of how it can limit the effect of judicial decisions.[310]

The EU, whilst sharing certain characteristics with the nation state, is also very dissimilar from it in a number of respects. First, the EU Treaties and the Charter, which have a *de facto* constitutional status,[311] but whose effect can be limited through modification and non-adoption[312] are quite different from national constitutions. In the majority of nation states have constitutions which usually outline the institutional structure of the state and the constraints to those institutions deriving from a limited set of core normative principles. In the EU, the Treaties additionally constitutionalise the Union's normative goals and legislative capacities.[313] This makes it easy, but fundamentally misleading, to expect the ECJ to play the same role as a national constitutional court.[314]

Second, the EU legislature is not an independent political entity, but rather, 'an agent of the Treaties' tasked with implementing a 'constitutionalised plan'.[315] Indeed, there are a number of scholars who have argued that when it comes to substantive policy-making, the role of the ECJ is exaggerated.[316] Noteworthily, the EU does not have organic competences, and is only allowed to legislate to the extent of the mandate granted to it through the Treaties by the Member States[317] and guided by the principles of conferral, subsidiarity and proportionality.[318] This is significant for clarifying the role of the EU legislature, which is not allowed to follow an autonomous vision for the future of the EU, but is instead curbed in its actions by the specific goals outlined in the treaties and enforced by the Court. The resulting unique relationship has

[308] Dorthe Sindbjerg Martinsen, Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union, *Comparative Political Studies*, 48(12), 2015, 1612-1660, p. 29.
[309] Ibid, p. 31.
[310] Ibid, p. 29.
[311] Davies, 2016.
[312] Martinsen, 2015.
[313] Davies, 2016, p. 846.
[314] A. Von Bogdandy & J. Bast, The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform, *Common Market Law Review*, *39*(2), 2002, 227–268.
[315] Pola Cebulak, *Judicial Activism of the Court of Justice of the EU in the Pluralist Architecture of Global Law*, 2011, p. 219.
[316] K. A. Armstrong, 'Legal integration: theorizing the legal dimension of European integration'. *JCMS: Journal of Common Market Studies* 36(2), 1998, pp. 155-74; M. Rasmussen, Rewriting the History of European Public Law: The New Contribution of Historians. *American University International Law Review,* 28(5), 2013, 1187-1223.
[317] See Article 5 of the TEU.
[318] Davies, 2016, p. 484.

inspired Gareth Davies to portray the EU legislator as a 'competition regulator or safety regulator […] carrying out a mission defined by authorities higher in the normative order'.[319]

Third, whilst the EU legislature might be the agent of the Treaties, it is the Court that is entrusted with interpreting their otherwise vague wording. Being broadly drafted and 'imbued with purpose-driven functionalism', the Treaties 'provide no more than a framework'.[320] Therefore, whilst helping with the teleological interpretation of secondary legislative instruments, the opportunities for a literal application of the Treaty provisions are limited.[321] Moreover, since the Treaties establish the legal bases for legislative acts, but they are so open-textured, their meaning and scope is left to be determined by the Court. This information so fundamental to directing the actions of the legislature thereby rests with the case law to the extent that the influence of the wording of the Treaties themselves is increasingly waning. This is especially so within the area of asylum, where the majority of rules are procedural, as opposed to substantive, and the many important terms are not defined in reflection of the Brussels-compromise that often characterises the adoption of legislation in this controversial area. This is consequential for the institutional hierarchy because the Court is allowed a lot of interpretative wriggle room. It has led some academics to argue that there is a 'principal-agent' relationship between the two institutions, with the Court acting as the principal and the legislature stepping in as its agent.[322] Knowledge of this unique institutional setup of the EU is often reflected in the Court's jurisprudence and is thereby fundamental to any attempts of profoundly understanding it.

In conclusion, there is a difference between the way the institutional relationships appear, and the way they play out. On the surface, the Member States are the ones who dictate the powers granted to the EU legislature and delineate its mandate through the Treaties; they are the principals and the legislature is the agent.[323] However, in practice, as the Court interprets the meaning of the mandate, it ends up 'effectively occup[ying] the Member States' role in the periods between Treaty changes. This observation does not, however, reflect on whether the Court is free from external influences and to what extent it is autonomous. As noted by others, 'the Court is one actor among many in the EU policy process' and one cannot ignore the effect of Member States' varying degrees of reluctance or willingness to accept the full-blown effects of ECJ decisions.[324] After all, the Court was created and continues to exist thanks to the sovereignty of the Member States, so it would be misleading to award it complete freedom to

[319] Davies, 2016, p. 484.
[320] K. Lenaerts & J. A. Gutierrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, *Columbia Journal of European Law*, *20*(2), 2014, p. 13.
[321] Ibid.
[322] Davies, 2016.
[323] Ibid, p. 848.
[324] Martinsen, 2015, p. 10.

test Member State sovereignty to its limits. Regardless of whether Davies' principal-agent theory can be applied to the relationship between ECJ and EU legislature, it definitely has a stronger role than most national highest courts in the balance of powers structure.

2. The Court's Idiosyncratic Mandate

Comparisons to national courts are equally inadequate when it comes to the mandate of the Court. First, the European Court of Justice is the highest court of the European Union, albeit not the only one belonging to the EU legal order. In fact, the EU boasts two courts, the European Court of Justice and the General Court, which are collectively referred to as the Court of Justice of the European Union (CJEU). Though both courts serve their individual functions, this thesis focuses on the former as it is the supreme court of the Union and the one which addresses cases of asylum and immigration. The existence of the General Court is important to mention, however, as this can draw attention to the presence of internal dialogue in the CJEU, which can have an impact on the standpoint of the Court.[325] Second, the CJEU has the ultimate word on issues concerning EU law, giving an interesting dynamic to the relationship the two EU courts have with the national courts of the Member States. This relationship is even more intriguing when the hierarchical conversation concerns any of the exclusive competences of the Union.[326] Whilst in the case of immigration and asylum, the EU and the Member States have a shared competence[327], the knowledge that this competence could have been exclusive contextualises the case law. Third, the ECJ is only allowed to deal with questions of law, and not of fact. This has both its pros and cons because to a large extent, this is a time-saving characteristic of the Court. As one of the judges noted in the interviews, if the Court were to be considering facts, the delivery of its judgments would be a much more time-consuming process.[328] Yet, he was also right to stress a downside to the process. Dealing exclusively with law means that judges from the ECJ have the same tools as national judges in their judicial toolbox, but not the same pool of data available for their application.[329]

Fourth, the ECJ can often find itself in the precarious position of having to account for the alternative legal orders to which either the EU as a whole or its Member States independently are committed to, with the result of many jurisdictions overlapping in the same area. This is hardly surprising when the process of globalisation has only exacerbated the interwovenness between national and international law.[330] The process has prompted academics to theorise new models that would more accurately reflect how diverse legal orders interact with each other,

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325 Cebulak, 2011, p. 219.
326 Ibid.
327 See Article 79(5) TFEU.
328 See Interview#6, conducted on 24/09/2018. Transcript available on file with the author.
329 Ibid.
330 Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law,* Oxford University Press, 2010.

with the conventional portrayal of the different exchanges as those between separate and independent legal orders growing obsolete and necessitating a more unified scheme.[331] One important effort at this was Krisch's conception of 'postnational law' to elucidate the dense interwoveness between national and international law.[332] The idea of postnational law connotes the 'increased cross-border flows of services, goods and capital, as well as the process of deformalisation of international relations expressed in a shift from "government" to "governance" and a dispersion of sources of authority away from the national state both vertically (due to internationalisation and communitisation) and horizontally (involving private actors)'.[333] The description afforded to postnational law is of course one that accurately captures what happens at EU level, although cross-border movements might have a very different character and diverse consequences depending on whether the borders are internal or outer EU borders. The idea of postnational law has a dynamic element to it that allows it to capture the constant shifts that blur the lines between national and international law. In its dynamicity, it is an idea that is very close to Valverde and de Sousa's use of the idea of 'interlaw' and 'interlegality'.[334] The effects of globalisation are not, however, limited to increased fluidity between national and international legal orders. Those are inscribed into regional and global legal orders, which often build upon one another, as in the case of the EU Charter building upon the ECHR, for example. In the asylum sphere, the European Court of Human Rights emerges as a partner and a reference point for the ECJ because questions of human rights protection arise often.[335] This overlapping jurisdiction has the potential to be both a point of conflict and of cooperation. As noted by Cebulak, 'from the national perspective of the Member States, the "classical dual relationship international law/national law, is gradually becoming replaced by a new triangular relationship, international law/EU law/national law"'.[336] This is hardly a novel observation, but is an important one nonetheless. There are many legal orders interacting between each other at any one time, and a static model is incapable of capturing the complex regime management skills that are required for a traditional institution like the ECJ to operate within them. Therefore, de Sousa Santos and Valverde's interdisciplinary efforts at applying ideas from critical geography to study the effects of dynamic overlapping regimes offer incredibly valuable tools for understanding the loss and gain of rights in moving between

331 Erika De Wet, The International Constitutional Order, *International and Comparative Law Quarterly*, 2006, Vol. 55, No. 1, pp.51-76, p. 75.
332 Krisch, 2010, p. 5.
333 Cebulak, 2016, p. 198.
334 De Sousa Santos, 1987; Valverde, 2009.
335 Nico Krisch, The Open Architecture of European Human Rights Law. *LSE Legal Studies Working Paper No. 11/2007*, 2007; P. Cragl, A giant leap for european human rights? The final agreement on the european union' Saccession to the european convention on human rights, *Common Market Law Review*, *51*(1), 13–58.
336 Cebulak, 2016, p. 199, quoting Nollkaemper, De Wet and Wouters, 2008.

different jurisdictions. Indeed, what might appear as peaceful coexistence between all the legal regimes governing asylum applicants has many potential points of conflict.

Fifth, the 1951 *Geneva Convention Relating to the Status of Refugees* and the subsequent 1967 *Protocol* do not have enforcement mechanisms, so reliance on them and their evolving interpretation has predominantly occurred in the ECJ and the European Court of Human Rights (ECtHR). Here, it is important to note that the ECJ has been increasingly vocal in underlining that, unlike the Charter of Fundamental Rights of the European Union, the decisions of the ECtHR and the content of the ECHR are not binding. As per Valverde's theoretical elaborations,[337] the ECJ's choice as to the 'who' of governance (the Charter, as opposed to the ECHR) thereby decides the 'how' of governance (through resorting to the rights elaborated on in the Charter, and not in the ECHR, and thereby increasing its visibility and legitimacy in the international order). Fifth, the European Court of Justice delivers its judgments in a single voice. Thus, in contrast to the case law of the European Court of Human Rights, where we may be able to read dissenting opinions at length, the case law of the European Court of Justice does not provide the opportunity to know exactly what discussions occurred leading up to the judgment. What we do know, however, is that a judge is *homo politicus* and as such, 'does not decide a case in a vacuum' so that 'every case is bound to carry a policy, social and political message'.[338]

3. The Treaty-Provided Context Around the Court's Performance

Article 19 of the Treaty on European Union (TEU) defines the gatekeeper role of the ECJ as one of 'ensur[ing] that in the interpretation and application of the Treaties the law is observed'. The Court's obligation is further clarified in the important case of *Les Verts*[339], where it clarified its own role as one of interpreting the law in a manner that would prevent any normative lacunae from leading to a result contrary both to the spirit of the Treaty […] and its system'[340]. The Court continues to perceive its role in the same way, with several officials stressing the difference between applying and interpreting the law and the importance of noting that the Court is there to first and foremost, *apply* the law, and only, if faced with vague legislation, *interpret* the law in a manner observing the rule of law.[341] Keeping in mind the 'Brussels compromise'-nature of the AFSJ legislation, where application of the law would be difficult because of its vague wording, it is easy to imagine that the Court would most often be taking on the interpretative hat when manoeuvring within the asylum sphere. This means that

337 Valverde, 2009.
338 I. G. Lang, Towards "Judicial Passivism" in EU Migration and Asylum Law? *Preliminary Thoughts for the Final Plenary Session of the 2018 Odysseus Conference*, 2018.
339 Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1357.
340 See Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1357, para. 25.
341 See Interview#2, Interview#4, Interview#5, Interview#6, Interview#7, Interview#9.

it would face many instances of having to imbue the legislation before it with meaning of its own choice.[342] Finally, as the President of the Court Koen Lenaerts himself notes, declining to apply or interpret vague legislation is not an option, as 'a refusal to interpret a provision of EU law because it is obscure, silent or insufficiently clear would run counter to the principle of effective judicial protection – enshrined in Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union (the 'Charter') --, given that such a refusal would constitute a denial of justice'.[343]

The interpretative role of the Court aside, it has to also pay attention to the EU principles of institutional balance and mutual sincere cooperation, as per Article 13(2) TEU, which states that:

> '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'[344].

Article 13(2) TEU ensures that the separation of powers principle is observed and the privileges afforded to the EU legislature remain within its domain. The most fundamental role of the Court can thus be summarized as applying (or, when necessary, interpreting) the law in a manner which strikes the right balance between the principle of effective judicial protection and the principles of inter-institutional balance and mutual sincere cooperation.[345] The three interpretative techniques that the Court uses are then its manner of realizing this delicate task.

Even though the Court of Justice has 'acquired a certain celebrity for dynamic interpretation',[346] it is worth noting that it has happened with regards to the development of the most fundamental of Treaty concepts. The same activism cannot be expected within the AFSJ because of the wide-ranging and at times conflicting objectives discussed above. Additionally, contextual sensitivity to the historical development of the AFSJ, its progressive communitarisation and the Court's limited jurisdiction over it until 2009 is an important factor to account for when noting the Court's comparatively timid behaviour within asylum.[347] This has led to the empirically correct observation that,

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342 Lenaerts & Gutierrez-Fons, 2014, p. 3.
343 Ibid.
344 Article 13(2) TEU
345 Lenaerts & Gutierrez-Fons, 2014, p. 3.
346 Hailbronner & Thym, 2016, p. 7.
347 Prior to the Lisbon Treaty, which did away with the three-pillar structure of the EU, the ECJ had only limited jurisdiction in the former 'Third Pillar', also known as the 'Justice and Home Affairs' Pillar. Up to the Lisbon Treaty, the preliminary ruling procedure would only be available if the Member State explicitly acquiesced agreed to it with a formal declaration. Upon the Lisbon Treaty's entry into force on Dec. 1st, 2009, the CJEU received full competence on EU law within the area, subject to a transitional period of five years, which expired on December 1st, 2014. For more readings on the impact of the Treaty of Lisbon on the AFSJ, please refer to: Vassilis Hatzopoulos, Casual but Smart: The Court's new clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty, *Research Papers in Law*, 2008; Christian Kaunert and Sarah Léonard, 'The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?' *Refugee Survey Quarterly*, Vol. 31, No. 4, 2012, pp. 1–20.

> '[t]he ECJ exhibits more sensitivity towards the choices of the EU legislature in areas where the EU Treaty awards the EU institutions a greater level of discretion. In the case law on immigration and asylum regulations and directives, there is a noticeable number of judgments developing their conclusion under the recourse to the wording, general theme, objectives and other interpretative principles mentioned above. This confirms that the Court's approach towards secondary legislation is more conservative, from a methodological perspective, than towards Treaty law. The legislature holds the primary responsibility to offset the framework for EU immigration and asylum law in the ordinary legislative procedure on the basis of Articles 77-80 TFEU'.[348]

Migrants might therefore not be entitled to the same cross-border freedom of movement rights that EU citizens enjoy constitutionally and the jurisdiction covering them might be rather incoherent, but the legislative discretion of the EU legislature is not absolute either; instead, it is subject to the governance regime established by human rights.[349] Last, but not least, Article 79 TFEU reiterates the shared competence between the EU and its Member States that is the hallmark characteristic of most questions relating to the entry and stay of foreigners.[350]

4. Interpretation at the European Court of Justice: A Complex Balancing Exercise

Understanding judicial decision-making at the European Court of Justice and the interpretative techniques on which the Court relies is fundamental for operating within the theoretical framework espoused by Marianne Valverde and performing the fine balance between high theory and the 'technicalities' of law that she refers to. Additionally, because the argument in both of the subsequent empirical chapters is intimately connected to and builds upon the language of the European Court of Justice, offering a brief overview of the Court's interpretative techniques is fundamental to understanding the discussion that is to follow. This would enhance the credibility of the analysis and enable it to escape the trap inherent in focusing too much on extra-legal relations and thereby 'reducing legal artefacts to invisibility or irrelevance'.[351] As important as the Court's interpretative techniques are, they cannot be fully grasped without an understanding of the Court's mandate and an outline of the Treaty-context in which they have to be exercised. Legislative interpretation at the European Court of Justice is unique in that the Court is charged with performing its idiosyncratic duties whilst striking the right balance between the principle of effective judicial protection and the complementary principles of

[348] Hailbronner & Thym, 2016, p. 7.
[349] Ibid, p. 4.
[350] Ibid, p. 272.
[351] Valverde, 2009, p. 153.

conferral and of mutual sincere cooperation that are fundamental to the functioning of the EU legal order.[352] Therefore, the following section will proceed by first, sketching the Court's distinctive mandate; second, outlining the balancing processes that underlie judicial decision-making as enshrined in the EU Treaties; and third, examining the techniques in more detail.

4.1. The Interpretative Techniques of the Court

There are numerous works devoted to the ECJ and its legal reasoning because it is so consequential for the development of the EU legal order.[353] The founding Treaties do not have any explicit direction as to the interpretative methods the Court should follow,[354] leaving ample room for ECJ judges to decide which method would best serve the delicate balance they are charged with upholding. Some scholars have therefore argued that ECJ relies on the traditional methods of interpretation (i.e. literal, contextual, and teleological interpretation) familiar from the 1969 Vienna Convention on the Law of the Treaties[355] and national judicial orders.[356] Despite the number of methods available at the national and international level, however, the President of the Court, Prof. Dr. Koen Lenaerts, is eager to remind one of the autonomy and unique character of the EU legal order, as underlined in the landmark judgments of *Van Gend end Loos*[357] and *Costa v ENEL*[358]. Those decisions confirm that the EU is a unique institution with a unique position within the international legal order, which therefore has a unique method of understanding and applying all of these methods because 'the fact remains that the ECJ may, in light of the autonomy of the EU legal order, attach a specific normative importance to that method'.[359] Therefore, although Member State constitutional traditions and public international law are clear reference points for the ECJ interpretative methods, they cannot be relied on to jeopardise the autonomy of the EU legal order which remains sacrosanct. In general, the European Court of Justice pursues three fundamental principles of interpretation, namely: textualism (which involves looking at the wording of the instrument and relying on the ordinary meaning of words), contextualism (internal, in looking at the normative context in which the

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[352] Šadl, The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU. *European Journal of Legal Studies*, *8*(1), 2015, pp.19–41, p. 20.

[353] For example, see: Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business*, Cambridge University Press 2014, pp.1-351; Gunnar Beck, *The Legal Reasoning of the Court of justice of the EU*, Hart Publishing 2012; Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, 2012, amongst others.

[354]Lenaerts & Gutierrez-Fons, 2014, p. 3; See however, Article 52 of the Charter of Fundamental Rights of the European Union which sets out interpretative rules for the Charter itself.

[355] See the 1969 Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, at 331. Article 31 of the Vienna Convention states that, in accordance with a general rule of interpretation, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [literal interpretation] in their context [contextual interpretation] and in the light of its object and purpose [teleological interpretation]'. In addition, Article 32 of the 1969 Vienna Convention refers to 'the preparatory work of the treaty and the circumstances of its conclusion' as complementary interpretative tools.

[356] Lenaerts & Gutierrez-Fons, 2014, p. 3.

[357] See Case 26/62 van Gend end Loos [1963] ECR 1, at 12, where the Court rules that 'the [EU] constitutes a new legal order of international law'.

[358] Case 6/64 Costa v ENEL [1964] ECR 585.

[359] Lenaerts & Gutierrez-Fons, 2014, p. 4.

EU law provision in question is placed and external, as confirmed through the *travaux préparatoires* which illuminate the decision-making process that went into a piece of legislation), and teleological interpretation.[360]

Textualism, or literal interpretation, consists of looking at the ordinary meaning of the words. This is also the interpretative method that 'best reflects the principle of legal certainty, as it guarantees a high degree of predictability in the judgments of the ECJ'.[361] Importantly, neither contextualism nor teleological interpretation would override textualism when a piece of EU legislation is clear and precise.[362] Contextualism, on the other hand, contains an internal and an external aspect. The internal involves looking at the normative context in which the EU law provision in question is placed and the external aspect relies on the decision-making process that went into a piece of legislation as confirmed through the *travaux préparatoires.*[363] The underlying premise of contextualism is *systemic interpretation*, i.e. one that perceives the EU legislature as a rational actor, who has founded a consistent and complete legal order through the Treaty framework.[364] To honour consistency, the Court should interpret all Treaty provisions consistently, and each EU legal provision in a manner that avoids conflict between the provision and the general scheme to which it belongs.[365]

Teleological, or purpose-driven, interpretation[366] is the most prominent method of interpretation that the European Court of Justice relies on. Koen Lenaerts argues that this is the case because unlike standard international treaties, the EU Treaties are built on 'the idea that there are objectives of paramount constitutional importance that the EU must attain'.[367] Indeed, the wording of the Treaties is rather general, relying on the political organs of the Union to achieve the objectives it espouses. Yet, the generality of the language cannot prevent the Court from exercising its powers, if a hearing takes place, as that would amount to the denial of justice.[368] The Court is therefore often in a situation where it 'must give concrete expression to notions which are too general and 'fill out' Treaty provisions whose meaning is incomplete'.[369] In such situations, the exercise of a Dworkinian-type of creativity by the judges is in high demand.[370] Teleological interpretation is also a very diverse, fit-all solution because it can be

360 Ibid, p. 5.
361 Ibid, p. 25.
362 Ibid, p. 6.
363 Ibid, p. 7.
364 Ibid, p. 13.
365 Ibid.
366 There is an important caveat to be made when discussing teleological interpretation. There are many instances in which a piece of EU legislation can be read as pursuing more than one objective. Since these objectives are not hierarchical, but are instead of equal importance, the ECJ then uses the principle of proportionality in deciding what the hierarchy of objectives should be.
367 Lenaerts & Gutierrez-Fons, 2014, p. 14.
368 Ibid, p. 24.
369 Ibid, p. 25.
370 Olsen and Küçüksu, Finding hidden patterns in ECtHR's case law: On how citation network analysis can improve our knowledge of ECtHR's article 14 practice, *International Journal of Discrimination and the Law*, *17*(1), 2017, p. 8.

applied both in situations of very broad wording (e.g. the Treaties), and in situations of very technical and complex wording (e.g. secondary EU legislation, such as the directives and the regulations governing the AFSJ). Therefore, the objectives pursued by the Treaties are operationalized very often as they are the founding elements of the purpose-driven interpretation. Yet, teleological interpretation cannot be uncritically accepted as an easy technical exercise of creative interpretation. Quite the contrary, as Beck notes, '[l]egal or judicial reasoning itself which seeks, or purports, to resolve uncertainty in primary legal texts by means of interpretative tools, cannot in turn escape vagueness and norm collision. Vagueness and value pluralism must be regarded as central and inescapable features of judicial interpretation no less than of the earlier law-making and drafting process'.[371] Beck's observation is significant in light of this work's theoretical indebtedness to Valverde and de Sousa Santos' conceptualisation of law as a mapping exercise which hides norm collisions under the veneer of objectivity.[372] It allows us to add a dimension of our understanding of the Court's interpretative techniques as much as an effort to handle incoherence as pursuing the resolution of conflicts caused by qualitative incommensurability.

Teleological interpretation can be subdivided into three kinds.[373] First, there is the 'functional interpretation', whereby the Court seeks to ensure the 'effectiveness' (or *effet utile*) of the legal instrument in question. Here, the Court has to assess the normative context of the provision in question in order to establish the interpretation that would best protect the effectiveness of the provision. Then, there is the 'teleological interpretation *stricto sensu*', which means that if an EU law provision is vague or incomplete, it needs to be interpreted in light of the objectives it pursues. Finally, there is the 'consequentialist interpretation' whereby the Court pays attention to the consequences that would result from them choosing a particular interpretation.[374]

Today, the fact continues to be that within the area of asylum, the Court is unusually preoccupied with the technicalities of the immediate language to the detriment of the bigger picture. This is highlighted by the Court's standard practice and is rendered particularly disturbing at the point of which political philosophy enters the landscape. There is a whole gamma of matters that are examined by global justice theorists who engage with the question of migration from a political philosophy angle. Keeping in mind that I had the aim of bridging the disciplines of political philosophy and law, I thought that discussions engaging justice with migration from the former field would easily connect with judicial discussions on the matter

371 Gunnar Beck, *Legal Reasoning of the Court of Justice of the EU*. Hart Publishing, 2012, p. 161.
372 De Sousa Santos, 1987; Valverde, 2009.
373 Lenaerts & Gutierrez-Fons, 2014, p. 25.
374 J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*. Oxford: Clarendon, 1993.

from latter field. In fact, I presumed that the bridge metaphor would be redundant because the two fields would already overlap to a certain extent. I was wrong. Reading through global justice theories on migration and the whole migration jurisprudence of the European Court of Justice, I realized that there was a divide between the two and I started to fear that it was unsurmountable.

4.2. What Role for Human Rights in Interpretation?

In the field of asylum and immigration, both human rights standards and international law have a strong effect on interpretation of EU law. Article 6 of the TEU states that '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […] which shall have the same legal value as the Treaties' and that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' This leaves little room for speculation as to the important weight human rights standards carry in EU law. The Charter is legally binding on the EU legislature, with the consequence that when in conflict with human rights, secondary legislation will be struck down unless it can be interpreted in conformity with human rights.[375] This is regardless of whether the recitals to a piece of secondary legislation invokes the Charter expressly or not.[376] EU Member States are also bound by the Charter when implementing EU law. The significance of the mandatory compliance with human rights is all the more highlighted when one thinks about the fact that in contrast, the weight given to international treaties concluded with third states is always subject to the considerations needed for preserving the autonomy of the EU legal order vis-à-vis the international legal order.[377] Daniel Thym has actually gone as far as to observe that the 'rejection of the traditional notion of unfettered state discretion concerning migration in light of human rights is significant and should be construed as the 'cosmopolitan outlook' of EU migration law'.[378]

Yet, a close reading of the asylum jurisprudence of the Court revealed that there were a number of cases in which rather than undertaking a human rights analysis, the ECJ favored focusing on the general scheme of secondary legislation. This is particularly characteristic of situations in which the human rights aspect was not deemed pertinent to the outcome of the

375 Hailbronner & Thym, 2016, p. 8; See for example, Cases C-199/12 - C-201/12 *X and Y and Z v Minister voor Immigratie en Asiel,* 7 November 2013, at para. 40.
376 Hailbronner & Thym, 2016, p. 23.
377 Hailbronner & Thym, 2016, p. 8; See for example, Case 6/64 *Costa v ENEL*, where the ECJ established that the EU is an autonomous supranational legal order distinct from public international law.
378 Daniel Thym, 'Citizens' and 'Foreigners' in EU Law. Migration Law and its Cosmopolitan Outlook. *European Law Journal*, 2016, p. 287.

case. Relevant examples consists of the silence on Article 8 ECHR in *Noorzia*[379] or the absence of comments on human dignity or Article 34 of the Charter in *Saciri*[380].[381] Within the logics espoused by Valverde, this choice of privileging the general scheme of a secondary instrument over a human rights analysis has far-reaching consequences for all stakeholders because deciding the 'what' (general scheme, instead of human rights) changes the 'how' of solving the problem; this means that individuals lose the place in the spotlight they are otherwise given in a human rights analysis whenever it shifts to a general scheme analysis. Additionally keeping in mind the didactic importance of ECJ pronouncements for national and international courts, it is hardly satisfying to presume that ignoring a human rights analysis is justifiable just because an alternative path leads to the same conclusion. That would be a very consequentialist way of looking at judgments, whereby their conclusions render their substance and path thereto irrelevant. Of course, one should remember that the ECJ needs to consider its mandate and other constitutional principles including the division of powers[382] between the EU and the Member States when deciding cases. Public international law, as represented by the international legal obligations of the EU, also remains present as a matter of principle,[383] whilst the Geneva Convention on the Protection of Refugees holds a special position entrenched in Article 78(1) TFEU which states that,

> '[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must 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.'

Yet, despite the need to ensure that the asylum jurisprudence complies with the Geneva Convention and the 1967 Protocol, the ECJ does not have an autonomous jurisdiction to interpret the Geneva Convention; it can do so only in combination with secondary relevant EU legislation.[384] Juggling all of these competing interests and having to consider all of its obligations, the Court is not, in that sense, a human rights court or 'a specialized immigration and asylum tribunal, but rather a supreme court with broader constitutional responsibilities'.[385]

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379 Case Case C 338/13, *Marjan Noorzia v Bundesministerin für Inneres*, 17 July 2014.
380 Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, 27 February 2014.
381 Hailbronner & Thym, 2016, p. 8.
382 See for example, the principle of conferral in Article 5(2) TEU.
383 Hailbronner & Thym, 2016, p. 8; On the role of international law in the EU, please refer to, Jed Odermatt, 'The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law', *Research Handbook on the International Court of Justice*, Edward Elgar Publishing, 2019; Jed Odermatt, 'Unidentified Legal Object: Conceptualising the European Union in International Law', Connecticut Journal of International Law, Vol. 33, No. 2, 2018.
384 Hailbronner & Thym, 2016, p. 26; See for example Recital 23 of the Asylum Qualification Directive (stating that its provisions are to guide the competent national bodies of the Member States in applying the Geneva Convention).
385 Hailbronner & Thym, 2016, p. 8.

Observing the language of the asylum jurisprudence of the Court, there is a definite trend towards increasingly referencing the EU Charter of Fundamental Rights and side-lining the European Convention of Human Rights as being part of the general principles of EU law.[386] Although arguably, the more human rights' instruments that get referenced by the Court, the better, this new tendency towards increasing the visibility, and thus the usage, of the EU Charter is a change to be embraced. Already back in 2013, de Burca published an influential article in which she showed that not only was there a 'sharp rise' in the number of cases that cited the Charter, but the Court had also 'engaged substantively with and given prominence to the Charter argument in a growing number of these cases'.[387] This had led to the rise of 'human rights adjudication' before the Court.[388] In its very strong report which, amongst other things, offers an empirical evaluation of the use of the EU Charter of Fundamental Rights in asylum proceedings, the European Council on Refugees and Exiles (ECRE) points towards the positive consequences of the ECJ choosing to rely on the Charter.[389] The main take-away is that it will increase its usage by national judges upon applying EU law domestically and thereby improve human rights protection in cases that do not reach the ECJ. ECRE's findings in the eight Member States that it studied[390] point towards the overwhelming reliance of Article 47 of the EU Charter ('Right to an effective remedy and to a fair trial'), followed by articles that do not exist in the ECHR, such as Article 1 ('Right to dignity'), Article 18 ('Right to asylum'), and Article 24 ('Rights of the child').[391] Additionally, the EU Charter was present more often in Dublin proceedings and in challenging procedural aspects of law than in any other area of asylum law.[392] Ultimately, the report concluded that 'rights that have not yet been defined in relation to their scope by the CJEU have been found to be too vague to be of any great use in domestic proceedings. It is clear that the EU Charter, despite being part of primary EU law since 2009, is still perceived as a relatively new instrument and one both practitioners and decision makers are wary of relying upon when other more established instruments such as the ECHR could be invoked instead'[393]. Yet, framing the underwhelming usage of the EU Charter as a problem to be addressed begs the legitimate question as to why it should matter whether either it is the Charter or the ECHR that is being relied upon, when they are overwhelmingly substantially similar. This observation is correct; however, it overlooks three key points. Firstly, the EU Charter offers to people, *at least* the protection available under the ECHR. That is so

386 G. de Burca, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?, *Maastricht Journal of European and Comparative Law*, Vol. 20; NYU School of Law, Public Law Research Paper No. 13-51, 2013.
387 Ibid, p. 171.
388 Ibid, p. 168.
389 See ECRE Report, *Preliminary Deference*, 2014, p. 71.
390 Those Member States are: Holland, the United Kingdom, France, Germany, Sweden, Belgium, Bulgaria, and Italy.
391 See ECRE Report, *Preliminary Deference*, 2014, p. 71.
392 Ibid.
393 Ibid.

say, it has a more extensive protection. Secondly, the protection available to applicants in the case law that will build around it does not have to face the same constraints the ECtHR case law does in accommodating the huge discrepancies in human rights' protection amongst signatory Member States. Therefore, the moment the EU Charter gets a more established role as an EU instrument, it will arguably be able to offer a more extensive protection than the ECHR does because it will be based on values that underpin the whole European Union project and from which no Member State would be allowed to digress. Thirdly, the EU Charter of Fundamental Rights is primary EU law *on par* with the TEU and the TFEU. That means that all secondary EU legislation needs to be interpreted in light of the rights propagated through the Charter. Yet, that fact is easily forgotten because the Charter is often absent in judicial decisions. What needs to happen, therefore, is for it to gain the place of prominence it was intended to through a constant reminder, reiteration and eventual permanent integration of the EU Charter in judicial decisions that touch upon human rights' concerns. As the ECRE puts it, with more awareness-raising activities, together with 'both the CJEU and higher instance national courts taking a more proactive role in referring to it and defining its scope, the EU Charter could become more of a living instrument which can play a real role in ensuring a fairer asylum procedure across the EU'.[394] In other words, the moment it is the unalienable part of judicial reasoning that it needs to be, by legislative intention and by design, the EU Charter will become a reliable source of human rights' protection both for EU and third-country nationals who interact with the EU. The effort to transform the EU Charter into a permanent presence of the language of the Court is therefore an effort towards (international) justice.

Part II: The Idiosyncrasies of the CEAS as a Site of Overlapping Legalities

5. The Common European Asylum System (CEAS): A Site of Intense 'Interlegality'

The governance of asylum within the EU is the overtly harmonious result of intensely overlapping nested sets of applicable norms and laws. Much like de Sousa Santos first explained,

> 'socio-legal life is constituted by different legal spaces operating simultaneously on different scales and from different interpretive standpoints. So much is this so that in phenomenological terms and as a result of interaction and intersection among legal spaces one cannot properly speak of law and legality but rather of interlaw and interlegality'.[395]

[394] ECRE Report, *Preliminary Deference*, 2017, p.71.
[395] De Sousa Santos, 1987, p. 288.

In recognition of the theoretical value of de Sousa Santos' observation, this section will seek to outline the contradictory and incommensurable obligations that permeate the EU asylum regime as an example of the interactions, intersections and conflicts that undergird it. It will prove that what on the surface appears as a peaceful system is in fact a veneer that hides the interaction (and conflict) of quantitatively and qualitatively different legal regimes that are often incommensurable. In fact, it is not an exaggeration to call the EU asylum regime an intense site of 'interlegality' where EU norms, national norms, and international norms such as the ones established by the ECHR and by the Refugee Convention continuously coexist, interact and collide in a manner consequential for the people affected by it. Once again, with de Sousa Santos' theoretical tools we are freshly reminded that 'different for[m] of law create[s] different legal objects upon the same social objects.'[396] Studying the asylum regime as a site of intense 'interlegality', as opposed to a static fact, therefore explicitly acknowledges the dynamic existence and constant interaction of the nested regimes. It enables a more informed understanding of what it means for the European Court of Justice to make sense of and deliver judgments within this sphere of otherwise invisible, but factually present, jurisdictional clashes.

Interestingly, in its overall practice as the highest judicial instance of the European Union, where different domains offer varying degrees of density of regime overlap,[397] the Court generally thrives in its role as the integration-motor of the European Union when examined from the point of view of its 'constitutionalised jurisprudence'.[398] The ECJ has been active in establishing principles not codified in any piece of legislation, it has teleologically interpreted the Treaties in pursuit of a bigger narrative, and it has been filling in the legal gaps for a more coherent EU legislative regime. Amongst the most famous examples of the Court establishing principles despite the absence of legislation are: *Costa v ENEL*, which established the primacy of EU law, *Van Gend en Loos*[399], which created the direct effect of EU law, *Francovich* that penalised Member States whose failure to transpose directives led to individual losses, and *ERTA*, which brought about implied exclusive powers for the European Union. The list is extensive and continuously growing. This gave birth to the legitimate presumption that the Court might equally play a major role as an independent avenue for pursuing policy coherence within the AFSJ. A truly *common* European asylum system is the reiterated objective of every legislative change which happens with the CEAS framework. However, different standards

396 Ibid, p. 287.

397 For example, depending on whether the European Union has exclusive competence (Article 3 TFEU), shared competence with the Member States (Article 4 TFEU) as it does in the AFSJ, competence to support, coordinate or supplement actions of the Member States (Article 6 TFEU) or competence to provide arrangements within which EU Member States must coordinate policy (Article 5 TFEU), the density of regime overlaps and jurisdictional clashes would vary significantly.

398 M. Blauberger and S. K. Schmidt, The European Court of Justice and its political impact, *West European Politics*, *4*(40), 2017, p. 543.

399 CJEU, Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (*Van Gend en Loos*), 05.02.1963.

amongst the Member States lead to different levels of protection afforded to asylum seekers and ultimately, to a fragmented and unsustainable asylum system that is not capable of addressing the needs of asylum seekers, or those of the EU border Member States hit most severely by the crisis. Because legislative proposals are often the compromise results of long negotiations between stakeholders with competing interests, judicial help for the harmonization of the field through 'the development of common judicial understandings, principles and norms concerning refugee matters' emerged as a reliable alternative.[400]

This voluntary role as the integration-motor of the Union played by the Court in tandem with the opportunity offered by the vague and sometimes conflicting legislative instruments within the AFSJ prompted Cathryn Costello, a refugee law expert, to argue that the ECJ had the potential to become a 'new refugee court' capable of increasing the protection afforded to refugees and having the competence to build a doctrine on the subject of asylum law.[401] Her remark stemmed from the European Union's increasing incorporation of refugee law concepts into its law following the Treaty of Amsterdam's establishment of the Area of Freedom, Security and Justice (AFSJ)[402] and the Common European Asylum System (CEAS). At an international level, the Court's 'innovative avenues for protection'[403] when interpreting the 1951 Convention Relating to the Status of Refugees in cases like *Y and Z*[404], and *X, Y, and Z*[405] were a welcome development for the Refugee Convention regime that otherwise lacks a judicial enforcement mechanism. Her argument had even more force in light of earlier observations by other authors that the steady 'communitarisation' of the AFSJ meant that the Union's supranational organs had transitioned from the side-lines to the spotlight, and thereby injected transparency and democratic legitimacy to decision-making within the field.[406] This, in turn, was seen to signify that the changed relationships had opened more room for influence by the 'liberty-oriented' European Commission and Parliament and would 'enhance the rights-based aspects of EU asylum law.'[407]

Reading through the whole ECJ case law within the area of asylum, however, casts doubt both on the realisation of Costello's hopeful prediction of the Court fulfilling a 'new and far-reaching role […] as a refugee law court' and on its ability to fix the legislative incoherence of

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400 H. Lambert, Transnational Judicial Dialogue, Harmonization and The Common European Asylum System. *International and Comparative Law Quarterly*, *58*, 2009, p. 520.
401 Cathryn Costello, Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored. *Human Rights Law Review*, *12*(2), 2016, p. 228.
402 See Article 3(2) Treaty on European Union 1992.
403 Costello, 2016, p. 228.
404 Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11.
405 See for example, Cases C-199/12 - C-201/12 *X and Y and Z v Minister voor Immigratie en Asiel,* 7 November 2013.
406 Davies, 2016, p. 846.
407 A. Ripoll Servent & F. Trauner, Do supranational EU institutions make a difference? EU asylum law before and after "communitarization." *Journal of European Public Policy*, *21*(8), 2014, p. 1142.

the CEAS.[408] A more substantive analysis of the Court's jurisprudence on the matter of asylum indeed offers a number of instances in which the Court was forced to go beyond applying or interpreting the law and went into the uncharted territory of defining it. It therefore acted as the principal author of the meaning behind pivotal legislative concepts, such as, 'irregular crossing'[409], 'material welfare conditions'[410], 'internal armed conflict'[411], 'Member State responsible' in cases concerning minors[412], what it means to be legally minor[413], 'risk to public policy'[414], 'public order'[415], and 'reasonable prospect of removal'[416] amongst others. Yet, these small glimpses of judicial engagement with developing asylum law have been rare and anyway grounded in the immediate legal context, as opposed to a grander narrative of what it means to offer asylum within the EU. In fact, it seems as though the area of asylum has been completely quarantined from the Court's 'activist' and 'integrationist' stance that has defined the rest of its jurisprudence and has instead marked the Court's retreat from its standard teleological manner of interpreting EU law. Whilst the fact of the historically gradual 'communitarisation' of the AFSJ might have something to do with it, as my research reveals, the Court has shied away from stepping beyond the immediate technical language even in cases which mandate engagement with values and human rights because of their apparent constitutional significance.[417] If anything, the Court has constrained itself to the role of an 'administrative court'.[418] Constant emphasis on the 'intention of the EU legislature', 'the effectiveness of EU law', and the 'objectives pursued' by the instruments at hand has meant that the novel institutional arrangements within the AFSJ have not necessarily resulted in more rights for applicants, but have instead led to a more readily accepting and less critical attitude towards the wording of EU instruments. In fact, even though migration has been one of the political priorities of the current Juncker Commission[419], the Court has stepped away from its usually 'activist' and 'integrationist' stance, often showing deference to the political institutions of the Union. This has raised the legitimate question of why the Court has taken on a role in asylum law so different from the one it performs in other areas of EU law, such as free movement. For Advocate-General

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408 Costello, 2016, p. 174.

409 Case C-646/16 *Khadija Jafari, Zainab Jafari v Bundesamt fur Frendenwesen und Asyl* (hereafter: *Jafari*).

410 Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, 2 February 2014.

411 C-285/12, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides,* 30 Jaunary 2014.

412 Case C-648/11 *M.A. and Others*, 6 June 2013.

413 Case C-550/16, *A and S v Staatssecretaris van Veiligheid en Justitie*, 12 April 2018.

414 Case C-554/13 *Z.Zh. and O.*, 11 June 2015.

415 Case C-373/13, *H. T. v Land Baden-Württemberg*, 24 June 2015.

416 C-357/09, *PPU Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009.

417 For a thorough discussion of cases with exclusive focus on 'effectiveness', please refer to Chapter IV; for a detailed study of a case where the room for engagement with constitutional values (as enshrined in the Treaties and in the EU Charter) was completely ignored by the Court, please refer to Chapter V.3.3.1. examining the case of *X and X v. Belgium.*

418 D. Thym, Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: Jafari, A.S., Mengesteab and Shiri. *Common Market Law Review*, (55), 2018, p. 562.

419 See 'Migration. Towards a European agenda on Migration'. *Commission and Its Priorities.* http://ec.europa.eu/priorities/migration_en. Last Access: July 20th, 2016.

Sharpston, the Court's extremely technical approach could be the symptom of a preference for the bottom-up change that characterises legislative drafting.[420] It is a signal from the Court that it is the legislature that should address the shortcomings of the Common European Asylum System. For Thym, on the other hand, '[t]his silence on constitutional law […] feed a noticeable trend towards the disappearance of the Treaties in the Court's reasoning. This leaves us with the impression that judges have lost confidence in the law as the fabric of the integration process. They preserve and defend its administrative integrity as an instrument of governance, but lose sight of its broader constitutional function'.[421] In an analysis that instrumentalises Valverde and de Sousa Santos' theoretical framework, the Court's behaviour is but a symptom of the incommensurability of the qualitatively different values realised by the regimes overlapping in the asylum area. It is the tip of the iceberg of a site of intense interlegality, where the Court's silence emerges as a rational 'analysis paralysis' dilemma. Albeit offering different rationales for explaining the Court's unusual behaviour within the area of asylum, all three viewpoints raise the logical question of whether the Court is intentionally passivist or simply ill-equipped to deal with an incoherent system which not only ascribes it with conflictual obligations, but whose challenges have been exacerbated by an unprecedented moment in human history.

5.1. Jurisdictional Divides between EU Citizens and Third Country Nationals

The Area of Freedom, Security and Justice, as established under Articles 67-89 TFEU, is conceptually autonomous from the remainder of the EU Treaty regime and thereby does not duplicate the freedom of movement rights afforded to EU citizens.[422] Yet, as the governance of immigration more broadly, and the asylum more particularly, both occur under the auspices of the AFSJ, a curious distinction arises between the rights afforded to different people despite being within the same jurisdiction. Said distinction separates EU citizens from so-called 'third country nationals (TCNs)' and is enabled through the law in a straightforward manner despite its deeply consequential nature. Indeed, the distinction between Union citizens and third country nationals (TCNs) in the EU Treaties 'is more than semantic […] it reflects a basic constitutional cleavage at the heart of the European project in so far as it designates a basic distinction between the free movement rights of Union citizens and the absence of corresponding guarantees enshrined at Treaty level for TCNs'.[423] From a global justice perspective, it marks the difference between the cosmopolitan policies of diminishing the

[420] E. Sharpston, Conflict and Compromise: Between Law and Politics in EU Migration and Asylum Policies, *Odysseus Annual Conference*, Brussels, Belgium, 2018.
[421] Daniel Thym, Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: Jafari, A.S., Mengesteab and Shiri. *Common Market Law Review*, (55), 2018, p. 562.
[422] Hailbronner & Thym, 2016, p. 4.
[423] Hailbronner & Thym, 2016, p. 285.

importance of borders for people within the EU, and the statist policies of reinforcing their symbolic significance for people beyond the EU.

The Treaty/secondary legislation distinction enables separating the jurisdictions applicable to the Union nationals and TCNs; this, in turn means that the two groups end up being treated in accordance with very different rationalities. This detail is therefore noteworthy. The ease with which legal instruments are able to compartmentalise their governance of individuals within the same breath of rules is an intricate example of 'the legal game of jurisdiction', which enables the 'complex governance manoeuvres' and the many 'modes and rationalities of governance that coexist in every political-legal 'interlegality" to remain undetected.[424] Yet, that same straightforwardness becomes curiously blurred once those third country nationals have a relationship with an EU citizen. The European Court of Justice has regularly used the idea of 'derived rights' to extend the free movement rights of EU citizens to their spouses and other family. This has resulted in a differentiated regime of rights being applicable to third country nationals depending on whether they have family from the European Union or not and has once again reiterated the consequential nature of the different jurisdictions applicable under the Treaty and the secondary legislative regime. For example, in cases of conflict, 'the rights of TCNs of EU citizens prevail over national immigration law or secondary EU legislation, since they emanate, at least indirectly in the form of derived rights, from constitutional free movement guarantees.'[425] This, once again serves as evidence of the dynamic and intense nature of the interlegality characterising the EU asylum system and the qualitative incommensurability of the overlapping legal regimes within it. It is by virtue of their constant interaction that such different versions of balancing of interests over the same individual can be realised.

5.2. Conflictual Obligations Permeating the AFSJ

The hallmark of the AFSJ is political disagreement, often resulting in a 'Brussels comprise'-type of legislation that all of the Court officials interviewed for this work referenced. This is however an obvious consequence of the 'conglomerate of competing policy objectives which cannot easily be reconciled' that the Treaty of Lisbon established as the foundation of the area of immigration and asylum law.[426] On the one hand, there is the abolition of internal borders and the establishment of the Schengen area, whilst on the other, there is the need for '*enhanced* measures to combat illegal immigration'[427] coexisting with mandatory 'compliance with the principle of *non-refoulement*'.[428] Simultaneously, the 'efficient management of migration

[424] Valverde, 2009, p. 139.
[425] Hailbronner & Thym, 2016, p. 286.
[426] Ibid, p. 273.
[427] See Article 79(1) TFEU.
[428] See Article 78(1) TFEU; Hailbronner & Thym, 2016, p. 4.

flows'[429] is to be characterized by 'fair[ness] towards third-country nationals'[430]. Any secondary law passed within the AFSJ is simultaneously expected to promote the objectives in Articles 77-80 TFEU (such as the abolition of internal borders (Article 77), the development of a common European asylum policy (Article 78) and a common immigration policy (Article 79), whilst keeping solidarity and fair sharing of responsibility amongst Member States (Article 80)), but also uphold other Treaty goals which are rarely justiciable. The contrasting objectives seem to pursue the aim of striking a fair balance between migration control and the legitimate interests of migrants. Although not a uniquely EU problem, the difficulty of serving this balance of interests in a fair manner is exacerbated in the EU. This is because of the juxtaposition between the cosmopolitan approach is has towards cross-border migration within its borders and the statist approach it takes on the same phenomenon at its outer borders.[431] Conflict is also bound to arise from the existence of other general objectives such as the pursuit of 'full employment'[432], which could arguably translate into 'restrained rules on the access of lesser qualified migrants for as long as unemployment remains ubiquitous among Union citizens'.[433] Limiting access to immigration so as to prevent brain drain of very qualified migrants from developing countries could also be justified on the basis of the objective of combating poverty[434]. Sandra Lavenex has observed that this 'growing mismatch between the EU's normative striving towards a "Union of values" and the political and institutional limits imposed' result in the simultaneous pursuit of the opposite aims of protective aspirations and protectionist policies.[435] For her, this phenomenon is the evidence of the 'ideological conflicts involved' in the creation of the CEAS. She recognises the tension inherent in balancing between Member State sovereignty and EU competence, as well as the often clashing normative sensitivities of pursuing policies of freedom, security, and justice. The result is 'organized hypocrisy', which is a nuanced phenomenon in her eyes.[436] Rather than only seeing it as an exclusively negative occurrence, Lavenex conceptualises it as *necessary* because it is the only way to handle the growing gap between the very high normative ambitions of the Union and its practical political capabilities. It is, therefore, 'an unconscious organizational strategy to cope with irreconcilable demands'.[437]

Hailbronner and Thym similarly note that the absence of clear political direction for the legislature continuously leads to 'protracted disputes at EU level about the desirability of joint policies and the scope of supranational competence'. Their explanation is different to Lavenex,

[429] See Article 79(1) TFEU.
[430] See Article 67(2) TFEU.
[431] Hailbronner & Thym, 2016, p. 4.
[432] See Article 3(1) TEU.
[433] Hailbronner & Thym, 2016, p. 4.
[434] See Article 21(2)(d) TEU.
[435] Lavenex, 2018, p. 1195.
[436] Ibid.
[437] Ibid.

however, as they claim that the 'underlying reason may be *the absence of a basic agreement about the conceptual underpinning of immigration policy*, since the Commission could not convince Member States to follow its essentially market-driven approach to economic migration' [emphasis added].[438] If one were to apply de Valverde's perspective, this would be evidence of conflict arising over disagreement on the 'how' of governance in 'the game of jurisdiction' in those rare occasions where the 'how' gets discussed. As mentioned previously, 'jurisdiction sorts the 'where', the 'who', the 'what', and the 'how' of governance through a kind of chain reaction, whereby if one question ('where' or 'who') is decided, then the answers to the other questions seem to follow automatically' [emphasis added].[439] Therefore, whilst the most significant question is the 'how' of governance by virtue of its ability to mobilise completely different jurisdictional apparatuses; in the majority of cases, the 'how' is decided as a 'side effect of questions about what, where, and who'.[440] The disagreement here was therefore the result of the realisation by the parties to the negotiations that market rationalities would govern immigration very differently to, for example, human rights rationalities. The resulting contradictory pieces of legislation are thus a rare, but ostensible, example of the struggle of the otherwise hidden 'how' to come to the surface. Regardless of which reason lies at the heart of the conflicting rationalities governing the AFSJ, the most important takeaway remains that these paradoxical obligations provide the context within which the ECJ has to make and deliver its decisions.

[438] Hailbronner & Thym, 2016, p. 273.
[439] Valverde, 2009, p. 144.
[440] Ibid.

CHAPTER IV
Empirical Evidence of Preoccupation with Procedural Justice at the ECJ

More often than not, political philosophers that espouse theories of global justice engage with the big question of what duties we owe to each other from a very abstract, *ideal*, point of view. They try to delineate our responsibilities to one another and treat the parameters of these obligations in different scales (ranging from the nation state to the global order) and in different domains (ranging from climate change to migration). Simultaneously, judicial actors occupy themselves with questions of justice from the much more practical, *non-ideal*, position, where they aim to perform as justly as possible in the imperfect scenario of applying non-ideal laws to non-ideal circumstances. The significant divide between theory and practice exemplified by the two communities becomes evident as soon as one tries to apply theories from within the global justice treatment of migration (which necessarily deal with asylum) to the asylum jurisprudence of the European Court of Justice.

Global justice theories of migration discuss the relevance of the nation state and its sovereignty. They examine borders; whether they should exist, and if so, whether they should be open or closed. They ask the question of whether those borders should have relevance for the duties we owe to the people beyond them and if so, whether those should be duties of *justice* or ones of a lower threshold, such as *humanitarian* duties. Depending on their opinion on these matters, philosophers who engage with issues of global justice identify themselves as either statists or cosmopolitans and eloquently ponder our responsibilities to one another. In the more particular migration debate, they subscribe to or deny the existing categories of 'migrant' and 'refugee', or at the very least question the precise location of the divide between them. They discuss the existing migration regime, address the suffering of many and its neglect, and often recognise the fetishization of the 'refugee' category with its allegedly outdated focus on the idea of 'persecution'. They philosophise the differing responsibilities inherent in owing duties as a matter of justice and as a matter of humanitarianism and engage with the significant matters of our time head-on. Doing so occurs in the more abstract domain because it is precisely through reasoning in the abstract that they can say something of true relevance to the everyday. Judges, on the other hand, deal with matters of justice through the particular facts of the cases that come before them. They are the practicing ambassadors of justice, and, in their ideal type, they use their platform to discuss matters of equal gravity and importance to the ones discussed by philosophers or, at the very least, use the more mundane facts of a case as a *conduit* to grander narratives. This idealistic expectation of judges as the patrons of justice is especially strong in the case of the European Court of Justice because of its mandate to only engage with questions of law and leave the questions of fact to the lower courts. In these circumstances, with its unique

relationship to the law, it can easily be seen as a potent site for the emergence of grand and substantive narratives of justice.

1. Empirical Evidence from Interviews at the European Court of Justice

Coming to the Court's asylum jurisprudence with the expectations set by the Court's mandate and its historical performance, and substantiated by political philosophy's grand theoretical discussions of migration is bound to leave one ill at ease, however. The common ground between global justice theories on migration and the European Court of Justice's deliberations within the migration domain seems to prematurely end where it started, at the modest terminological overlap between 'justice' and 'migration'. The Court engages in no grand narratives and makes no allusions to anything even resembling the substance of the theoretical debates mentioned above. There are therefore no direct links between the global justice domain of political philosophy and ECJ's practice within the area of asylum. This is this work's first major empirical finding; namely, that there is no overlap between the asylum jurisprudence of the European Court of Justice and the substantive principles espoused by global justice discussions on migration from political philosophy. The frustration of expectations is, of course, two-fold. On the theoretical side, there are those political philosophers who devote the majority of their time engaging with the most important aspects of theorising matters of global justice, for whom it might come as a surprise, if not disappointment, that there is no straightforward evidence that judges are in anyway cognizant of their deliberations or that their discussions feed into the judicial lexicon. On the practical side, there are the judges who engage with matters of asylum on a daily basis, but are missing out on the important grand discussions from political philosophy that could benefit their reasoning. The abstract, philosophical engagement with matters of justice and asylum, and the resulting elaborate, thought-out arguments could prove to be an invaluable resource for judges, but have remained hidden by virtue of belonging to a separate discipline. This absence of any signs that substantive narratives of justice from political philosophy served as the basis of my interview.

When it came to the content of my interviewing questionnaire, I hoped to examine how the members of the Court perceive themselves and their work; how they viewed their responsibilities and whether they engaged with academic debates or consciously took broader philosophical ideas into account. Most importantly, I hoped that the study of the complex topic of asylum would be improved by my interdisciplinary method of examining the jurisprudence of the Court. Although answers to the same questions varied, I observed a number of common threads. All of the interviews disproved the premise on which I had started this project; namely, that the Court is an EU institution that operates at a safe distanced from politics, preventing it from being hostage to (con)temporary political whims. All members of the Court were mindful

of the EU political process and how it compares and contrasts to the national one. From the very start, this was an example of the interviewing process generating insight that was pushing against legal doctrine. Since I was focusing on the asylum jurisprudence of the Court, all members stressed the importance of reminding me that Common European Asylum System (CEAS) legislation has been and continues to be the result of a broad "Brussels compromise" where all Member States, the European Parliament, and the European Commission had to agree before an instrument could become reality. Indeed, the political process at the EU level differs from that at the national level in that it has a greater number of participants with interests and legal and political cultures that are much more diverse. This often results in legislation that is the consequence of a significant compromise, which is reflected in the legislation's vague wording. This, in turn, results in a lot of room for different interpretations when the Court is asked to rule on the law, although as my interviews showed me, all members of the Court were at great pains to avoid resorting to any kind of interpretation that could later be labelled as "judicial activism". Therefore, they gave varying accounts of their decision-making process, always trying to ground their interpretations in concrete, legislature-produced documents. They also referred to the same interpretative tools, albeit attaching different weight to their importance and the sequence of their application within the judicial decision-making process. The *travaux préparatoires* came up in discussion often, although reference to them seemed to be limited to those cases in which they could *clearly* explain the reason behind a particular rule. The context in which an instrument was drafted, including how it operated alongside other legislation, including the Charter, was also of value. The effectiveness of the overall legislative regime and not undermining it in tandem with the officials' reluctance to go against the political will were constantly reiterated.

EU institutional politics were also recurrent in the answers I collected. All Court officials were careful to delineate and underline their mandate, whose extent they seemed very preoccupied with. This self-awareness was often used to justify their rather limited express engagement with values enshrined in the Treaties and preference for working with the concrete secondary legislation at hand. Questions about whether it was legitimate to expect a grander, coherent narrative from the constitutional Court of the EU were almost always answered with the reminder that the Court's role is to use general rules to decide a *particular* case. The emphasis on the particularity, combined with a case-by-case approach was intriguing. One Court official suggested that formulating the grander narrative of the Court is an academic duty. In any case, the values enshrined in Article 2 and Article 3 of the Treaty on European Union[441] were seen as non-justiciable recommendations, despite their established constitutional nature.

[441] See *Treaty on European Union*, Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

Furthermore, the interviews quickly became an important milestone in rationalising the absent dialogue between the two epistemic communities. In and of themselves, they serve as insightful contributions towards unlocking judicial perceptions of the very meaning of justice. All twelve Court officials were asked, as the guardians of justice, to reflect on the meaning of the term itself. Judges' understanding of justice is much more in procedural, as opposed to substantive, terms. Unlike political philosophers, their conception of justice is limited in scope to the applicants immediately before them. Political philosophers have certainly pondered the difference between procedural and substantive justice, yet, '[f]or most philosophers […] the justice of a procedure is to a large extent a function of the justice of the outcomes that it tends to produce when applied'.[442] In that sense, the absent overlap one encounters between philosophers' discussions of justice and judicial practice of it could, to a certain extent, be seen as a function of their different approaches to it. After several of the interviews had taken place, a number of patterns started to emerge. For my first interviewee, the overwhelming focus in defining 'justice' needed to be on the democratic pedigree of rules. To serve justice therefore meant 'to apply the rules adopted by the legislator and not to invent them or go beyond them because it is the legislator that can have a dialogue with the stakeholders, and it is in this interaction that true democracy lies'[443]. The value of democracy kept re-emerging with Court officials even postulating a dichotomy between unfair legal rules vs. clear legal rules and arguing that whenever the legal rule is clear, it needs to be applied directly. This underlined the Court's reluctance to go against the clearly stated political will and once again reiterated the significance it attaches to democratic pedigree.[444]

The most important revelation from asking judges to reflect on the abstract meaning of 'justice' was their overwhelming reliance on matters of procedure to define the word. For one of the interviewees, 'justice' took on very practical clothing and meant 'reaching a reasonable, accountable, and workable solution to the case before the adjudicators'[445]. For another interviewee, 'justice' meant taking all available material, weighting it up objectively, and making sense of it before applying it in a manner that must not offend the common sense of fairness.[446] It was about arriving at a legally correct and just result in a particular case. Thus, for this Court official 'justice' was a matter to be established on a case-by-case basis and could not be defined in the abstract.[447] This struck me as a very practical way of looking at justice, and one which was far removed from the abstract efforts at defining it pursued by political philosophers. For yet

[442] Miller, 2017.
[443] See Interview #1, conducted on 17/09/18, transcript available on file with the author.
[444] See Interview #1, conducted on 17/09/18 and Interview #7, conducted on 25/09/18. Both transcripts are available on file with the author.
[445] See Interview #3, conducted on 20/09/18, transcript available on file with the author.
[446] See Interview #8, conducted on 27/09/18, transcript available on file with the author.
[447] See Interview #8, conducted on 27/09/18, transcript available on file with the author.

another one of my interviewees, the pursuit of justice immediately summoned the principle of legal certainty.[448] Invoking the principle of procedural justice, this interviewee drew attention to the fact that justice is very much about the methods that are applied in reaching a particular conclusion, which are to be combined with common sense. The interviewee reiterated the role of the judges at the Court as follows, '[y]ou are there not to exercise your individual opinion, but to apply, and if needed (whenever the law is unclear), interpret the law'[449]. Another interviewee translated 'justice' into taking all interests at stake into account and arriving at a well-balanced decisions in a manner that does not damage people unnecessarily. It is also about proportionality, procedural justice and the appearance of justice. Therefore, for this interviewee the motivation of the ultimate decision in a judgment was very important. In her opinion, it is the Court's responsibility to show to the losing party that the points it brought up were taken into account. That would ensure the feeling of righteousness that derives from all parties feeling that the Court has done justice to everyone involved in the case.[450] Finally, the President of the Court, Judge Lenaerts, answered my query as follows,

> '[j]ustice is a matter of striking a balance between competing values, principles and rules. In litigation there is always a conflict between values, principles and rules because, had there not been one, there would have been no need to go to court in the first place […] Justice is therefore about listening to the legal articulation of the point of view of each and every interested party to a case with equidistance, openness, and full empathy. Then, it is about deciding where the balance is to be struck and transparently explaining why. Thereafter, it is about learning from the comments made on that decision by others'.[451]

What this quote represents is a symbolic summary of the sentiment that permeated all interviewed Court officials' verbalized intuitions about the meaning of rendering justice. When approaching the idea of justice from the non-ideal, practical side, judges engaged with it in a pragmatic, procedural manner. Their *procedural* understanding of justice as practitioners contrasts philosophers *substantive* understanding of justice from an ideal point of view thereby carving out an *ideal-practice* gap explained by the *substantive-procedural* gap. It further establishes an implicit *scope* gap. Whilst political philosophers ponder theories of justice through a grander, *global* scope, judicial engagement with the matter is limited to the *personal* scope of the applicants that come before it. This was a valuable revelation for my project which sought to trace the potential manifestation of more substantive versions of justice in the Court's jurisprudence. It cautioned against conflating matters of substantive justice with matters of procedural justice as

[448] See Interview#6, conducted on 24/09/18, transcript available on file with the author.
[449] See Interview#6, conducted on 24/09/18, transcript available on file with the author.
[450] See Interview #9, conducted on 28/09/18, transcript available on file with the author.
[451] See Interview with President of the Court, Judge Lenaerts, conducted on 20/09/18, transcript available on file with the author.

that might cause the absence of a coherent account of one (substantive justice) eclipsing the presence of the other (procedural justice). Ultimately, all of the Court officials had an opinion on the meaning of justice, though one more closely related to matters of procedural, as opposed to substantive justice. Therefore, albeit intimidating, the gap between political philosophers' discussions of justice and the Court's practical engagement with matters of justice became more consequential for the question of whether political philosophy has any influence on judicial practice than for the absolute engagement of the Court with more abstract matters of justice.

Furthermore, the gap may also very well be related to the nature of the area of asylum both as a very politicized area and as a relatively recently communitarized area. The AFSJ is historically an area that took a very long time to be communitarized precisely because of its political sensitivity. As part of the former third pillar of the European Union, asylum was largely a political matter agreed upon by Member States, with the ECJ being largely kept out of it.[452] On the one hand, this means that the Court carries the historical memory of being an outsider to the area. On the other hand, it also translates into a significantly recent jurisdictional reign in the area with less time to put on its integrationist cloak familiar from other spheres of EU law and develop EU concepts unique to asylum. Last, but not least, the interviews revealed that judges at the Court are very much aware that they are in the media spotlight whenever they deliver asylum judgments. The fact that they keep up to date with media coverage of their decisions is not news,[453] but the extent of their concern with their mandate was remarkable.

All in all, the interviews enabled insight that was not available from conducting a dogmatic reading of the jurisprudence. Indeed, the interviewing process revealed that desktop research is not sufficiently insightful even though the intuitive method of examining the Court's jurisprudence is simply to read and analyse it. Nuances of the judicial process are missed and the extent to which politics permeate judicial institutions cannot be accurately accounted for without access to the institution itself. The interviews allowed me to see that, contrary to what I had initially thought, the Court is not immune to the politics of the day. I was also surprised to discover the degree to which the media's portrayal of the Court had captured its attention. Though I had imagined that the Court would be concerned with how just it appears, it was equally concerned with how activist it was seen to be. The interviews not only provided me with a different knowledge about the concrete problem I was studying, but also guided me in directions I had not considered previously. Most importantly, the interviews pushed against

[452] For a detailed study of the historical development of the AFSJ, please refer to: Christian Kaunert and Sarah Léonard, 'The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?' *Refugee Survey Quarterly*, Vol. 31, No. 4, 2012, pp. 1–20.

[453] See Michael Blauberger, Anita Heindlmaier, Dion Kramer, Dorte Sindbjerg Martinsen, Jessica Sampson Thierry, Angelika Schenk & Benjamin Werner (2018) 'ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence', *Journal of European Public Policy*, 25:10, pp. 1422-1441 (for use of empirical data to theorise Court responsiveness to politicization and the changing public debates about EU citizenship)

preoccupation with *substantial* justice prevalent in political philosophy by drawing my attention to the equally valid legal preoccupation with the *procedural* achievement of justice.The Court's emphasis on the *procedural* aspects of justice within its asylum jurisprudence is an important segue into the empirical insight that follows in the remainder of this chapter and subsequently in **Chapter V**.

2. Empirical Evidence from the ECJ Case Law

By relying on mixed methods to study a legal actor and its jurisprudence, moving across disciplines, and combining interviews with qualitative legal research, this thesis is entering largely uncharted territory as '[t]here has been a notable lack of empirical studies endeavouring to systematically unpack the legal mechanisms that enable the Court to fit the law to the facts of individual cases without compromising the overall coherence and consistency of jurisprudence'.[454] The intricate engagement of my work with the complete asylum jurisprudence of the ECJ[455] therefore makes a novel *empirical* contribution to our understanding of the Court, whilst the subsequent theorising of its reference to the concept of vulnerability (**Chapter V**) is an original *theoretical* one. I also counter the predominant trend in the majority of studies on the Court's increasingly prominent role within the EU to only focus on 'how the jurisprudence has been received rather than the particularities characteristic of it'.[456] Therefore, my work aims to strike the right balance between high theory and looking into the technicalities of the law, whilst avoiding the temptation of reducing legal artefacts to irrelevance by focusing too much on extra-legal relations.[457] The synergies created by theorising the Court's jurisprudence in a more philosophical sense make this work a unique contribution to the EU, sociolegal, and philosophical academic tradition.

Thus far, this chapter has established that despite its practical, day-to-day engagement with asylum matters, the Court is completely removed from grander narratives or discussions about it, even though one can observe those in more abstract disciplines such as political philosophy. The interviews serve important clues as to why that might be the case. The remainder of the chapter will be devoted to illustrating the claim in practice. In it, I claim that the Court has adopted an administrative, passivist role within the area of asylum, which is characterised by overzealous concern for the technicalities of the legislative instruments before it. I make these claims based on an empirical analysis which establishes 'effectiveness'[458] as a

454 Šadl, 2015, p. 20.

455 As mentioned previously and outlined in detail in Chapter I.5.2.1., covering my research method, the boundaries of the asylum jurisprudence of Court were set by the Court's tags of it and cover the period from January 2004 to January 2019.

456 Šadl, 2015, p. 19.

457 Valverde, 2009.

458 This work distinguishes between 'effectiveness' cases, in which the expression is used to denote the pursuit of effectiveness of EU law which includes the prohibition of any measures that might damage the unity or efficiency of the common market and 'effectiveness' in the procedural sense of the word, as exemplified by the familiar Rewe formula of 'effectiveness and equivalence' between EU and national law.

recurring rationale[459] in the Court's reasoning, and call it the 'ECJ refrain' behind a very diverse (in terms of subject-matter) set of cases from the ECJ asylum jurisprudence. In them, calls to heed to the principle of 'effectiveness' are almost always buttressed by additional references to the 'intention of the EU legislature' and the 'objective/purpose/function of the instrument' in question. These findings are then be situated within Mariana Valverde and Boaventura de Sousa Santos' theoretical framework, whereby this over-technicality of the Court's language will be framed as the result of the CEAS being a space of intense 'interlegality'. Thereafter, I offer a more in-depth legal analysis of certain asylum cases, each of which represents a category of 'effectiveness' cases, which have been delineated based on qualitative criteria. The aim is to illustrate the diversity in the claims that reach the Court and thereby underline the peculiarity inherent in its constant return to the same rationale.

3. The Principle of 'Effectiveness' as the ECJ Refrain

The empirical study of the Court's asylum jurisprudence reveals that the most common and consistently used rationale in its reasoning is protecting the 'effectiveness' of either EU law or the particular instrument under examination. It is often buttressed by the additional references to 'the intention of the EU legislature' and the 'objective/function/purpose of the instrument' in question (as often derived through a close reading of the *travaux préparatoires*). The remainder of this chapter argues that focusing on the principle of 'effectiveness' frequently diverts attention away from an individual's rights and is a symptom of the existence of irreconcilable differences between the different legal systems at operation in the asylum sphere.[460]

The principle of 'effectiveness' (also called *'effet utile'*) pursues the effective application of EU law in the Member States' legal orders. It is typically used in the context of the Court's teleological manner of interpreting rules with a view to upholding the objectives of EU legal instruments.[461] Therefore, in the majority of ECJ cases (in all of the Court's different domains), the pursuit of effectiveness has meant the promotion of the larger integration process, despite the fact that 'the objectives to be promoted by the *effet utile* principle should be determined by

[459] There are a total of 17 cases which rationalise the decision by relying on the 'effectiveness' of the asylum system or of the regulation in question; another three cases do not mention effectiveness, but nonetheless call onto the 'intention of the legislature' to justify the outcome of the case.

[460] At this point, it is worth highlighting the various uses of the principle of effectiveness (*effet utile*) in different foras so as to differentiate them from how it is applied within the context of the Court's jurisprudence. In political science debates, effectiveness often seems to denote the input/output legitimacy of EU measures, as represented by works such as: Vivien A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'', *Political Studies*, Vol. 61, 2013, 2–22; Andrew Moravcsik, A., 'Reassessing Legitimacy in the European Union', Journal of Common Market Studies, 40 (4), 2002, 603–24. There is also part of the legal literature which differentiates between *effet utile* and the effectiveness of the ECJ as an institution, as represented by works such as, Yuval Shany, *Assessing the Effectiveness of International Courts,* Oxford University Press, 2014. Yet, the subsequent discussion will rely on the principle of effectiveness as used by the European Court of Justice and also by the literature on the matter.

[461] Lenaerts & Gutierrez-Fons, 2014, p. 22.

means of statutory interpretation; they are dependent on the content and context'.[462] And yet, diverse opinions on the principle's exact meaning and function continue to exist amongst EU researchers. For example, some scholars such as Paul Craig frame it as a tool indispensable to the creation of the central doctrines of EU law such as direct effect, indirect effect, and supremacy, amongst others.[463] Both Rasmussen[464] and Hartley[465] see it as a 'façade for potentially unbridled policymaking under the guise of interpretation'.[466] Whereas scholars like Urška Šadl argue that the principle of 'effectiveness',

> 'ha[s] a distinct function: to balance the entrenchment and expansion of the fundamental doctrines of European judge-made law, primacy, direct effect and human rights… [and]…is a rhetorical instrument used to persuade Member States to accept judicial doctrines and the ensuing powers of the Court without having to compromise the coherence and continuity of law in the process'.[467]

Discussions on the nature and function of the pursuit of 'effectiveness' by the ECJ judges are many and varied. From seeing it as a 'routine linguistic formulation in the case law of the Court' to framing it as a 'rhetorical disguise or a legal principle',[468] numerous academics have grappled with the presence of the term in ECJ jurisprudence. In the following work, the meaning of 'effectiveness' will be built around the premise that it is more akin to a rhetorical disguise than to a routine linguistic formulation or an indispensable tool for the functioning of the EU legal order. Importantly, for one of the judges I interviewed at the Court, the principle of 'effectiveness' was evidence that 'the system has a value of its own'[469].[470]

As noted in the introduction to this chapter, the subsequent pages refer to empirical evidence to establish the principle of effectiveness as playing against individual rights in the Court's asylum jurisprudence. Whilst this is a finding that is valuable and intriguing in its own right, it becomes especially remarkable in light of the Court's historical development of the principle of effectiveness. Looking back at some of the watershed moments in EU jurisprudence since the 1963 decision in *Van Gend & Loos*[471], it is apparent that the Court's reasoning has had strong footing in the promotion of individual rights (as they stem from the Treaties) against Member State rights. In *Van Gend & Loos*, the Court established the principle of direct effect,

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462 Hailbronner & Thym, 2016, p. 10.
463 Craig, 2011, p. 400.
464 Hjalte Rasmussen, The European Court of Justice, Gadjura, 1998.
465 Trevor Hartley, *The Foundations of European Union Law : An Introduction to the Constitutional and Administrative Law of the European Union*, 7th edn, Oxford University Press, 2010.
466 Šadl, 2015, p. 24.
467 Ibid, p. 21.
468 Ibid, 2015, p. 24.
469 See Interview #5, conducted on 20/09/18, transcript available on file with the author.
470 For additional insight into the many applications of the principle of effectiveness in EU law, please refer to José Luís da Cruz Vilaça, 'Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour' in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, 2013, pp. 279-306.
471 *NV Algemene Transport-Expedite Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*, (1963) Case 26/62.

and ruled that the EEC Treaty was capable of generating legal rights that are enforceable by both natural and legal persons before Member State national courts. The Court ruled that

> 'independently of the legislation of Member States, Community law not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.'[472]

Although the case primarily concerned the principle of direct effect, and not effectiveness, the Court's reasoning was very much about rights and preserving this new legal order that was to become the European Union today. It relied on the effectiveness of EU law to enforce the rights of EU citizens in the following manner,

> 'a restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under the articles *would be ineffective* if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty. The vigilance of individuals concerned to protect their rights amounts to an *effective* supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.'[473] [emphasis added]

In a much more vivid fashion, in the famous *Francovich*[474] decision, the Court relied on the principle of effectiveness to establish that European Union Member States could be liable to pay compensation to individuals who suffered a loss because of a Member State's failure to transpose an EU directive into national law. The Court can be quoted as saying,

> '[t]he full *effectiveness* of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full *effectiveness* of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.'[475] [emphasis added]

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[472] See *NV Algemene Transport-Expedite Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*, (1963) Case 26/62, at Summary, para. 3.
[473] See *NV Algemene Transport-Expedite Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*, (1963) Case 26/62, at B - On the Substance of the Case.
[474] *Francovich v Italy*, (1991), Case C6/90, [1991] E.C.R. I-5357.
[475] See *Francovich v Italy*, (1991), Case C6/90, [1991] E.C.R. I-5357, Summary, at para. 3.

The above quote is one of many throughout the judgment, where the Court grounded the *effet utile* doctrine in the right of the concerned individuals to fully enjoy the rights they have been granted by the Treaties. This background makes surprising the empirical findings on the Court's recourse to the principle of effectiveness within its asylum case law.

It is not for lack of references to the principle that the area of asylum stands out from the remainder of the Court's jurisprudence; quite the contrary, the ECJ often refers to the principle of 'effectiveness' in its asylum practice. However, it exclusively does so in a manner reflecting the sentiment that '[w]hile the *effet utile* can work to the benefit of migrants, it is not intrinsically linked to this scenario, since it aims to promote the effectiveness of union law as an end in itself'.[476] In fact, within asylum, pursuing 'effectiveness' has always meant preserving the ability of the CEAS to keep running, irrespective of the additional case-specific context that might have been provided by taking the individual applicant into consideration. Whilst by virtue of its absence, the context of the applicant's situation appears irrelevant, the context of the legislative instrument is brought forward, inspected, and very much relied on. Indeed, the political context surrounding the legislation and its drafting is considered highly valuable. The importance ascribed to it can be deduced from the fact that the principle of 'effectiveness' is often buttressed by additional references to 'the intention of the EU legislature', and the 'objective/function/purpose of the instrument' in question (as often derived through a close reading of the *travaux préparatoires*). This 'triad of rationales' is problematic to the extent that it focuses the spotlight onto the importance of the 'effectiveness' of the system at the expense of the individual caught in it. As far as can be seen from a close reading of the jurisprudence, where there is an overzealous concern for the 'effectiveness' of system, there is often no mention of the rights of the individual involved. This is very unusual in light of the background provided above whereby effectiveness was used by the Court precisely in order to stress the importance of individual rights, as opposed to undermine them or take attention away from them. As my subsequent analysis will reveal, in an unusual turn of events, within the Court's asylum practice, the 'effectiveness' rationale emerges as a potent distractor that diverts attention away from individual rights instead of acting as a conduit for them (as it did in *Francovich*, for example). Yet, it is fundamental that one avoids the pitfall of bidding effectiveness and human rights against each other. As the President of the Court, Judge Lenaerts pointed out in his interview with me, '[t]o see the effective application of the Dublin system as in conflict with human rights is to approach the issue on the basis of a false premise.'[477] Therefore, it is important that the claim that the principle of 'effectiveness' often has an eclipsing effect on individual rights is always

[476] Hailbronner & Thym, 2016, p. 10.
[477] See Interview with Judge Lenaerts, conducted on 20/09/18, transcript available on file with the author.

interrogated in light of the particular use of the principle on a case-by-case basis.[478] It is very curious to observe, however, that this is precisely the kind of role the principle has played in the overwhelming majority of the asylum cases in which it has been invoked. Relying on Valverde and de Sousa Santos' work could, therefore, offer an interesting angle into the unique relationship between 'effectiveness' and human rights and nuance it beyond a simple dichotomy. If one recounts de Valverde's premise that 'the game of jurisdiction' enables different 'logics' to apply to different legal regimes, one could pose the question: 'why certain logics are applied only in certain jurisdictions' with a scrutiny that combines high theory with attention to the 'technicalities' of the law.[479] Set within the context of this paper, answering Valverde's call means asking why the 'human rights' logic of the *effectiveness* principle is applied within the integration jurisprudence, but disappears within the asylum case law. The answer then lies with an application of the 'scale conception of law' and an understanding of the jurisdictional clashes occurring in the EU asylum space. This presents the opportunity to of conceptualising the change as the consequence of changing scales, clashing jurisdictional 'logics'. Indeed, the changing definition of 'effectiveness' is evidence of moving from a human rights-based logic of derivative rights within the internal market to this 'concurrent reinforcement of protective claims and protectionist policies'[480]-logic applicable within the asylum regime. The discussion is also an excellent example of rights emerging and disappearing when one moves between jurisdictions within the same geographical space and enables a new understanding of the Court's behaviour.

With the majority of references to the principle of 'effectiveness' being complemented by additional calls to discern 'the intention of the EU legislature' and the 'objective/function/purpose of the instrument' in question, further problems arise because of the unreliability of the 'intention of the legislature' as a means to deciphering the meaning of vague legislation. This is so because keeping in mind that legislative power within the EU is shared between the Commission, the Council and the European Parliament and that those three institutions are collective bodies, it is questionable to what extend the Court is truly able to discern the real intentions of the EU legislature.[481] Interestingly enough, other writers have noted that '[t]he fragmented European executive leaves room for a stronger judicial branch'.[482] Yet, this does not seem to be the case for the ECJ within the asylum sphere. The 'objective/function/purpose' of the instrument in question are equally elusive if one is to

[478] For a further reading on the scope of application of fundamental rights in the Court's reasoning, please see, Koen Lenaerts. 'How the ECJ Thinks: A Study on Judicial Legitimacy'. 36 *Fordham Int'l L.J.* 1302, 2013, pp.1302-1371.
[479] Ibid.
[480] Sandra Lavenex, 'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System, *Journal of Common Market Studies, 56*(5), p. 1195.
[481] Lenaerts & Gutierrez-Fons, 2014, p. 25.
[482] Cebulak, 2016, p. 92.

interpret them in light of the overall scheme underpinning the AFSJ. As was shown in **Chapter III**, the area of immigration and asylum law is governed by an often conflicting 'conglomerate of competing policy objectives which cannot easily be reconciled'.[483] Overwhelming reliance on these rationales can therefore be problematic in its own right, but perhaps most so, when their use might eclipse an explicit engagement with the rights of the individual applicant. Such a conclusion aligns at least partially with 'a narrower segment of the scholarship [that] analyses *effet utile* from a socio-legal and more critical angle' where '*effet utile* is an empty if not a misleading rhetoric employed by the Court to "justify" innovation and divergent outcomes *without substantively engaging with the goals of integration and the arguments of the parties*' [emphasis added].[484] Whilst this work does not necessarily see 'effectiveness' as an instrument charged with the intent to mislead, it aims to underline a consensus amongst certain critical scholars that its use can have obscuring, albeit probably unintended, consequences.

Beyond having costs of its own, the use of the 'effectiveness' language is also a symptom of the jurisdictional clashes occurring beneath the apparently calm surface of the asylum regime. Here, it is useful to remember Valverde's aim mentioned in previous chapters, which is to provide scholars with the theoretical tools for analysing 'law in action' and thereby 'enable appreciating the role played by the game of jurisdiction.'[485] This is precisely what applying her conceptualisation of 'jurisdiction' and de Sousa Santos idea of 'interlegality' to the empirical findings about the use of 'effectiveness' can do. If framed as intentional, the overwhelmingly technical language of the Court's asylum jurisprudence can be seen as the Court's way to maintain its image as a politically neutral institution and the appearance of the domain in which it is operating as a static jurisdiction where all the competing and often contradicting interests enjoy a peaceful coexistence. It would thereby fall under Urška Šadl's observation of judicial language as 'prefabricated judicial formulas and locutions which are used to project the autonomy, neutrality, and universality of jurisprudence.'[486] Such a conclusion would also be supported by the Court officials' interviews, where many of them mentioned the intensity of the spotlight they felt was directed at them whenever an asylum case was ongoing. A couple of them noted that the Court had been called 'activist' in the media, and they were certainly conscious of policing their own work in a manner that would avoid drawing similar unwanted attention to the Court's asylum jurisprudence in the future. Drawing on the democratic pedigree of the EU legislature through the principle of 'effectiveness' would thereby protect the Court's appearance of neutrality.

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[483] Hailbronner & Thym, 2016, p. 273.
[484] Šadl, 2015, p. 23.
[485] Valverde, 2016, p. 180.
[486] Šadl, 2015, p. 21.

If framed as unintentional, the technical language employed by the ECJ can be seen as the inadvertent consequence of the intense 'interlegality' boiling beneath the surface of what merely appears as the harmonious governance of asylum law in the EU. In this case, the 'effectiveness' language would be the symptom of the covert conflicts between the qualitatively heterogeneous legal regimes and jurisdictions that are otherwise presumed as perfectly compatible. It would therefore reminds us that each legal order

> 'has its own scope, its own logic, and its own criteria for what is to be governed, as well as its own rules for how to govern […] the fact that differences in legal scale appear as technical matters on a par with a mapmaker's choice of cartographic scale means that the quite heterogeneous modes of governance carried out by different legal assemblages appear to coexist without a great deal of overt conflict. The structural incommensurability that characterizes interlegality is blackboxed […] by the operation of scale as such'.[487]

The legal systems clash and their incommensurability is hidden beneath the veil of technicality, which in turn conceals the individuals affected by them, who are in turn the points of overlap for many systems. This observation is summarised by de Sousa Santos who notes that each 'different for[m] of law create[s] different legal objects upon the same social objects.'[488]

A final point worth noting is that all three rationales (the 'effectiveness' of the system, the 'intention of the legislature' and the 'objective of the instrument' in question) engage a democratic element and can therefore be seen as signs of the Court's preoccupation with providing a democratic pedigree for its decisions within this particular domain of EU law. It is almost as though the Court's understanding of pursuing justice hinges on clarifying and thereafter engaging with the desire of the legislature, which, as mentioned above, is very difficult to discern.[489] In any case, the constant return to the same triad of rationales sits uncomfortably with the variety of topics covered by the jurisprudence, which include, but are not limited to: detention, the right to an effective remedy, freedom of religion, LGBTQIA+ issues, reception conditions, freedom of movement for receiving benefits, entitlement to social benefits, crime, terrorism, minors applying for asylum, the right to *non-refoulement*, the right to be heard and the family reunification regime for beneficiaries of international protection, amongst others. It is this diversity that all the more highlights the inflexibility of the reasoning offered by the Court and simultaneously renders terms like 'administrative'[490] and 'passivist'[491] as credible redefinitions of its role by prominent academics. The following chapter will present a selection of cases where the Court relies on the 'effectiveness' rationale before concluding with a

[487] Valverde, 2009, p. 141.
[488] De Sousa Santos, 1987, p. 287.
[489] Lenaerts & Gutierrez-Fons, 2014, p. 25.
[490] Thym, 2018.
[491] Lang, 2018.

reflection on what those mean in terms of describing the Court in a manner informed by an empirical study of its practice.

4. Critical Socio-Legal Analysis of the 'Effectiveness' Cases

The category of 'effectiveness' cases encompasses fourteen cases[492] from the Court's asylum jurisprudence, which are united around the Court's recurrent recourse to the 'effectiveness' rationale. Twelve of them concern the Dublin system (and thus the interpretation of either the original or the recast version of the Dublin Regulation), but not all Dublin system cases use the 'effectiveness' language. The category itself contains those pronouncements by the Court, which insist on reminding everyone of: the 'effectiveness' of either the regulation in question or of the asylum system, its 'practical effect', the 'functioning of the (Dublin) system', the 'objective (of the directive in question or, more often than not, the Dublin Regulation)', the 'purpose (of the Dublin Regulation or the overall asylum system)', the 'overall scheme (of the Dublin Regulation)', the 'intention of the EU legislature', the 'intention (of the instrument)', or the 'proper general functioning of the system'. The language of the Court in these cases is therefore striking for its practicality. It reveals deference to the legislature and an intent to keep the asylum system well and functioning, even if that might risk jeopardising the rights of the individuals involved. The pursuit of effectiveness thereby diverts attention away from the applicants that stand before the Court. This is especially visible in those instances where the substance of the case presents opportunities for engaging with a more human-rights-based language, but where it nonetheless ends up being completely avoided. Yet, it is important to note a remark made by one of the ECJ judges during his interview with me. He rightly mentioned that 'legislation is already so detailed and already incorporates human rights to such a degree that often times, there might be no need to discuss human rights instruments at all'.[493] That might indeed be the case when dealing with legislation that is full of references to human rights; however, it is important to remain vigilant to the explicit invocations of these norms because of their symbolic signalling power for lower courts. Additionally, the ECJ judge noted that within the preliminary ruling procedure (which also constitutes the sample of judgments in this study), the Court deals exclusively with questions of law and submitted the legitimate observation that 'if the Court dealt with facts, and not with questions of law, then perhaps more

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[492] The cases are: Case C-670/16 *Tsegezab Mengesteab v Germany*, Case C-646/16 *Khadija Jafari, Zainab Jafari v Bundesamt fur Frendenwesen und Asyl*, Case C-578/16 PPU *C. K., H. F., A. S. v Replublka Slovenija*, Case C-490/16 *A.S. v Republic of Slovenia*, Case C-60/16 *Mohammad Khir Amayry v Migrationsverket*, Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others*, Case C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Case C-394/12 *Shamso Abdullahi v Bundesasylamt*, Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, Case C-245/11, *K. v Bundesasylamt*, Case C-19/08 *Migrationsverket v Edgar Petrosian and Others*, Case C-47/17 *X.*, Case C-38/14 *Zaizoune*, Case C-383/13 PPU *G. and R.*.
Case C-277/11 *M. M. v Minister for Justice, Equality and Law Reform and Others*, Case 175/11 *H. I. D. and B. A. v Refugee Applications Commissioner and Others*.

[493] See Interview 4, 19/09/2018, transcript on file with the author.

references to human rights would pop up'.[494] Once again, this is an important reminder that the Court is, indeed, confined to answering questions of law and its exposure to the facts is limited to the manner in which they have been presented to it by lower Member State national courts (in the case of the preliminary ruling procedure). However, what looking at debates from political philosophy can do is remind one that human rights are often just as relevant to abstract discussions of law as they are to practical examinations of fact. Therefore, both of the above quotes from ECJ judges are a welcome reminder for the reader to take in the Court's case law with a grain of salt so as to reflect its institutional idiosyncrasies.

In light of the hitherto considerations about the place of human rights in the Court's jurisprudence, one could argue that if there is space for a discussion of the applicants' human rights, but it remains completely absent, then claims of the Court turning into an administrative tribunal in its asylum jurisprudence[495] (unlike in other spheres where it takes on a more constitutional role) can credibly carry negative connotations. This is especially true when the administrative path appears as the result of exercising a choice. And yet, even when alternatives are available, the administrative, deference-disclosing language can have positive connotations because it can be read as the Court sending a signal to the legislature that legislative change should take place at the democratic level. It reveals a self-consciousness on the Court's part, whereby its technical language can be read both as deference and as an awareness as to its role as the protector of the EU order, and by extension, of the EU asylum system. As Thym metaphorically notes, '[l]ike a mechanic who does his best to keep an ageing car going until the new one arrives, the Court maintains the Dublin III Regulation pending a political agreement'.[496] Keeping in mind that the majority of 'effectiveness' cases are Dublin cases and that the majority of Dublin cases can be categorized as 'effectiveness' cases, Thym's observation is an apt reminder of the democratic nuances that can be read into the Court's 'effectiveness' jurisprudence.

An important note on the 'effectiveness' cases is that a very big number of them concerns the determination, under the Dublin regulation, of the 'member state responsible' for taking on an asylum application. On the surface, this process *appears* strictly technical and a routine matter of applying the rules to the facts of a case and yet, the amount of jurisprudence this procedure has generated puts this presumption under question. This is where Valverde's theory of jurisdictional clashes and de Sousa Santos' elaboration on the importance of scale can be very useful. They can elucidate the discrepancy between the apparently technical nature of the case law and the disproportionate amount of jurisprudence that it nonetheless seems to

[494] See Interview 4, 19/09/2018, transcript on file with the author.
[495] Thym, 2018; 2019.
[496] Thym, 2018, p. 550.

produce as a coverup for the irreconcilable nature of the clashes between the qualitatively heterogeneous jurisdictions that underlie the EU asylum space. The technicality is therefore the symptom of an effort, whether conscious or not, at painting a picture of a harmonious co-existence between the many legal systems that simultaneously govern and paint different legal personas upon the same person within the aspirational EU area of freedom, security and justice.[497]

In the particular instance of the asylum cases before the Court, the different legal orders in terms of scale (e.g. international law, EU law, Member State national law) all operate within a different kind of 'legality', whether that be 'large-scale legality', 'medium-scale legality', or 'small-scale legality', with the consequence that they attach different importance to different details. For example,

> '[t]he large-scale legality is rich in details and features; describes behaviour and attitudes vividly; contextualises them in their immediate surroundings; is sensitive to distinctions (and complex relations) between inside and outside, high and low, just and unjust […] On the contrary, small-scale legality is poor in details and features, skeletonises behaviour and attitudes, reducing them to general types of action'.[498]

This necessarily creates clashes as the different legalities struggle to reconcile the fact that they operate within the same space, but consider very different details as important. As de Sousa Santos clarifies,

> 'the different legal scales do not exist in isolation but rather interact in different ways […] In such a case the regulatory purposes of the three legal scales converge in the same social event. This creates the illusion that the three legal objects can be superimposed. In fact, they do not coincide; nor do their 'root images' of law and the social and legal struggles they legitimate coincide'.[499]

De Sousa Santos thereby allows us to read the apparently technical nature of the case law as a symptom of profound jurisdictional differences and to acquaint ourselves with the likely possibility that the strongest conflicts might be hidden underneath what seem to be the least conflictual spaces. The subsequent discussion of the 'effectiveness' cases will therefore rest on precisely this assertion; that the technicality of the judicial engagement reveals a struggle of a qualitative and often irreconcilable nature and that 'effectiveness' is a rhetorical devise that more often than not diverts attention away from individual rights.

Below, I offer a critical socio-legal analysis of some of the 'effectiveness' cases that stood out from the Court's asylum jurisprudence. There are three judgments about detention[500] and

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[497] De Sousa Santos, 1987, p. 287.
[498] Ibid, p. 289.
[499] Ibid, p. 288.
[500] Case C-601/15 PPU *J. N. v Staatssecretaris van Veiligheid en Justitie,* Case C-60/16 *Mohammad Khir Amayry v Migrationsverket*, Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie.*

an important technical trio concerning the Dublin system, where the administrative language of the Court can be read as signalling the need for legislative change. I will start with the judgments concerning detention whose technicality stood out because it was in the context of the physical deprivation of liberty which should arguably be a very human rights' driven issue involving human rights' language.

5. 1. The 'Effectiveness' Detention Cases[501]

The following part will discuss those cases in which the principle of 'effectiveness' is used within the context of detention in order to illustrate the overwhelming presence of the principle in matters concerning the deprivation of liberty which should arguably engage human rights to an equal if not larger degree. Yet, this is not the case and human rights language is largely absent in the Court's rulings examined below. The applicants in them were deprived of their liberty for some time during the processing of their asylum applications. In the cases of *Khir Amayri*[502] and *Al Chodor*[503], the applicants were detained pending transfer to the Member State responsible for reviewing their applications under the Dublin Regulation; in the case of *Arslan*[504], the applicant was detained with a view to his administrative removal under the 2008 Returns Directive[505].

The case of *Khir Amayry*[506] concerned a so-called 'take charge' request. A 'take charge' request involves a Member State, where an asylum application has been lodged, requesting that another Member State, where the applicant first entered the EU irregularly, 'take charge' of the application in question. In this particular case, Mr. Amayry lodged an application for protection in Sweden. However, the Eurodac system[507] illuminated the fact that the applicant had not only already applied for asylum in Denmark, but had also entered the Union irregularly through Italy. Therefore, Sweden requested that Italy take charge of his application. Italy acknowledged its responsibility and accepted the request to take charge of the asylum applicant, whereby Sweden closed his case in preparation for transferring him to Italy and detained him on the alleged grounds that there was a high risk of him absconding. Mr. Amayry appealed both the decision to transfer him and the decision to detain him, which were dismissed, and he was finally transferred to Italy in May 2015. Less than a month later, the applicant returned to Sweden and

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501 The 'Effectiveness' Detention Cases within this part of the chapter refers only to those three detention cases that come under the 'effectiveness' classification. Otherwise, in the overall asylum jurisprudence of the Court, there are also other detention cases (e.g. Case C-601/15 PPU *J. N. v Staatssecretaris van Veiligheid en Justitie*, Case C-18/16 *K. v Staatssecretaris van Veiligheid en Justitie,* Case C 695/15 PPU *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal*).

502 Case C-60/16 *Mohammad Khir Amayry v Migrationsverket.*

503 Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others.*

504 Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie.*

505 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ L 348, 24.12.2008, p. 98–107.*

506 Case C-60/16 *Mohammad Khir Amayry v Migrationsverket.*

507 European Dactyloscopy is the European Union fingerprint database for identifying asylum seekers and irregular border-crossers, whose finger prints are taken as a matter of EU law if they are above the age of 14. The purpose of the system is to make it easier to identify the Member State responsible for processing an asylum application.

made a new application for international protection. The referring Swedish court ultimately granted leave to appeal solely on the matter of the detention and not the transfer. The questions themselves were to a large degree, very technical. They concerned the duration for which applicants can be detained, the date from which any such duration is to be calculated, and whether days spent in detention could be subtracted from the total detention time that a person can be subjected to. Therefore, the judgment served to define the time limits for detention leading up to a Dublin transfer under Article 28 of the Dublin III Regulation.

To begin with, the Court ruled that reading Article 28 of the Dublin III Regulation in light of Article 6 of the EU Charter does not 'preclude national legislation, such as that at issue in the main proceedings, which provides that, where the detention of an applicant for international protection begins after the requested Member State has accepted the take charge request, that detention may be maintained for no longer than two months, provided, first, that the duration of the detention does not go beyond the period of time which is necessary for the purposes of that transfer procedure, assessed by taking account of the specific requirements of that procedure in each specific case and, second, that, where applicable, that duration is not to be longer than six weeks from the date when the appeal or review ceases to have suspensive effect' (para. 49), but 'it does preclude national legislation, such as that at issue in the main proceedings, which allows, in such a situation, the detention to be maintained for 3 or 12 months during which the transfer could be reasonably carried out' (para. 49). The Court answered in the negative the question concerning whether the days that an applicant had already spent in detention need to be deducted from the six-week period established under the provision. Instead, the Court said that this period would begin 'from the moment when the appeal or review no longer has suspensive effective, and also applies when the suspension of the execution of the transfer decision was not specifically requested by the person concerned' (para. 73).

Admittedly, the Court did mention a human rights instrument in its reasoning when it directed the Member State referring 'authority to take account of Article 6 of the Charter of Fundamental Rights of the European Union, in so far as Article 28(2) of the Dublin III Regulation provides for a limitation on the exercise of the fundamental rights to liberty and security'[508] (see also para. 49). However, the two mentions are completely outnumbered by references to the 'wordings, context and the objective pursued' by the directive (para. 29), and keeping its 'effectiveness' uncompromised (para. 37),

> '[i]n light of those considerations, it is apparent that the interpretation envisaged in paragraph 33 above, first, would be such as to appreciably limit the effectiveness of the procedures provided for by that regulation and, second, would risk encouraging the person concerned to abscond in order to prevent their transfer to the Member State responsible,

[508] Case C-60/16 *Mohammad Khir Amayry v Migrationsverket*, para. 43.

thus barring the application of the principles and procedures of the same regulation' (para. 37)

acknowledging the wishes and intentions of the 'EU legislature' (paras. 38, 53, 64, 65),

'[m]oreover, that interpretation would be inconsistent with *the wish of the EU legislature*, expressed in recital 20 of the Dublin III Regulation, to allow detention while limiting its duration, since it would result in the limitation or cancellation of the detention, not on the basis of the time during which the person concerned was actually detained, but merely on the basis of the period of time elapsed since the requested Member State accepted the take charge or take back request' [emphasis added] (para. 38)

'[t]hat interpretation is supported by *the function assigned to those deadlines by the EU legislature*' [emphasis added] (para. 53)

'[i]t must moreover be noted that the *EU legislature refers* to the lifting of the suspensive effect 'in accordance with Article 27(3)' of the Dublin III Regulation, without drawing a distinction between the Member States which have decided to give an appeal or a review an automatic suspensive effect pursuant to Article 27(3)(a) and (b) of that regulation and the Member States which have chosen to make the grant of that suspensive effect subject to the intervention of a judicial decision to that effect on the request of the person concerned within the meaning of Article 27(3)(c) of that regulation' [emphasis added] (para. 64)

'[i]n this respect, it should be recalled that the *EU legislature did not intend* the judicial protection enjoyed by applicants for international protection to be sacrificed to the requirement of expedition in processing applications for international protection' [emphasis added] (para. 65)

and not depriving the provision in question from its 'utility' (para. 71),

'[c]onsequently, such an interpretation would mean, pursuant to Article 29(1) of the Dublin III Regulation, that, when the competent authority makes use of the power laid down in Article 27(4) of the same regulation for the benefit of a person who has not been detained, the deadline for carrying out the transfer should also be calculated from the moment of acceptance by another Member State of the take charge or take back request. That interpretation would therefore, in practice, be such as to greatly deprive that provision of its utility, since it could not be used without the risk of preventing the transfer being carried out within the time limits laid down by the Dublin III Regulation' (para. 71).

As supported by the numerous examples above, pragmatic considerations and presumptions concerning the intention of the EU legislature in drafting the directive in question held the overwhelming majority in terms of presence in the language of the Court. Establishing the legislature's intention is portrayed as a technical matter, although, as previously observed, it is a much more contentious process than can be discerned from the Court's recurrent references to it. The solitary mention of human rights all the more highlights the disproportionately frequent allusion to the EU legislature's intention. The extent to which the reasoning of the Court

surrenders to the intention of the legislature reveals that the pursuit of 'effectiveness' aims at compensating for the democratic deficit presumed to characterise the Court's decisions. Ultimately, the Court struck the right balance in preventing excessive detention, but only after an analysis that was completely free from human rights consideration that went out of its way to ensure that the 'effectiveness'[509] of the legislative provision would not be compromised. It is important not to fall into the trap of concluding that as long as excessive detention was avoided, the path through which that decision was reached is irrelevant. As has been mentioned before, because of the symbolic and exemplary role that the ECJ plays for the international community and for Member State courts, it is of immense value when it references human rights in its reasoning and thereby signals that they should be an important consideration in rendering a decision.

The case of *Arslan*[510] concerned Directive 2008/115/EC[511] on return of illegally staying third-country nationals ('The 2008 Returns Directive') which covers the concept of 'detention' in quite vague terms. The directive is ambiguous in relation to the duration of detention (a maximum of six months which can be extended to a maximum of 18 months in exceptional situations), the 'reasonable intervals' for the review of detention, and the reason for detention (e.g. the risk of 'absconding').[512] The vague wording leaves ample room for the ECJ to make pronouncements that would clear the confusion in a manner that it sees fit. The applicant in the case, a Turkish national, was detained for 60 days in the Czech Republic upon entering it irregularly, and despite presenting an asylum application, a second decision ordered his further detention for 120 days. Mr. Arslan appealed the latter decision, arguing that in view of the high improbability of having him removed within the maximum delay of 180 days provided by the 2008 Returns Directive, the extension of his detention was in breach of the Directive's wording. In light of these circumstances, the referring court asked whether there was a blanket ban against the detention of third-country nationals who had applied for international protection or whether such detention could be allowed under national law. Here, the conflict was one of scale: between the small-scale legality of EU law and the large-scale legality of Member State law. The ECJ answered that the 2008 Directive on illegally staying third-country nationals does not apply to people who had lodged an application for international protection. However, it also ruled that the detention of such applicants is allowed where there is a national law, which, following a case-by-case assessment of all the relevant circumstances, enables a conclusion that an application was made solely to delay or jeopardise the enforcement of a return decision

[509] See Case C-60/16 *Mohammad Khir Amayry v Migrationsverket*, para. 37.
[510] Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie.*
[511] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).
[512] Thym, 2018, p. 550.

concerning the applicant and detention is 'objectively necessary' (para. 59) to prevent the person concerned from permanently evading his return.

There are scarce references to human rights or to human rights' instruments in the decision. The only human rights language used by the Court appears when it draws attention to the preamble of the directive in question, where it is that people are 'to be returned in a humane manner and with full respect for their fundamental rights and their dignity' (para. 42). The remainder of the noteworthy references are to 'the wording, scheme and purpose' of the directive (para. 48), the discretion available to Member States (para. 56), the 'objective of that directive' (para. 60) and its 'effectiveness' (para. 61). Ultimately, the Court reminded the referring authority that following a case-by-case examination of all the relevant circumstances, detention of six months would be permissible if 'the application was made solely to delay or jeopardise the enforcement of the return decision and [if] it is objectively necessary to maintain detention to prevent the person concerned from absconding' (para. 63).

It is not for this work to pass judgment on the correctness of the Court's decisions, but to draw attention to certain patterns. The current recast Dublin III Regulation sets the time limit for detention at six weeks (see Article 28(3)). Arguably that is what the legislators deem as the 'humane' limit, so whenever the Court delivers a judgment which allows for a detention time exceeding six weeks by more than four times (as it did in *Arslan*), and fails to discuss the human rights implications of detention for detainees, a legitimate expectation by human rights' advocates gets frustrated. After all, human rights are an essential part of the European Union order and enjoy a constitutional status under the Charter of Fundamental Rights of the EU. Therefore, if the Court has concerns regarding overstepping its mandate by bringing them in when discussing cases where they would be relevant, such concerns would be unjustified. The ECJ is not there to train national courts in being aware of the importance of human rights and of applying them, but purely linguistically, more references to them could have that effect because 'international courts exert an influence that exceeds the binding force of their judgments'.[513] Instead, the Court's preoccupation with technicalities and neglect of such instruments such as the EU Charter of Fundamental Rights, has the effect of obscuring the individual affected by the legislation in question.

5. 2. The Dublin System 'Package' Cases

The Dublin system 'package' encompasses the cases of *Jafari*[514]*, A. S.*[515]*, and Mengesteab*[516]. All three judgments concerned the non-application of the Dublin rule regarding the state-of-

[513] Shai Dothan, International Courts Improve Public Deliberation. *Michigan Journal of International Law*, *39*(2), 2018, p. 9.
[514] Case C-646/16 *Khadija Jafari, Zainab Jafari v Bundesamt fur Frendenwesen und Asyl* (hereafter: *Jafari*).
[515] Case C-490/16 *A.S. v Republic of Slovenia* (hereafter: *A.S.*).
[516] Case C-670/16 *Tsegezab Mengesteab v Germany* (hereafter: *Mengesteab*).

first-entry across the 'Western Balkans route' and were delivered by the Grand Chamber of the Court on the same day. In that sense, they can be considered as a 'package' of cases, which are to be read together. Therefore, I will examine all of them, despite the fact that only *Mengesteab* fits, strictly speaking, within the 'effectiveness' category. *Jafari* and *A. S.* miss references to 'effectiveness', but profusely call to the rationales which usually buttress the pursuit of 'effectiveness'; namely, 'the intention of the EU legislature', and the 'objective/function/purpose of the instrument' in question. Therefore, although they are not counted towards the fifteen 'effectiveness' cases that I listed at the start of this chapter, they are nonetheless considered in detail below.

Mengesteab references the EU legislature (paras. 45, 52, 79), the effectiveness of the Dublin system (paras. 46, 91), the functioning of Dublin (para. 95), the objective of Dublin (paras. 47, 54, 58, 68, 96), and the purpose of Dublin (para. 98). *Jafari* mentions the EU legislature (paras. 46, 48, 56, 71, 94), the overall EU legislation (para. 51), the objectives of Dublin (para. 84), the overall scheme of Dublin (para. 89), a Council Decision (99), a Commission proposal (para. 88), but also has references to the spirit of solidarity (paras. 85, 88, 100), and a single reference to the Charter (para. 101). *A.S.*, in its own turn, warns against the fact that certain interpretation would lead a regulation to be 'deprived of most of its practical effect' (para. 34); mentions that 'the arrival of an exceptionally large number of third-country nationals wishing to obtain international protection can have no effect on the interpretation or application of that provision' (para. 40), the intention of regulation (para. 47), and also has one reference to the Charter (para. 41). Each of the cases will be tackled in further detail below.

In terms of the greater context surrounding the cases, particularly *Jafari* and *A.S.* concerned the seven months between September 2015 and March 2016, when north of 700,000 people made use of the so-called 'Western Balkans' route which started in the Middle East, went through Turkey, Greece, Former Yugoslav Republic of Macedonia, up to Serbia, Hungary, Croatia (once Hungary close its border with Serbia), Slovenia and Austria, and often ended with Germany as the ultimate destination. In that sense, none of the asylum seekers on this route actually applied for asylum in their first country of irregular entry, which is usually the defining condition under the Dublin III Regulation for establishing the 'Member State responsible' (MSR) for examining an asylum application. What was unique about this time period was that the authorities of Member States and third countries all facilitated the asylum seekers in their journey by providing transportation along the route. This put the presumption of *irregular* entry

which is listed as the requirement for determining the MSR for an application under the Dublin III Regulation under question and therefore required a clarification by the Court. [517]

The Syrian applicant in *A.S.* and the two Afghan applicants in *Jafari* all took the Western Balkans route in 2015/2016 and ended up applying for asylum in Slovenia and Austria respectively, after having received aid by Member State and third country authorities along the way. Therefore, both the Austrian referring court in *Jafari* and the Slovenian referring court in *A.S.* wanted to establish whether the fact of national authorities aiding mass border crossings in times of humanitarian crisis could amount to the issuance of a 'visa' and therefore amount to 'regular entry' into the EU, or whether they still qualified as 'irregular crossings' regardless of the help that was received and therefore fell under the regime established by the Dublin III Regulation. Both referring Member States had refused to examine the applications because they saw Croatia as the 'Member State responsible' for the examination. Croatia was considered the applicants' first point of entry into the EU because at this point in time, Greece was exempt from Dublin transfers due to the systemic deficiencies evidenced in its asylum system, as established under the Grand Chamber case of *N. S. and Others*[518].[519]

The questions before the Court largely centred around defining the concept of 'irregular crossing', which lacked further clarification in the Dublin III Regulation or any other EU act. The Court was therefore responsible for establishing the meaning of a fundamental aspect of the regulation. This was an excellent example of the 'broad Brussels compromise' that was mentioned in almost all of the elite interviews I conducted at the Court. Both judges and Advocate-Generals were referring to the political constellation in Brussels, where the need for a consensus often times leads to vague legislation which the Court is then burdened with the difficult task of clarifying. Making the Court the only and final instance to settle the meaning behind terms of such importance makes it an essential actor in establishing the overall asylum legislative scheme.

In both judgments, the ECJ held that the arrivals of the applicants must be seen as 'irregular crossings' within the meaning of Art 13(1) of the Dublin III Regulation 'irrespective of whether the crossing was tolerated or authorized in breach of the applicable rules or whether it was authorized on humanitarian grounds by way of derogation from the entry conditions

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[517] E. Fassi & S. Lucarelli, The European Migration System and Global Justice: A First Appraisal, *GLOBUS Working Papers*, 2017, p. 47.

[518] Joined cases C-411/10 and C-493/10 N. S. (C-411/10) v Secretary of State for the Home Department, United Kingdom and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, Ireland.

[519] The 2011 Grand Chamber case was an instance of the Court prioritising human rights considerations over preserving the effectiveness of the Dublin system and as such, it is discussed in more detail in Chapter V.2.2.2., which is devoted to implicit engagements with the vulnerability theory.

generally imposed on third-country nationals'[520]. In *Jafari*, the Court elaborated at length on the meaning of 'irregular crossing'. It first reiterated the purpose of the Dublin III Regulation,

> '[t]he purpose of the responsibility criteria set out in Articles 12 to 14 of the Dublin III Regulation is not to penalise unlawful conduct on the part of the third-country national in question but to determine the Member State responsible by taking into account the role played by that Member State when that national entered the territory of the Member States' (para. 91).

Then, the Court noted that the conditions for 'irregularly crossing' are met whenever a third-country national enters EU territory without meeting entry conditions,

> '[i]t follows that a third-country national admitted into the territory of one Member State, without fulfilling the entry conditions generally imposed in that Member State, for the purpose of transit to another Member State in order to lodge an application for international protection there, must be regarded as having 'irregularly crossed' the border of that first Member State within the meaning of Article 13(1) of the Dublin III Regulation, irrespective of whether that crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals' (para. 92).

The Court also took the opportunity to address the fact that the authorities of certain countries facilitated the crossing of the asylum seekers. Taking into account 'the overall scheme of that regulation', it stated clearly that any such action cannot absolve said countries from responsibility,

> 'In the light of the foregoing, the criteria laid down in Articles 12 to 14 of the Dublin III Regulation cannot, without calling into question *the overall scheme of that regulation*, be interpreted to the effect that a Member State is absolved of its responsibility where it has decided to authorise, on humanitarian grounds, the entry into its territory of a third-country national who does not have a visa and is not entitled to waiver of a visa' [emphasis added] (para. 89)
>
> 'Furthermore, the fact that, as in the present case, the third-country national in question entered the territory of the Member States under the watch of the competent authorities without in any way evading border control is not decisive for the application of Article 13(1) of the Dublin III Regulation' (para. 90).

Finally, the Court dismissed the relevance of the number of arrivals as though wishing to define the legislation in a vacuum without bias towards the 'crisis'-like situation happening on the ground,

> '[t]he fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection cannot affect the interpretation or application of Article 13(1) of the Dublin III Regulation' (para. 93).

[520] See *Jafari*, para. 92.

As per the above quote, the Court ruled that the unprecedented number of third-country nationals crossing into the EU had no effect on its irregular nature.[521] Thus, the only circumstances which could deprive the Member State of first irregular entry from responsibility would be a situation in which a Dublin transfer to it could risk infringing Article 4 of the Charter (freedom from inhuman or degrading treatment)[522]. In the words of the Court,

> '[i]n any event, it should be noted that, under the second subparagraph of Article 3(2) of the Dublin III Regulation and Article 4 of the Charter of Fundamental Rights of the European Union, an applicant for international protection must not be transferred to the Member State responsible where that transfer entails a genuine risk that the person concerned may suffer inhuman or degrading treatment within the meaning of Article 4 of the Charter (see, to that effect, judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraph 65). Such an applicant cannot therefore be transferred if, following the arrival of an unusually large number of third-country nationals seeking international protection, such a risk existed in the Member State responsible' (para. 101).

Effectively, the *Jafari* ruling meant that Croatia was the EU Member State responsible for examining not only the applications under *A.S.* and *Jafari*, but also those of the overwhelming majority of the 700,000 people that had crossed its border in the time period mentioned above.[523] Yet, even if one were to accept the reasoning of the Court and its strictly formalistic language, there are authors who argue that its automatic application of the 'irregular crossing'[524] criterion to Croatia is questionable. Under a strict application of the first-state-of-entry criteria, Greece would have had to be established as the responsible for the applicants, since all three applicants in *A.S.* and *Jafari* entered the EU through Greece. The failed asylum system had, however, made it impossible to have Dublin transfers to the country as of 2011. Yet, as Advocate-General Sharpston notes, there never was a legal provision in the Dublin Regulation to the effect that 'responsibility under that provision transfers to the *second* Member State of entry.'[525] Lang also rightly draws the parallel with Advocate-General Villalón's opinion in *Abdullahi*, where he observes that,

> '[i]n principle, each criterion is exhausted on its application, since each one will ordinarily identify a single Member State responsible. It would therefore make no sense to re-apply the criterion that led to the determination of the Member State to which the applicant for asylum cannot in the end be transferred because the application of that criterion would inevitably lead to the Member State which had been excluded. By the same token, it would be unthinkable even to consider applying one of the previous criteria, the application of which was ruled out as soon as it was

[521] See *Jafari*, para. 93.
[522] See *Jafari*, para. 101.
[523] Lang, 2018.
[524] See Article 13(1) of the Dublin Regulation (also knows as the 'state-of-first-entry rule').
[525] See Opinion of Advocate-General Sharpston in Cases C-490/16 *A.S.* and C-646/16 *Jafari*, delivered on June 8th, 2017, at para. 188.

> concluded that the correct criterion was one of the following ones' (Opinion A-G Villalón, para. 73).

Following that logic, the responsible Member State would be the one where the asylum application was first submitted, as per Article 3(2) of the Dublin Regulation, which states that '[w]here no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it'[526].[527] On the other hand, as Advocate-General Sharpston stressed, the Court had to do a lot of retrofitting in this case. The ECJ was asked whether applicants ending up in Slovenia and Austria had committed an 'irregular crossing' as defined by the Dublin III Regulation, but the instrument in question was not catered to those kind of circumstances, forcing the Court to decide a problem which it was, and continues to be, ill-equipped to deal with.[528] Ultimately, the Court and Advocate-General Sharpston disagreed in their answer to the submitted question, with the Advocate-General arguing in her Opinion that the applicants had not done an irregular crossing and therefore should have ended up in their destination states.

The case of *Mengesteab* had different concerns, but the fact of its delivery on the same date as *A.S.* and *Jafari* has been consequential for the interpretation and application of all three decisions. The applicant in the case was an Eritrean national whose arrival and application for asylum in Germany was preceded by entrance into EU territory through Italy. Close to a year following his initial informal request for asylum, but only a month after his formal application in Germany, Germany issued a 'take charge request' to Italy. The applicant challenged this decision by claiming that the request had been made after the expiry of the three-month time limit for 'take charge requests' outlined in the Dublin III Regulation, arguing that such time limit should run from the day of his informal, as opposed to his official, request for asylum. The Court ruled that the applicant was entitled to challenge transfer decisions where Member States had not properly observed time limits. Additionally, the Court ruled that an informal application was enough for considering that an application had been lodged,

> '[a]rticle 20(2) of the Dublin III Regulation must be interpreted as meaning that an application for international protection is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing the obligations arising from that regulation, and as the case may be, if only the main information contained in such a document, but not that document or a copy thereof, has reached that authority' (para. 103).

[526] See Article 3(2) of the Dublin III Regulation.
[527] Lang, 2018.
[528] Lang, 2018.

In terms of importance, the particular form of the application was not relevant in light of the intention of the applicant and the public authorities' knowledge thereof. That is to say, the relevant authority's awareness, with certainty, of a third-country national applying for international protection is enough to consider an application lodged. Else, the whole system and the guarantees for the applicants would be jeopardized,

> '[i]t follows that, in order to be able effectively to start the process of determining the responsible Member State, the competent authority needs to be informed, with certainty, of the fact that a third-country national has requested international protection, and *it is not necessary for the written document prepared for that purpose to have a precisely defined form* or for it to include additional information relevant to the application of the criteria laid down by the Dublin III Regulation or, a fortiori, to the examination of the application for international protection. Nor is it necessary, at that stage of the procedure, for a personal interview already to have been organised' [emphasis added] (para. 88)

> '[i]t is clear from the explanatory memorandum of the Commission proposal [COM(2001) 447 final] which led to the adoption of Regulation No 343/2003, first, that an asylum application must be considered to have actually been lodged as soon as the asylum seeker's *intention* has been confirmed with a competent authority and, second, that Article 4(2) of that regulation is the repetition of Article 2 of Decision No 1/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, concerning provisions for the implementation of the Convention (OJ 1997 L 281, p. 1). Article 2(1) stated that an application for asylum is regarded as having been lodged 'from the moment the authorities of the Member State concerned have something in writing to that effect: either a form submitted by the applicant or an official statement drawn up by the authorities" [emphasis added] (para. 90)

Most prominently, the Court kept in mind the 'effectiveness', the results 'in practice' of any alternative reading of the Regulation, and its 'objective':

> '[i]n the third place, the *effectiveness* of certain important guarantees granted to applicants for international protection would be restricted if the receipt of a written document, such as that at issue in the case in the main proceedings, was not sufficient to demonstrate that an application for international protection had been lodged' [emphasis added] (para. 91)

> '[i]n those circumstances, to consider that a document such as that at issue in the case in the main proceedings does not constitute a 'report', within the meaning of that provision, would, *in practice*, allow third-country nationals to leave the Member State in which they have requested international protection and to re-request that protection in another Member State, but they could not be transferred, for that reason, to the first Member State and it would not be possible to trace their initial request by using the Eurodac system. Such a situation could seriously affect the functioning of the Dublin system by calling into question the special status which the Dublin III Regulation grants to the first Member State in which an application for international protection is lodged' [emphasis added] (para. 95)

> '[i]n the fifth place, to consider that a document such as that at issue in the main proceedings constitutes a 'report', within the meaning of Article 20(2) of the Dublin III Regulation, is *consistent with the objective* of rapidly processing applications for international protection, referred to in recital 5 of that regulation, since such an interpretation ensures that the process of determining the Member State responsible begins as soon as possible, without having to be delayed as a result of accomplishing a formality which is not necessary for carrying out that process. In contrast, *that objective would be weakened* if the starting date for that process depended solely on a choice made by the competent authority, such as the grant of an appointment for a personal interview' [emphasis added] (para. 96)

All in all, in *Mengesteab,* the overall scheme pursued by the Dublin III Regulation and thereby, its 'effectiveness', once again held centre-stage in determining the interpretation that should be provided to answer the questions referred for a preliminary ruling. Indeed, all three cases referenced the 'intention of the regulation', the importance of preserving its 'practical effect', the EU legislative intention, the objectives of Dublin III, and the functioning, effectiveness and purpose of Dublin III. Both *Jafari* and *A.S.* cited a human rights' instrument, but only singularly, when Article 4 of the EU Charter was mentioned. In cases like the ones above, vague legislation leaves plenty of room for manoeuvre for the Court, which becomes free to choose which instruments from its judicial toolbox it will choose to use, and thereby emphasise, in clarifying the legislation. Though the legislative intention is difficult to discern because the vagueness of the instruments is the result of absence of unified voice on the legislature's part, the Court still tries to discern it. In terms of substance, this is indicative of the Court's overall pursuit of filling in the legislative gaps in a manner that is overwhelmingly tipped in favour of preserving the effectiveness of the overall system and less prone to account for the human rights instruments that could be useful in the interpretative process and to the functioning and coherence of the overall system.

As for the timing of the three cases, 'it is no coincidence' that the Court issued *Mengesteab* on the same date as *A.S.* and *Jafari* because *Mengesteab* applied a temporal limit to what would otherwise have been an overwhelming consequence of the former two judgments.[529] The *Mengesteab* decision established that a Dublin transfer can no longer occur after the expiry of a three-month period that follows the lodging of an asylum application. This decision *de facto* meant that for the hundreds of thousands of asylum seekers who had used the Western Balkans route and would have needed to be transferred to Croatia under the judgments in *Jafari* and *A.S.*, it was no longer the case. This judgment trio is important in its message: the Dublin III Regulation will be subjected to a formalistic reading even in cases of mass influx of unprecedented scale. Yet, the qualifying role played by *Mengesteab* at least indirectly

[529] Lang, 2018.

acknowledges the difficulty of the situation. It sent a message to the EU legislature to enact change if it wishes to see change. The Court had the opportunity to 'fix' the law, but it recognized that it was not for the Court, but for the legislator, to do so. In his elaborate study of these cases, Daniel Thym agrees with characterising the Court as an administrative tribunal, but he also sees value in the Court's approach towards upholding the rule of law and claims that 'the judges in Luxembourg knew that their position on the Dublin system and, even more so, on the actions for annulment, initiated by Hungary and Slovakia, against the relocation decisions would be essential for the future of the rule of law in Europe'.[530] There is no doubt, for him, that the judgments 'signal unambiguously that it is the responsibility of politicians to reform the Common European Asylum System (CEAS)'.[531] Furthermore, he saw the combined effect of the judgments as leading to a 'surprisingly balanced output'.[532] Although, as Iris Lang notes, it remains 'doubtful whether striking the right balance by delivering a "package of judgments" makes up for the shortcomings of individual judgments contained in that package'.[533]

6. Major Takeaways from the Court's Engagement with the Idea of Effectiveness: Is the ECJ a 'Passivist', an 'Administrative', or a 'Principal' Court?[534]

It is difficult to ignore the success of the European Court of Justice in balancing the demands of law with the individual demands of the EU Member States.[535] It has managed to cater to the local sensitivities of each state, whilst steering clear of any potential allegations that it might be heeding to the political interests of governments at the expense of the rule of law.[536] The principle of 'effectiveness' has definitely played a central role in achieving this balance. As per Šadl's observations the principle of 'effectiveness' has been 'a legal judicial means which allows the Court to develop a coherent body of case law without risking major political backlash from the Member States'.[537] Yet, within asylum, the references to 'effectiveness' have not fared as successfully in striking the right balance between ensuring the preservation of the system and considering the rights of the individuals caught in it. As established previously, whilst the principle of effectiveness has largely acted as a conduit for individual rights in the Court's non-asylum jurisprudence, it has not had a protection-enhancing effect for the rights on third country nationals in asylum cases. In fact, as the above discussion has revealed, the use of the

530 Thym, 2018, p. 550.
531 Ibid.
532 Ibid.
533 Lang, 2018.
534 Within the asylum law context, the Court has previously been described as 'passivist' by Iris Goldner Lang and as 'administrative' by Daniel Thym. Gareth Davies, on the other hand, sees it in a co-dependent relationship with the EU legislature where the former is the 'principal', whilst the latter is the 'agent'.
535 Lang, 2018.
536 Šadl, 2015, p. 19.
537 Ibid, p. 42.

'effectiveness' rationale has operated as a distraction from individual rights, a symptom of irreconcilable conflict between different jurisdictions, and an artificial compensation for the democratic deficit of judicial decisions within certain contested areas of EU law. All of these observations have shed doubts on what would be the most appropriate qualification for describing the Court's work within asylum, with several different ideas having gained traction in certain academic circles.

Indeed, the European Court of Justice has been the subject of many studies on judicial activism, with arguments coming from different perspectives. Cebulak provides a useful taxonomy based on whether the definitions rely on: the separation of powers doctrine,[538] the canons of judicial behaviour,[539] or the specific context of the international jurisdiction.[540] The opposite side of the coin, judicial passivism, has also had its moments of fame in academic literature on the ECJ, albeit much fewer.[541] In her remarks as part of the 2018 Annual Odysseus Conference, Prof. Iris Goldner Lang put forward the idea of 'judicial passivism' as an apt description of the Court's actions within the area.[542] She argued that the term had failed to attract anywhere near the amount of attention 'judicial activism' had and acknowledged the fact that defining either is a subjective matter because 'the delimitation of the ECJ's powers often lies in the eye of the beholder'.[543] Seeing the Court as an activist or a passivist would therefore reveal more about the observer than about the Court itself. However, rather than operating under the standard presumption of viewing the two terms as opposites, Lang chose to instead view judicial passivism as a subdivision of judicial activism; as applying in situations where 'the ECJ is consciously (actively) not using its powers where it should, and thereby sending a message to EU institutions, its Member States and other political actors in the EU'.[544] She saw the Court's 'judicial passivism' in those terms. She defined two possible forms of judicial passivism in what she termed a 'narrow' and an 'extensive' sense. The former would cover those cases where the ECJ 'chooses not to decide on the issue by declaring that it lacks jurisdiction', whilst the latter 'would also encompass situations where the Court is using its judicial (e.g. interpretative) role, but it does so in a manner which deviates from the teleological interpretation by which the

538 Ramussen, 1998; William P. Marshall, 'Conservatives and the Seven Sins of Judicial Activism', *University of Colorado Law Review*, 2002, p.1220; Craic Green, An Intellectual History of Judicial Activism, *Emory Law Journal*, 58:5, 2009; Daniel Sarmiento, 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice', pp.11-40, p.16 in Claes, Monica, Maartj De Visser, Patricia Popelier, and Catherine Van de Heyning (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, 2012.

539 Green, 2009; A. Grimmel, Politics in Robes? The European Court of Justice and the Myth of "Judicial Activism", *Europa-Kolleg Hamburg Discussion Paper* No 2/11, 2011, p. 13.

540 Cebulak, 2016, p. 73.

541 Sarmiento, 2012; Lang, 2018; Thym, 2018.

542 Other academics have also engaged with the Court's laconic judgments. For example, Daniel Sarmiento frames them as evidence of 'judicial minimalism' in Daniel Sarmiento, 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice', pp.11-40, p.16 in Claes, Monica, Maartj De Visser, Patricia Popelier, and Catherine Van de Heyning (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, 2012.

543 Lang, 2018.

544 Ibid.

Court has accustomed us over the past decades of its adjudication'.[545] In sum, judicial passivism, par Lang, involves either the Court choosing not to decide a case, or deciding to do so, but in a merely formalistic way.

What is immediately notable about Lang's conceptualization of the Court's behavior is the negative connotation underlying its so-called 'passivism'. It implies that in those cases that the Court decides not to get involved with ruling on a case or decides to do so purely formalistically, it usually has room for an alternative decision. It also implies an intent on the Court's part and, in that sense, is very normatively loaded. Advocate-General Sharpston offers an alternative, more nuanced, conceptualization. For her, it is essential to acknowledge the difficult situation the Court found itself in upon the mass influx of people the Union witnessed in 2015; it had to retrofit the Dublin III Regulation and apply it to a situation it was not fit to handle. Whilst she agrees with Lang that passivism is an active choice, she stresses the fact that it is not an accident. She therefore offers a threefold conceptualization of the Court's actions within asylum law: namely, judicial passivism in the narrow sense (as per Lang's definition), a middle category of 'negative judicial passivism', where the Court engages with the issue, but steps aside, leaving the problem to be solved through national law (as was the case in *X and X*) and a final category of what she calls 'positive judicial passivism', where the Court engages with the issue at hand and tries specifically to choose a particular reading (as was the case in *A.S.* and *Jafari*). When it comes to the asylum jurisprudence of the ECJ, Advocate-General Sharpston's conceptualisation proves to be the more useful one. It injects greater nuance into the decisions of the Court and allows for the simultaneous coexistence of the many possible explanations for the Court's technical language and its recourse to the principle of 'effectiveness'. This judicial passivism, whether it be a-la-Lang or a-la-Sharpston, casts a doubt on Gareth Davies' conceptualisation of the Court as the 'principal' in its 'principal-agent' relationship with the EU legislature, at least within the asylum sphere. A much more apt description is one incorporating deference and administrative approach instead.[546] The Court's choices are in the direction of heeding to the actions of the legislature, and perhaps rightly so. As previously noted, controlling migration is seen as the 'last bastion of sovereignty' and any questions, whose solution might infringe on the Member States' right to self-determination are perhaps best left to the EU legislature.

[545] Ibid.
[546] Thym, 2018.

CHAPTER V

The 'Vulnerability Thesis': Bridging the Gap between the Disciplines of Political Philosophy and Law

The generic use of the term 'vulnerability' has been around in judicial decisions for a long time. Different academics have also engaged with the concept and some have even theorised its existence in an elaborate fashion. However, it is Martha Fineman's 'vulnerability thesis' (also referred to as 'vulnerability theory') that captivated both the legal and the philosophical imagination and forms the focal point of this work. Therefore, the following chapter will be devoted to unpacking the ways in which her thesis can help answer the research questions underpinning this work and thereby bridge the gap between political philosophy and judicial practice. A major argument in favour of embracing her particular articulation of a theory of vulnerability is that the Court already echoes some aspects of her ideas. That means that theorising its use of vulnerability in Fineman's terms would neither be far-fetched, nor mean that the Court would need to compromise with its intuitive ideas about the meaning of vulnerability. Rather, it would be an easy transition into a more coherent and legally predictable engagement with the concept.

The presence of Fineman's ideas in the jurisprudence on an international court (the ECtHR) has been previously done to a certain extent in Peroni and Timmer's 2013 work on 'vulnerable groups'.[547] Yet, it did not engage with the theory's individual vulnerability aspect and did not provide an overarching taxonomy for applying the theory to any subject case law. The subsequent taxonomy will therefore be one of the original contributions of this work, capable not only of focusing on instances of engaging individual vulnerability when studying the jurisprudence of a supranational court, but of also offering an innovative taxonomical framework for tracking the theory's presence that is especially valuable because of its ability to engage with Fineman's theory of vulnerability even in the absence of the explicit use of the term itself.

In order to paint the picture of the Court's understanding of the idea of vulnerability, the initial study of the Court's *explicit* references to the concept will draw on its complete jurisprudence, which will thereafter be narrowed down to its asylum case law, where this work

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[547] See Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law', *I•CON*, 2013, Vol. 11 No. 4, 1056–1085.

will trace the Court's *implicit* engagement with it. The taxonomy will consist of two main categories: 'explicit presence' and 'implicit presence'. The 'explicit presence' category concerns those cases which mention the word vulnerability. Those can be divided into two sub-categories: references which are 'far from Fineman's approach' and those which are 'close to Fineman's approach'. The 'implicit presence' category highlights those cases in which the word itself is absent, but the reasoning engages with different aspects of Fineman's theory, most notably, with its insistence on the applicants' embodiedness and/or embeddedness.

Whilst taxonomizing the case law, this chapter will simultaneously offer three ways of using Fineman's vulnerability thesis to bridge the gap between political philosophy discussions on migration and the asylum jurisprudence of the European Court of Justice. First, it will examine the explicit, albeit generic, references to the concept of vulnerability within the Court's overall jurisprudence in order to argue that Fineman's vulnerability thesis can provide the theoretical background for a coherent use of the word within the Court's practice (Part V.1). This will have the consequences of bridging the gap between global justice discussions on migration from political philosophy and the Court's practice within asylum, whilst granting the latter the sense of abstraction and permanence so central to political philosophy. Second, this chapter will study the ECJ's *implicit* engagement with the idea of vulnerability through human rights in order to posit the vulnerability analysis as a safety net in cases where the human rights' identity breakdown so essential to the asylum regime (e.g. when the Court needs to decide whether an applicant qualifies for a refugee status based on whether she is prosecuted due to her religious, ethnic, gender or other *identity*) fails to extend protection to all vulnerable individuals who might be in danger because of the context in which they find themselves (Part V.2). By offering the tools for a structural interrogation of an applicant's circumstances, the vulnerability analysis will thereby widen the protection available to vulnerable asylum seekers. Vulnerability will hence be theorised as a safety net that both ECJ and national judges should keep in mind and, when needed, cast whilst undertaking their case-by-case analysis of an issue. Third, this chapter will conceptualise the vulnerability of an applicant as a counterbalancing force to the Court's commitment to preserve the effectiveness of the asylum system (Part V.3). It will argue that the more vulnerable an applicant is, the greater consideration her interests must heed in balancing her rights against the principle of preserving the effectiveness of the asylum system.

1. *Explicit* References to the Concept of Vulnerability in the Court's Overall Jurisprudence

The following discussion tackles the task of establishing the Court's familiarity with the idea of vulnerability by presenting the evidence of its *explicit* presence within the complete jurisprudence of the European Court of Justice. Relying on the empirical study of the Court's decisions, Part V.1. establishes that the appearance of the word 'vulnerability' is not a novelty. Yet, a close legal reading of the substance of the cases reveals that its use is often generic and its meaning varies. More than being a meaningful designation, vulnerability emerges a vacuous concept with multiple meanings not only across different EU law spheres, but also within the spheres themselves. This inconsistent and incoherent use of the term undermines the principle of legal certainty and makes the case for theorising it even more compelling. The introduction of Fineman's vulnerability thesis to the Court's practice can therefore remedy the legal uncertainty caused by the incoherent reliance on the term and thereby make for a valuable contribution to reconceptualizing the ECJ jurisprudence. Importantly, offering the theoretical backbone for the Court's use of vulnerability can also result in bridging the gap between global justice discussions on migration from political philosophy and the Court's decisions within the asylum sphere and grant the latter the sense of abstraction and permanence so fundamental to political philosophy.

The subsequent part of the chapter groups the examination of the cases with explicit references to vulnerability into two types: those, whose meaning is far from Fineman's approach because vulnerability is neither inherent, nor embodied, but is instead assigned and applicable to legal persons, such as enterprises, and objects (1.1.), and those, whose meaning is close to Fineman's approach because it is inherent, embodied, and used in a manner going beyond identity categories (1.2.).

1.1. Far from Fineman's Approach: *Assigned* Vulnerability in the Court's Overall Jurisprudence

In the complete jurisprudence of the European Court of Justice[548], the word 'vulnerability' appears in forty-one judgments between 1960 and 2019.[549] The subject-matter of the cases varies, with thirteen (or one-third) of them coming from within the Area of Freedom,

[548] The number of all closes cases in the form of delivered judgements by the European Court of Justice is 11,471 as of April 5th, 2019.

[549] This number of cases is valid as of March 22nd, 2019 and involves a simple 'free text' search through all of the closed cases of the ECJ on the CVRIA website: http://curia.europa.eu/juris/documents.jsf?text=vulnerability&oqp=&for=&mat=or&lgrec=en&jge=&td=%3B%3B%3BPUB1%3B%3B%3BORDALL&jur=C&etat=clot&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Ctrue%252Ctrue&language=en&avg=&cid=5658809.

Security, and Justice.[550] Having read through all of the cases, it is easy to see that the word is used in a generic manner and represents the kind of vulnerability we are used to as being 'assigned' by the political process. In that sense, 'assigned' vulnerability is juxtaposed to Martha Fineman's insistence on 'inherent' vulnerability, as the former varies across time because of who (e.g. refugees, women, children, investors in foreign states, etc.) or what (e.g. certain institutions) is deemed vulnerable changes with the politics of day, whilst the latter is permanently there, albeit subject to change in terms of degree. The stigmatizing and agency-depriving dangers of 'assigned' vulnerability are discussed further below. The appearance of vulnerability within the ECJ overall jurisprudence is also applicable to buildings and institutions, and in that sense once again clashes with Fineman's conceptualization of the idea as being applicable to human beings only.

In the twenty-seven non-asylum and non-AFSJ cases, the word is mentioned in relation to several different instruments and contexts. A big number of the cases concern consumer protection and are looked at in more detail below. Although performing this exercise might appear as an analytical diversion, doing so is essential to buttressing this work's argument; namely, that the term 'vulnerability' is being used so inconsistently by the Court's that it has become a vacuous concept that risks jeopardizing legal certainty. It is precisely those instances in which 'vulnerability' is used in reference to buildings and companies that help argue in favour of the adoption of a more coherent, a-la-Fineman definition for the term that will limit its application to natural persons. Hence, the subsequent discussion of empirical engagement with the Court's jurisprudence. In the twenty-seven non-asylum cases which mention 'vulnerability', the term is not only 'assigned' as opposed to 'inherent', but is also utilized vaguely to cover natural and legal persons, depending on the case. Six of the cases[551] have to do with Directive 92/85[552], which addresses the 'vulnerability of pregnant workers'. In those cases, vulnerability takes on a transient image, which can justify paternalistic policies that reinforce the image of the permeability of the female body. Besides those, there are a number of odd instances of its use, with one example being the case of *Ordine degli Ingegneri della Provincia di Lecce and Others*[553], where the word appears generically in considering the 'seismic vulnerability of hospitals'. In such cases, we see the concept of vulnerability being stretched to cover buildings and institutions.

[550] The further classification of these 13 cases is as follows: 4 asylum policy cases, 1 border checks case, 1 immigration case, 2 judicial cooperation in civil matters cases, 4 judicial cooperation in criminal matters cases.

[551] *González Castro*, Case C-41/17; *Otero Ramos*, Case C-531/15; *D.*, Case C-167/12; *Kiiski*, Case C-116/06; *Merino Gómez*, Case C-342/01; and *Tele Danmark*, Case C-109/00. All six cases were labelled as 'social policy' cases.

[552] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

[553] Case C-159/11 *Ingegneri della Provincia di Lecce and Others*, 2012.

1.1.1. Explicit Reference to Vulnerability in Consumer Protection Cases

In the Court's jurisprudence that mentions the term 'vulnerability', there are several consumer protection cases, including *Eni and Others*[554], *Philip Morris Brands and Others*[555], *Federutility and Others*[556], and *Pammer*[557]. As such, they deal with the vulnerability of consumers, but the latter are not necessarily limited to humans; instead, enterprises are also deemed as capable of being vulnerable. For example, in *Eni and Others*[558], the Court mentions certain 'protected customers' as 'particularly vulnerable' in the reasoning of the judgment whilst rephrasing legislation.[559] The legislation in question assigns particular vulnerability to 'small and medium-sized enterprises, provided that they are connected to a gas distribution network, and essential social services'[560]. Here, vulnerability is assigned not to a natural, but to a legal person such as an enterprise, a feature which would not be possible under Fineman's vulnerability thesis, where only human beings are vulnerable by virtue of their embodiedness.

In the case of *Federutility and Others*[561], the word is once more mentioned in interpreting legislation, namely, Article 3(3) of Directive 2003/55 which explicitly delineates a circle of customers who must necessarily be protected on account of their vulnerability.[562] Both the legislation and the judgments fall short of clarifying the meaning of said vulnerability and whether the term 'customers' is limited to humans or not. On the other hand, in *Philip Morris Brands and Others*[563], vulnerability is to be understood as the consequence of the asymmetrical relationship between producers of addictive products and their consumers. In that case, the Court had to decide whether certain EU legislation had fairly balanced between, on the one hand, protecting the freedom of expression and information of enterprises and, on the other hand, protecting human health. The Court therefore noted in its reasoning that certain practices had the purpose of 'exploit[ing] the vulnerability of consumers of tobacco products who, because of their nicotine dependence, are particularly receptive to any element suggesting there may be some kind of benefit linked to tobacco consumption, in order to vindicate or reduce the risks associated with their habits'.[564] In this case, vulnerability was very obviously limited to

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554 Case C-226/16 *Eni and Others v Premier Ministre and Ministre de l'Environnement, de l'Énergie et de la Mer* (*Eni and Others*), 2017, para. 31.

555Case C-547/14 *Philip Morris Brands and Others v The Secretary of State for Health*, 4 May 2016.

556 Case C-265/08 *Federutility and Others v Autorità per l'energia elettrica e il gas*, 20 April 2010.

557 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) (Pammer) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09), 7 December 2010.

558 Case C-226/16 *Eni SpA and Others v Premier ministre and Ministre de l'Environnement, de l'Énergie et de la Mer*, 20 December 2017, at para. 31.

559 Ibid, at para. 31.

560 See point 1(a) of the second paragraph of Article 2 of Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC Text with EEA relevance.

561 Case C-265/08 *Federutility and Others v Autorità per l'energia elettrica e il gas*, 20 April 2010.

562 Ibid, at para. 40.

563 C-547/14 *Philip Morris Brands and Others v The Secretary of State for Health*, 2016.

564 Ibid, at para. 160.

humans. Yet, had it not been for the human health aspect of it, one would once again be stuck in the position of establishing whether the vulnerability arising from the asymmetrical business relationship would be limited to humans or not. For example, in the *Pammer*[565] case, the asymmetry inherent in the market relationship between producer and consumer is mentioned where 'the vulnerability of consumers with regard to traders' offers'[566] is touched upon, absent any further clarification. What is therefore fascinating about the consumer protection cases is that they reveal how much the meaning of 'vulnerability' can vary. Even within the same sphere of EU law, which deals with the same set of rights, obligations, and relationships, the concept can take on multiple meanings, threatening legal certainty and legal consistency.

1.1.2. Explicit Reference to Vulnerability in AFSJ Cases

The situation is no different when it comes to cases from the AFSJ jurisprudence of the Court, where the use of the word and its definition also vary greatly. In the most recent case, *R. O.*[567], the word appears within the context of explaining the referring court's previous decisions and does not form part of the ECJ's reasoning. In *X. and X.*[568], the applicants' '*particular vulnerability*, associated with their belonging to the Orthodox Christian community'[569] [emphasis added] makes a brief appearance in the Court's quotation of the referring court's rationale behind applying for the urgent preliminary ruling procedure. In *A. and S.*[570], the 'particular vulnerability' of unaccompanied minors is mentioned in paraphrasing Directive 2013/32/EU[571] in the reasoning. Interestingly, the 'particularly vulnerable' word combination in asylum cases is not a first in the Court's jurisprudence, as its consumer protection case of *Eni and Others*[572] mentioned above also uses the expression to refer to a specific part of its customers. What attracts attention here, however, is the fact that the idea of vulnerability is limited to human beings.

The cases of *Covaci*[573] and *X.*[574] are both AFSJ cases concerning judicial cooperation in criminal matters. The former is yet another example of 'vulnerability' being mentioned in the

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[565] *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) (*Pammer*) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09), 7 December 2010.
[566] Ibid, para. 62.
[567] Case C-327/18 PPU, 9 September 2018.
[568] Case C-638/16 PPU, *X. and X. v. Etat belge*, 7 March 2017.
[569] Ibid, at para. 30.
[570] Case C-550/16 *A and S*, 12 April 2018
[571] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29.6.2013, p. 60–95.
[572] Case C-226/16 *Eni*, at para. 31.
[573] Case C-216/ 4 *(Gavril Covaci) Zustellung und Sprache im Strafverfahren.*
[574] Case C-507/10 *X.*, 21 December 2011.

non-operative part of the judgment, where relevant legislation is listed.[575] Yet, the latter, *X*.[576], talks about the 'particularly vulnerable victim'. It concerns the interpretation of the Council Framework Decision on the standing of victims in criminal proceedings.[577] It mentions that 'victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances',[578] but leaves the idea of vulnerability undefined. The Court interprets this as leaving 'a large measure of discretion' to national authorities,

> '[i]n the absence of fuller clarification in the actual provisions of the Framework Decision in the light of Article 34 EU, which grants to national authorities the choice of form and methods necessary to achieve the desired result of Framework Decisions, it must be recognised that the Framework Decision leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement the objectives to be attained (see, to that effect, Case C-404/07 *Katz* [2008] ECR I-7607, paragraph 46; Case C-205/09 *Eredics and Sápi* [2010] ECR I-0000, paragraphs 37 and 38, and Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-0000, paragraphs 57, 72 and 74)'.[579]

The bigger discretion available for national authorities, the less legal certainty a provision has. This is the unfortunate consequence of the continued lack of theorization of the 'vulnerability' concept, which this work is eager to solve.

A close reading of the AFSJ jurisprudence that explicitly recalls the idea of vulnerability, also reveals a subcategory of asylum cases which mention the word. Those are the cases of *F*.[580], *A*.[581], and *M*.[582], which refer to the right to an interview in one way or another. Despite sharing a common subject and therefore being part of a niche selection of cases, however, their engagement with the idea differs across form and substance. For example, in *F*.[583] and *A*.[584], 'vulnerability' is not part of the reasoning, but is instead present in the non-operative part of the judgment which lists relevant legislation. In both cases, the Court quotes Directive

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575 See Recital 27 of preamble to the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings: 'The duty of care towards suspected or accused persons who are in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential *vulnerability* that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed.'

576 Case C-507/10 *X*., 21 December 2011.

577 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1; 'the Framework Decision').

578 See Article 2(2) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1; 'the Framework Decision').

579 Case C-507/10 *X*., 21 December 2011, at para. 28.

580 Case C-473/16, *F v Bevándorlási És Állampolgársági Hivatal*, 25 January 2018.

581 Case C-148/13 *A and Others v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, at para. 70.

582 Case C-560/14 *MM v Minister for Justice and Equality, Ireland and the Attorney General*, February 27 2015.

583 Case C-473/16, *F v Bevándorlási És Állampolgársági Hivatal*, 25 January 2018.

584 Case C-148/13 *A and Others v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, at para. 70.

2005/85/EC[585] which mentions the need for interviewers to be qualified enough to consider and take note of applicants' vulnerability when conducting interviews with them. In contrast, in *M.*[586], the Court had to decide whether an applicant's right to be heard was satisfied with an initial interview or whether she or he should have been allowed additional interviews. Here, the applicant's vulnerability was pivotal to the Court's reasoning, where it was stated that,

> '[a]n interview must also be arranged if it is apparent — in the light of the personal or general circumstances in which the application for subsidiary protection has been made, in particular any specific *vulnerability* of the applicant, due for example to *his age, his state of health or the fact that he has been subjected to serious forms of violence* — that one is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application'[587] [emphasis added]

Interestingly, the 'specific vulnerability' of the applicant is in line with Fineman's vulnerability approach as she argues that all people are vulnerable, with some of them being more vulnerable than others because of factors such as the ones listed above. In fact, the 'serious forms of violence' mentioned are very much akin to pointing out structural, contextual, non-identity-related causes of vulnerability which Fineman tries to capture with her theory. By going beyond the identity of the applicant, which can be gleaned through the prism of categories such as age and health, and instead additionally looking into the way the circumstances surrounding the applicant might render him more vulnerable, the Court is very much taking on the type of analysis Fineman is promoting with her theory. Therefore, this case could easily be read as evidence of the Court's potential to mobilize vulnerability in a post-identity paradigm and also be placed under the category of cases which exemplify engagement with vulnerability that echoes Fineman's theory (V.1.2.).

1.2. Close to Fineman's Approach: Inherent and Embodied Vulnerability in the Court's Overall Jurisprudence

Despite the overwhelmingly disperse and incoherent explicit use of the term 'vulnerability' in ECJ jurisprudence, some cases have engaged with it in a rather sophisticated fashion that evokes ideas similar to Martha Fineman's vulnerability thesis. These instances show that, in certain respects, the Court's asylum jurisprudence might prove fertile soil for planting

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[585] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13). See Article 13(3) of the directive, which states:

'Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end Member States shall:

(a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or *vulnerability*, insofar as it is possible to do so; …' [emphasis added]

[586] Case C-560/14 *MM v Minister for Justice and Equality, Ireland and the Attorney General*, February 27 2015.

[587] Ibid, at para. 51.

the seeds of Fineman's thesis because three of her ideas are already echoed throughout the Court's asylum cases. The first of these ideas is that vulnerability is inherent and limited to human beings by virtue of them being 'embodied and embedded'. The second idea is that as our embeddedness carries with it the natural consequences of aging such as the fact of becoming increasingly prone to disease or in need of care. The third, and perhaps most innovative, aspect of her vulnerability thesis is that it offers a 'post-identity' analysis which enables one to capture and expose both the privilege-endowing and disadvantage-producing *structures* and *processes* (as opposed to inherent identities) that make us particularly vulnerable. In that sense, her theory allows one to apprehend substantive angles of vulnerability that go beyond what can be seen through the formal non-discrimination-related identity categories we are so used to deal with. The insight achieved through the vulnerability thesis therefore goes beyond the one that can be gleaned through an intersectional analysis that involves overlapping such categories. These three fundamental aspects of Fineman's vulnerability thesis can now provide the context for the forthcoming exposé of cases. They represent an echo of each of her aforementioned ideas, with the very recent judgment of *Jawo*[588] showing an unprecedented and very progressive engagement with the idea of vulnerability in much the same way as Fineman's thesis does. The case goes beyond identity categories because and focuses on the vulnerability of the applicant as created by his circumstances.

1.2.1. The Vulnerability Thesis Posits: Vulnerability is 'Universal and Inherent'

Viewing vulnerability in Martha Fineman's terms as inherent and universal gives it a permanent flavour that protects the idea from being instrumentalised to cater to the political waves of the time by being *assigned* to particular groups. This is the case because whenever vulnerability is *attributed* (through the political process), as opposed to (permanently) *inherent*, political change has an ongoing influence on the definition and the beneficiaries of the term. In this scenario, the target vulnerable group changes all the time. That is indeed also the case in the European Union, where the appearance of the term 'vulnerability' in EU legislation and discussions of it by the Court are all instances of assigning vulnerability (and denying agency), rather than examples of accepting it as inherent. Both this politically-stirred and thereby fleeting nature of vulnerability as well as its denial of agency are cured by Martha Fineman's theorization of it as inherent and inevitable. With political change being constant, but also fundamental in shaping migration governance in the EU, Martha Fineman's vulnerability thesis thereby provides the substance for grounding the substance of the idea in something more permanent. The resulting theorisation of vulnerability as inherent and inevitable thereafter allows us to also see differences amongst individuals as distinctions of degree rather than of kind. It empowers

[588] Case C-163/17 *Jawo*, March 19, 2019.

those individuals who would have otherwise had their agency denied under a 'vulnerable group' designation.

1.2.2. The Vulnerability Thesis Posits: Humans are 'Embodied and Embedded'

The 2010 AFSJ case, *Eredics and Sápi*[589], contains the earliest judicial mention of the idea of vulnerability in a manner particularly relevant to Martha Fineman's thesis. This is largely because the Court discusses the idea of vulnerability in a language that evokes her idea of human beings as 'embodied and embedded' beings who are interconnected. In seeking to further clarify the interpretation of the same Framework Decision as the one discussed in *X*.[590] noted above, the Court had to answer the interrelated questions of whether the concept of 'victim' could be applicable to legal persons in addition to natural persons within criminal proceedings and if not, whether that constituted discrimination against legal persons. The Court's answer was loud and clear in saying,

> '[n]or does an interpretation of the Framework Decision as applying solely to natural persons constitute discrimination against legal persons. The European Union legislature could legitimately establish a body of rules designed to protect only natural persons, since such persons are objectively in a situation which differs from that of legal persons *because of their greater vulnerability* and because of the nature of the interests which can be harmed by offences which can be committed only against natural persons, *such as the victim's life and physical well-being*.
>
> In the light of the foregoing, Articles 1(a) and 10 of the Framework Decision must be interpreted as meaning that the concept of 'victim' does not extend to legal persons for the purposes of the promotion of mediation in criminal proceedings under Article 10(1).'[591] [emphasis added]

The above quotes are a fantastic illustration of the Court establishing that certain offences can only be committed against natural persons because of their emobodiedness. The Court's acknowledgement of the legitimate differentiation between legal and natural persons by virtue of the latter's 'greater vulnerability' is therefore a welcome act. However, it is worth remembering that because the Court does not have one, unified way of defining vulnerability, this differentiation would only go as far as being applicable within the context of this and similar cases dealing with the same piece of legislation.

[589] Case C-205/09 *Criminal proceedings against Emil Eredics and Mária Vassné Sápi*, 21 October 2010.
[590] Case C-507/10 *X.*, 21 December 2011.
[591] Case C-205/09, *Criminal proceedings against Emil Eredics and Mária Vassné Sápi*, paras. 30-31.

A similar note is made by the Court in both *Commission v Greece*[592] and *Medipac - Kazantzidis*[593], although this time in paraphrasing Directive 93/42[594]. In both cases, the Court notes in largely identical language that,

> 'Article 11 of Directive 93/42 regulates the procedure for assessing the compliance of medical devices with the requirements of that directive. For this purpose, as is stated in the 15th recital in the preamble to that directive, medical devices are grouped into four product classes and the checks to which they are subject are progressively stricter depending on *the vulnerability of the human body* and taking account of the potential risks associated with the technical design and manufacture of those devices.'[595] [emphasis added]

The mention of 'the vulnerability of the human body' is particularly evocative of Fineman's description of the most fundamental aspect of her theory, namely that we are *all* vulnerable because we exist as 'embodied and embedded' human beings. It shows that the Court would already be positively predisposed to a theory such as hers. In any case, it reveals that it would not be an unexpected leap into the unknown should the concept of vulnerability be theorised in this particular direction.

1.2.3. The Vulnerability Thesis Posits: The Human Body is Prone to Disease, Ages and Needs Care

The second important aspect of Fineman's vulnerability thesis is that as our embodiedness carries with it the natural consequences of aging. Those include, but are not limited to, growing increasingly prone to disease with the passing of time or being in need of care at different stages of our lives. The care aspect, whether early or late in life, is in turn a sign of our embeddedness and dependence on others for help. We have all been helpless infants and children once and we are all subject to the aging process, whereby our vulnerability and the need for care increases with the passing of time. We are inevitably embedded within social institutions that help us progress through the precarity of life and the language of vulnerability lets us investigate how those institutional forms of cooperation alleviate or exacerbate our vulnerability. Therefore, case discussions which engage with the vulnerability contingent on the different stages of the aging process can be credibly said to reflect Fineman's conceptualization. Case *IKA*[596] offers an excellent example of the Court echoing these observations when it explicitly ties vulnerability to the aging process,

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[592] Case C-489/06 *Commission v Greece*, 27 March 2015.
[593] Case C-6/05 *Medipac-Kazantzidis AE v Venizeleio-Pananeio*, at para. 15.
[594] Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ 1993 L 169, p. 1), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 93/42').
[595] Case C-489/06 *Commission v. Greece*, at para. 14; See also Case C-6/05, at para. 15.
[596] Case C-326/00 Idryma Koinonikon Asfaliseon (IKA) v Vasileios Ioannidis, 15 October 2002.

> '[a]s both the Greek Government, in its written observations, and the Advocate General, at point 32 of his Opinion, have observed, the fact that the Community legislature did not wish to model the system applicable to non-working pensioners on that applicable to employed and self-employed persons may be explained by a desire to promote effective mobility of that category of insured persons, taking into account certain characteristics which typify them, such as *a potentially greater vulnerability and dependence in health terms* and an increased freedom from commitments permitting more frequent stays in other Member States'[597] [emphasis added]

The Court's recognition of aging people's greater vulnerability *and* dependence is significant in recalling Fineman's refrain that all humans are both 'embodied and embedded'. The vulnerability in health terms evokes Fineman's idea of being embodied, whereas the 'dependence in health terms' conjures her idea of being embedded within a community with other people on whom we can rely and whose presence or absence might increase our vulnerability or improve our resilience. Similarly, in *Shiri*[598], Mr Shiri's 'vulnerability owing to his state of health'[599] is mentioned in the reasoning once. This is an important reference to the word because it is not tied to its presence in any of the legislation under consideration, but is instead an example of the Court's independent use of it.

The implications of the aging process for our need to receive care are, however, not limited to getting old. After all, our infancy and minority also carry significant consequences for our dependency on others to survive. Therefore, it is also worth noting those cases in which vulnerability is mentioned in the context of minors as potentially reflecting Fineman's thesis. For example, in the case of *Maria Pupino*[600], the Court noted that minors constitute a class of 'victims who are particularly vulnerable'. The case concerns the Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings[601] which contains instructions towards institutions to ensure special treatment for 'victims who are particularly vulnerable' without defining the idea any further. In search of a suitable definition for those, the Court rules that,

> '[t]he Framework Decision does not define the concept of a victim's vulnerability for the purposes of Articles 2(2) and 8(4). However, independently of whether a victim's minority is as a general rule sufficient to classify such a victim as particularly vulnerable within the meaning of the Framework Decision, *it cannot be denied that where, as in this case, young children claim to have been maltreated,* and maltreated, moreover,

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[597] Ibid, para. 38.
[598] Case C-201/16 *Shiri*, 25 October 2017.
[599] Ibid, at para. 15.
[600] Case C-105/03 *Criminal proceedings against Maria Pupino*, 15 June 2005.
[601] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ 2001 L 82, p. 1.

> by a teacher, *those children are suitable for such classification having regard in particular to their age* and to the nature and consequences of the offences of which they consider themselves to have been victims, with a view to benefiting from the specific protection required by the provisions of the Framework Decision referred to above' (para. 53) [emphasis added]

In the above quote, we see the Court as confirming that children, by virtue of their age, are capable of being classified as 'particularly vulnerable'. Even though it falls short of saying that this is the case in all circumstances where there is a minor plaintiff involved, the Court's recognition of the connection between age and vulnerability is a welcome evidence of its occasional engagement with the concept of vulnerability in a manner close to Fineman's approach.

1.2.4. Vulnerability Analysis as a Post-Identity Analysis

One of the most fundamental and paradigm-changing takeaways from Fineman's work on her vulnerability thesis is how a post-identity paradigm can be the most potent tool for addressing existing material and social inequalities between people.[602] In Fineman's terms, an 'identity paradigm' is the one that has accompanied the mainstream non-discrimination and 'sameness of treatment' regime which has sought to enable equality between people by eradicating any forms of discrimination based on identity characteristics like gender, race, and ethnicity. Such analysis, she argues, is insufficient because '[t]he process of analysing the differences that arise from individual experience within social structures does not begin with the particular characteristics of the individual, but with the nature of social arrangements'.[603] She would much rather see an 'equality in context'[604] type of analysis that would allow one to look beyond the individual characteristics of a person and account for her circumstance as well. It is therefore that Fineman refers to the vulnerability thesis as operating within a 'post-identity' paradigm.[605] It allows for a more systemic analysis, where one can observe the processes that interact to produce privileges for some and disadvantages for others, and recognise that 'privileges and disadvantages accumulate across systems and can combine to create effects that are more devastating or more beneficial than the weight of each separate part'.[606] Here, the emphasis is on the fact that is it *systems*, as opposed to *identities* that interact and produce inequality. More precisely, she argues the following,

> '[w]ith respect to the assets any one person possesses, it is not multiple *identities* that intersect to produce compounded inequalities, as has been posited by some theorists, but rather *systems of power and privilege* that interact

[602] Fineman, 2008.
[603] Fineman, 2017, p. 143.
[604] Ibid.
[605] Fineman, 2008, p. 1.
[606] Ibid, p. 17.

> to produce webs of advantages and disadvantages. Thus, where other theorists expand the traditional equal protection analysis provides a means of intersecting identities, a vulnerability analysis provides a means of interrogating the institutional practices that produce the identities and inequalities in the first place' [emphasis added].[607]

Although played out in an 'substantive inequality vs. formal non-discrimination' argument, the emphasis on identity categories and the need to move away from them in favour of the more fitting post-identity approach is also very relevant to sustainably addressing the root causes of the many processes that render people more or less vulnerable.

A post-identity model is also appropriate to the asylum context because of the ways in which the international refugee protection system and the majority of national asylum systems are modelled on the identity categories paradigm. The very definition of a 'refugee' centres around identity categories that we are familiar with from the anti-discrimination model. Just as discrimination based on racial, ethnic, or gender grounds is impermissible, so is 'persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group'[608]. Whilst the historical progress enabled through reliance on these identity categories should be a cause for celebration, their existence has to a certain extent eclipsed a clear view of the social processes that to this day continue to exacerbate vulnerability and reproduce inequality. Indeed, a vulnerability analysis is a more robust method than a simple identity-based or rights-based analysis for pointing out the root causes of inequality and thereby addressing injustices, past and present. Within the context of asylum, a vulnerability inquiry would allow us to refocus our attention by moving it away from the identity sources of an applicant's vulnerability and towards its structural causes. It would also remove some of the importance given to the *source* of vulnerability under the 'persecution' requirement and redistribute parts of it towards looking at the *extent* of the vulnerability itself. This would reclaim the individual as the focal point of such an analysis.

Whilst expectations of doing away with the identity categories that characterise the international protection regime seem too ambitious at this point in time, recent ECJ judgments have shown timid signs of budding engagement with the idea of expanding in that direction. The judgment in *Jawo*[609] not only explicitly engages with the idea of vulnerability, but it also surpasses the standard application of identity categories familiar from the Court's rationales in favour of noting the more structural causes of vulnerability. This has resulted in a first in the Court's asylum jurisprudence, where it engages with a socio-economic analysis and the non-

[607] Fineman, 2008, p. 15.
[608] United Nations, *The Convention Relating to the Status of Refugees*, 1951.
[609] Case C-163/17 *Jawo*, 19 March 2019.

identity-related circumstances of poverty to deter asylum transfers under the Dublin III Regulation. Both cases will be examined in greater detail in section V.3.

2. *Implicit* Engagement with the Vulnerability Thesis through Human Rights in the Court's Asylum Jurisprudence

There are a number of cases within the Court's asylum jurisprudence, where, although the explicit use of the word 'vulnerability' is absent, the Court's manner of engaging with the case before it nonetheless echoes Fineman's ideas. The subsequent part will therefore offer a study of the Court's *implicit* engagement with her theory. The criteria for picking those cases has involved looking into the extent to which they focus on the individual applicant's circumstances and whether they make references to human rights. Therefore, in contrast to the very technical argument of 'effectiveness' that permeates a significant portion of the Court's asylum jurisprudence, these cases very often refer to human rights' instruments and identity categories to build their argument. This feature of theirs will help establish the second possible application of the vulnerability analysis: namely, as a safety net in those cases where the human rights' identity analysis, which is fundamental to the asylum regime, fails to offer protection to *all* vulnerable individuals. In that sense, the subsequent examination will be strongly rooted in the 'post-identity' aspect of her theory. As a quick reminder, Fineman has argued that examining people's vulnerability,

> 'is a "post-identity" inquiry in that it is not focused only on discrimination against defined groups, but concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions. As such, vulnerability analysis concentrates on the structures our society has and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality'.[610]

The 'discrimination-based model' that she refers to is the one which prohibits discrimination based on different identity categories, such as: gender, race, sexuality, and age. Whilst there is plenty to be celebrated about the progress that has been achieved through the application of this model, it has no answer for the people that are left behind because of structural inadequacies in society that continue to accrue disadvantages on them.[611] Instead, their disadvantages situation is seen as 'the just results of their own individual failures and inadequacies'.[612] However, as per Fineman's observation, 'the claim of failure of personal responsibility might be harder to make if we do not frame equality arguments in terms of the absence of impermissible

[610] Fineman, 2008, p. 1.
[611] Ibid, p. 18.
[612] Ibid, p. 2.

discrimination […] A vulnerability inquiry proposes a more thorough and penetrating equality analysis – one that considers structural and institutional arrangements'.[613] As Fineman's inquiry concerns itself with the inability of rights-based protection policies to defend all vulnerable individuals, her argument is transferable to the international protection regime. Currently, the beneficiaries of international protection are limited to those who can show they are being persecuted by a state because they fall under particular identity categories, as opposed to suffering under the structural inadequacies of their countries or of the international economic system. Thereafter, the international asylum regime also cares about the source, and not the extent, of someone's harm. This leads to the paradox in which a person, who lives in life-threatening poverty because of the structural inadequacies of his home state is not granted international protection, even though she might be more vulnerable than a person who has a well-founded fear of being persecuted because of their identity. The vulnerability analysis can cure this paradox by offering a safety net for those cases where an identity analysis leads to the conclusion that the person should not be granted any protection, whether as a refugee or as the beneficiary of subsidiary protection in the EU.

By offering the tools for a structural interrogation of an applicant's circumstances, the vulnerability analysis will ensure a wider protection for all vulnerable migrants. Vulnerability will thereby be theorised as a safety net that both ECJ and national judges need to keep in mind whenever they are undertaking their case-by-case consideration of an issue. Below, I will elaborate on each case in order to reconstruct the implicit presence of the idea of vulnerability in Fineman's more substantive sense of the word. Examining them will also allow the reader to familiarise oneself with the Court's human rights discourse in a time when human rights have emerged as 'the core of the current morality'.[614]

2.1. Presenting the Jurisprudence

The subsequent discussion of the cases *implicitly* engaging with Fineman's vulnerability theory will be divided into two parts. The first part will present an unconventional category; namely, the four 'blanket ban' cases[615] (Part 2.2.). They stand in as evidence of the most unusual manner of engaging with the theory of vulnerability and cover the instances in which protection is automatically denied to people by virtue of them being covered by 'blanket concepts'. I see those cases as *implicitly* alluding to the idea of vulnerability in an indirect and unconventional way because of their preliminary dismissal of an individual vulnerability analysis. The 'blanket concepts' approach engenders the polar opposite of what a vulnerability analysis requires and

[613] Ibid, p. 18.
[614] Fassi & Lucarelli, 2017, p. 78.
[615] The 'blanket ban' cases are: Case C-695/15 PPU *Mirza*, Case C-175/11 *D. and A.,* Case C-404/17 *A.,* and Case C-411/10 *N.S.*

therefore represents an *implicit*, albeit negative, engagement with Fineman's ideas. However, the 'blanket concepts' themselves can also be conceptualised as fascinating instances of intense interlegality. Therefore, I will take the opportunity to theorise 'blanket concepts' through Valverde and de Sousa Santos' work and present them as the symptoms of the incommensurability of overlapping legal regimes.

The second part of the study of cases *implicitly* engaging with idea of vulnerability will present those referring to human rights (Part 2.3.). The European Court of Justice has a long practice of referring to human rights' instruments and is incredibly well-versed in utilising it when needed, with nineteen cases[616] explicitly citing human rights in one way or another. Formally, the examples include many mentions of the ECHR, ECtHR jurisprudence, Charter articles, or the overall need for protecting human rights and focusing on the personal circumstances of the applicants. Substantially, the cases have a fundamental rights aspect which appears irrespective of whether the ruling is in favour of the applicants or not. The cases cover a wide range of topics. Some of the recurring ones are: the right to freedom of movement irrespective of locations of benefits, the right to freedom of religion, the right to adequate reception conditions, the right to be heard, the right to an effective remedy, the right to family reunification, the rights of LGBTQIA+ individuals, and the rights of minor applicants. The subsequent examination in Part 2.3. will offer a more detailed look into those cases that have the strongest explicit engagement with human rights.

2.2. The 'Blanket Ban' Cases

The following section studies the cases in which applicants are denied an individual examination of their case because they are covered by what I term 'blanket bans' through the application of certain 'blanket concepts', i.e. concepts which apply in total, to everyone belonging to a particular category without the chance of an individual treatment. The concepts in question are 'safe third country' and 'safe country of origin'[617]. In all of the subsequent cases in this part, the vulnerability of the applicants covered by these ideas is automatically denied in a blanket manner, irrespective of their individual circumstances. Because vulnerability is simultaneously universal and individual, a vulnerability-informed engagement with a case would

[616] The cases in reverse chronological order are as follows: Case C-578/16 PPU *C. K., H. F., A. S. v Replublka Slovenija*, Case C-348/16 *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, Case C-18/16 *K. v Staatssecretaris van Veiligheid en Justitie*, Case C-443/14 *Kreis Warendorf v Ibrahim Alo and Amira Osso v and Region Hannover*, Case C-543/13 *Mohamed M'Bodj v État belge*, Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, Case C-648/11 *The Queen, on the application of MA and Others v Secretary of State for the Home Department*, Case C-364/11 *Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal*, Case C-245/11 *K v Bundesasylamt*, Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z*, Joined Cases C-411/10 and C-493/10 *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla (C-175/08), Kamil Hasan (C-176/08), Ahmed Adem, Hamrin Mosa Rashi (C-178/08) and Dler Jamal (C-179/08) v Bundesrepublik Deutschland*, Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, Case C-638/16 *PPU X and X v État belge*.

[617] The idea of the 'safe country of origin' ca be found in Article 31(8) of Directive 2013/32.

necessitate an individual study of the circumstances of the applicants and deny the possibility for absolute concepts like the ones mentioned. The blanket ban on offering protection to people who are arriving from a 'safe third country' or who started off in a 'safe country of origin' is therefore an example of an *implicit*, albeit negative, engagement with vulnerability by pre-emptively dismissing the option of a vulnerability analysis. Those concepts presume invulnerability by refusing to examine the possibility of it.

Interestingly enough, the 'blanket ban' cases can also be theorised as symptoms of covert clashes between heterogeneous legal orders. Through Valverde's studies of jurisdiction and scale, one is able to see how the concepts enable the illusion of the harmonious coexistence of different legal orders even though denying an individual analysis in an asylum case must clash with the human rights' principles and the protection envisioned under the different jurisdictional regimes established under the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the Refugee Convention. Valverde reminds the reader that 'the fact that differences in legal scale appear as technical matters on a par with a mapmaker's choice of cartographic scale means that the quite heterogeneous modes of governance carried out by different legal assemblages appear to coexist without a great deal of overt conflict'.[618] The technical nature and automatic application of the blanket concepts is therefore the consequence of the pursuit of seeming harmony in spaces of underlying clashes.

In reality, the different regimes mentioned above 'create different legal realities.'[619] They operate on different 'scales' and see different levels of detail. De Sousa Santos calls the results 'local, national and world legality' and argues as follows:

> '[t]he legal developments reveal the existence of three different legal space and their correspondent forms of law: local, national and world legality. It is rather unsatisfactory to distinguish these legal orders by their respective objects of regulation because often they regulate or seem to regulate the same kind of social action. Local law is a *large-scale legality*. Nation state law is a *medium-scale legality*. World law is a *small-scale legality*. This concept has broad implications. First, it means that, since scale creates the phenomenon, the different forms of law create different legal objects upon eventually the same social objects. They use different criteria to determine the meaningful details and the relevant features of the activity to be regulated. They establish different networks of facts. In sum, they create different legal realities.'[620]

The application of a blanket concept to the case of an asylum seeker in therefore the result of different-scale legalities interacting. In the 'blanket ban' cases, all jurisdictions offer 'small-scale

[618] Valverde, 2009, p. 141.
[619] De Sousa Santos, 1987, p. 287.
[620] Ibid.

legality' because they are closest to his idea of 'world law'. However, they have different 'strategic and instrumental action packages'[621] which means that they prioritise different goals. In an ideal scenario, the ECHR and the Refugee Convention jurisdictions prioritise individually handling the case of an asylum seeker as a rights-bearing legal object regardless of her country of origin, whilst the EU asylum jurisdiction prioritises rapid handling of cases and robust inter-Member-State relations in the same scenario.

The blanket concepts prove that 'the regulatory purposes of the [different number of] legal scales converge in the same social event' creating 'the illusion that the three legal objects can be superimposed' when, in reality, 'they do not coincide; nor do their 'root images' of law and the social and legal struggles they legitimate coincide.'[622] De Sousa Santos' work on scale is invaluable for making explicit the paradox of having overlapping jurisdictions. Once the fact that 'different legal orders operating on different scales translate the same social objects into different legal objects'[623] is exposed, one cannot help but see blanket concepts as the symbol of a struggle between legal orders, which sacrifices more individualised approaches.

The case of *Mirza*[624] concerned the concept of 'safe third country' as present in Article 38 of Directive 2013/32 entitled 'Procedure in the event of implicit withdrawal or abandonment of the application'. The applicant in the case was arriving from Serbia, a 'safe third country', but his application was already in a state different to the one where he had launched his first asylum application. The Court therefore had to rule whether the Member State responsible (MSR) for the application had to warn the sending state that they operate under the presumption of inadmissibility if an application is from a 'safe third country'. The Court replied in the negative denying any responsibility for the MSR to warn the sending state of such practices. It stated that,

> 'the right to send an applicant for international protection to a safe third country may also be exercised by a Member State after that Member State has accepted that it is responsible, pursuant to that regulation and within the context of the take-back procedure, for examining an application for international protection submitted by an applicant who left that Member State before a decision on the substance of his first application for international protection had been taken.
>
> 'Article 3(3) of Regulation No 604/2013 must be interpreted as not precluding the sending of an applicant for international protection to a safe third country when the Member State carrying out the transfer of that applicant to the Member State

621 Ibid, p. 290.
622 Ibid, p.288.
623 Ibid.
624 Case C-695/15 PPU *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal*, 17 March 2016.

responsible has not been informed, during the take-back procedure, either of the rules of the latter Member State relating to the sending of applicants to safe third countries or of the relevant practice of its competent authorities.'[625]

The substance of the ruling is technical and matter-of-fact. It is illustrative of the power of the 'safe third country' concept in shining the spotlight on the system at the expense of the individual caught in it.

In *D. and A.*[626], the Court dealt with the blanket concept of 'safe country of origin' in a national measure.[627] It had to rule whether a Member State is precluded from adopting administrative measures which require that a class of asylum applications be defined on the basis of the nationality or country of origin of the asylum applicant be examined and determined according to an accelerated or prioritised procedure. The Court answered the above question in the negative, effectively allowing national measures of the type described above. Significantly, it noted,

'[a]s to the principle of non-discrimination, relied on by the applicants in the main proceedings, it should be noted that, in matters of asylum and, in particular, under the system established by Directive 2005/85, the country of origin and, consequently, the nationality of the applicant play a decisive role, as appears from both recital 17 and Article 8 of the directive. It is clear from Article 8(2)(b) of the directive that the country of origin of the applicant has a bearing on the determining authority's decision, given that the determining authority is required to keep abreast of the general situation existing in that country in order to determine whether a danger exists for the applicant for asylum and, if necessary, whether that person has need of international protection.

In addition, as appears from recital 17 in the preamble to Directive 2005/85, the European Union legislature introduced the concept of 'safe country of origin' according to which, when a third country may be regarded as safe, Member States should be able to designate it as safe and presume that a particular applicant will be safe there. The European Union legislature therefore provided under Article 23(4)(c) of that directive that Member States may decide that an examination procedure be prioritised or accelerated in the case where the asylum application is considered unfounded because the applicant is from a safe country of origin within the terms of that directive'.[628]

The 'safe country of origin' concept was nonetheless qualified by the Court when it recognised its potential for leading to discrimination. The Court reminded the referring national instance,

'[n]onetheless, it must be stated that, in order to avoid any discrimination between applicants for asylum from a specific third country whose applications might be the

[625] See Case C-695/15 PPU *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal*, at concluding paragraphs.
[626] Case C-175/11 *H.I.D. and another v Refugee Applications Commissioner and others.*
[627] Please note that as per the Court's decision in the case Case C-404/17 *A.*, Member States cannot rely on the 'safe country of origin' concept, when they have not previously implemented it into national law.
[628] See Case C-175/11 *H.I.D. and another v Refugee Applications Commissioner and others,* paras. 71-72.

> subject of a prioritised examination procedure and nationals of other third countries whose applications are subject to the normal procedure, that prioritised procedure must not deprive applicants in the first category of the guarantees required by Article 23 of Directive 2005/85, which apply to all forms of procedure.
>
> 'Thus, the establishment of a prioritised procedure such as that in the main proceedings must allow in full the exercise of the rights that that directive confers upon applicants for asylum who are Nigerian nationals. In particular, the latter must enjoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin'.[629]

The Court struck a balance between the application of the blanket concept of 'safe country of origin' and the right to non-discrimination of the applicant. Later, in the case of *A.*[630], the Court underlined that the 'safe country of origin' is a rebuttable presumption and also noted that a Member State that has not implemented the concept, cannot rely on it. Keeping in mind that courts have to conduct an individual analysis regardless of the concept's application casts doubts on its utility. This is especially relevant in light of its hazardous obstructive nature. Yet, the blanket concept of 'safe country of origin' continues to exist as a curious artefact of the invisible clashes between different legal jurisdictions.

Whilst the 'safe country of origin' continues to be a valid EU concept, the presumption that all EU Member States are safe countries was challenged in the watershed case of *N.S. and Others*[631]. It was an example of the concept's shortcomings and represented a battlefield for sovereignty as evidenced by the high number of Member State interventions. There are references to the intention of the EU legislature (paras. 65, 79), Commission statements (paras. 66, 110), the Court's own case law, and the necessity for interpretation to comply with general principles of EU law (which include ECHR) (para. 77). On the other hand, there are references to human rights (paras. 78, 83, 98), and a big discussion of the European Convention of Human Rights' case law and how European Court of Human Rights has acted (paras. 88, 90, 91, 111, 112). Ultimately, the European Court of Justice ruled that when it came to the concept of 'safe countries', there was not a conclusive, but instead a *rebuttable* presumption about whether Member States observe human rights. Therefore, what could be said with certainty about these blanket concepts is that whenever they are applied, the methods they enable are in stark

[629] Ibid, paras. 73-74.
[630] Case C-404/17 *A v Migrationsverket,* 25 July 2018.
[631] Joined cases C-411/10 and C-493/10 *N. S.* (C-411/10) v Secretary of State for the Home Department, United Kingdom and *M. E. and Others* (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, Ireland.

opposition to a vulnerability analysis. However, the individual continues to have the space to present a case to the contrary of the presumptions underlying them. The problem then is that these concepts unduly burden the individual applicants by placing this additional burden of proof onto them. The 'blanket ban' regime creates an asymmetrical distribution of responsibility amongst asylum seekers depending on their country of origin and, for those less informed about the concepts' qualified nature, it might even have a chilling effect on certain applications.

2.3. The Human Rights Cases

The following section offers a close reading of those cases that use very strong human rights language or address questions of immense relevance to human rights. Therefore, they also represent what could have been an excellent opportunity for the Court to undertake a vulnerability inquiry into the circumstances of the applicants. I will proceed with my investigation by looking at a number of those cases in more detail in order to illustrate where a vulnerability analysis could have complemented the human rights' argument and strengthened individual protection by acting as a safety net for those individuals who did not qualify for international protection. Importantly, vulnerability should never become an additional burden which the applicant needs to discharge. There are a number of case that meet the requirements to be discussed below. Sometimes, the same case can simultaneously fall under several of the categories I have chosen to establish for differentiating the case law. In those instances, the different sections might refer to each other to avoid duplication.

1. The Subsidiary Protection Case: *Elgafaji*[632]

In the case of *Elgafaji*[633], a Dutch national instance asked the ECJ to clarify the idea of 'subsidiary protection' as present in Article 15(c) of the 2004 Qualification Directive[634]. Mr. and Mrs. Elgafaji had applied for temporary residence permits in Holland, arguing that they would face a risk of serious harm if they were to be sent back to Iraq. Mr. Elgafaji had worked for a British company offering security clearance. He was threatened with a letter stating 'death to collaborators' hammered to his door and his uncle was killed in a terrorist attack. The Dutch Minister for Immigration argued that Mr. and Mrs. Elgafaji had failed to fulfil the criteria under Article 15(c) which, in offering one of the three definitions of 'serious harm', clarifies it as 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence

632 Case C-465/07 *Elgafaji v Saatssecreteris van Justitie* [2009] ECR I-921.

633 *Ibid.*

634 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, [2004] OJ L 304/2, replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.

in situations of international or internal armed conflict'[635]. This was because, according to the Minister, the degree of individualisation required by Article 15(c) was the same as the one required by Article 15(b), which defined 'serious harm' as 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'. Therefore, it was contended, the applicants had to show that they were individually targeted, which could not be achieved by reliance on the indiscriminate violence during the armed conflict in Iraq. The referring Court asked whether Article 15(c) only applied in situations covered by the type of breach addressed under Article 3 of the ECHR and also asked the ECJ to catalogue the criteria for establishing whether a person is entitled to protection under Article 15(c) of the Qualification Directive.

The confusion of the referring national Court is understandable in light of what can be seen as 'the *prima facie* semantic tensions between, on the one hand, the terms 'serious and individual threat' and, on the other hand, the terms 'indiscriminate violence".[636] The confusion was intensified further by the fact that Article 15(c) did not seem to have a corresponding source unlike Article 15(a), whose definition of 'serious harm' as 'death penalty or execution' implemented Protocol 6 to the ECHR which prohibits the death penalty in peace time, and Article 15(b), whose definition of 'serious harm' as 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin' ensured protection against breach of the non-derogable rights under Article 3 of the ECHR. The Dutch court therefore wished to resolve the contradiction.

The ECJ reasoned that unlike Articles 15(a) and 15(b), Article 15(c) of the Qualification Directive establishes an autonomous concept of EU law, whose meaning should not undermine the protections guaranteed by the ECHR. In addition, the Court noted, the threshold for protection in Articles 15(a) and 15(b) would only be met upon the applicant being exposed to a risk from a particular type of harm, whereas, Article 15(c) offered protection upon the establishment of more general risks of harm,[637] as easily deducible from the terms 'armed conflict' and 'indiscriminate violence'. Indeed, the Court ruled that the individual level of vulnerability of the applicants aside, the situations covered by Article 15(c) and thereby qualifying as 'serious threat' would be the ones where the level of indiscriminate violence due to an armed conflict was so high that the presence of the applicant in the country or region

[635] See Article 15(c) of 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, [2004] OJ L 304/2, replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.

[636] K. Lenaerts, The Contribution of the European Court of Justice to the Area of Freedom, Security, and Justice, *International and Comparative Law Quarterly*, *59*(April 2010), 2010, p. 294.

[637] See *Elgafaji,* at paras. 32-34.

would be enough to put one at real risk of being subject to the serious threat referred. In the words of the Court,

> 'the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.'[638]

The reasoning of the Court here is in line with the post-identity aspect of Fineman's theory. That is not simply because the Court considers the fact that applicants can be at the risk of being harmed 'irrespective of their identity', but also because it thereby affords subsidiary protection to individuals who might be at risk because of the structural failures of their home state 'solely on account of [their] presence' in it. In that sense, the Court is not far from instructing the referring national court to undertake a vulnerability analysis, which would not only have focused on the identity of the applicant, but would have also interrogated the structural and institutional failures that would have left him or her unprotected.

2. The Social Welfare Cases

There are four social welfare cases within the Court's asylum jurisprudence (the 2017 *Ayubi*[639] case, the 2016 *Alo*[640] case, the 2014 *M'Bodj*[641] case, and the 2014 *Saciri*[642] case). They address different questions concerning whether Member States have positive obligations in terms of providing social assistance to asylum seekers or subsidiary protection beneficiaries. The following examination will leave out *Ayubi* and focus on analyzing *Alo* and *Saciri* and *M'Bodj* because of their multiple references to human rights instruments.

[638] See Elgafaji, at para. 35.
[639] Case C-713/17 *Ayubi,* 21 November 2018.
[640] Joint Cases C-443/14 & C-444/14, *Kreis Warendorf v Ibrahim Alo & Amira Osso v Region Hannover*, March 1st, 2016.
[641] Case C-542/13, *Mohamed M'Bodj v État belge*, 18 December 2014.
[642] Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, 2 February 2014.

2. a. The *Alo*[643] Case and the Qualification Directive[644]

In the *Alo* case, the Grand Chamber qualified the application of the freedom of movement clause in the Qualification Directive[645]. The two applicants in question were granted subsidiary protection status in Germany under the Qualification Directive[646]. Their cases concerned objections to certain residence conditions imposed on them, whereby they were restricted to settling in particular, pre-designated areas of the country. These residence conditions were linked to the applicants receiving certain social security benefits since the start of their asylum procedures. The ECJ therefore received three questions for a preliminary ruling. First, whether the condition of taking residence in a particular geographic area was a restriction on the freedom of movement, which was otherwise to be extended to the territory of the whole Member State under Article 33 of the Qualification Directive[647]. This, the Court answered in the affirmative, pointing out that the directive requires from 'the Member States to allow beneficiaries of international protection both to move freely within the territory of the Member State that has granted such protection and to choose their place of residence within that territory' (para. 37). Second, the Court was asked whether such residence conditions would nonetheless be compatible with Article 33 if they were based on the objective of achieving equal distribution of social assistance burdens amongst the different institutions involved in providing said assistance within the territory of a Member State. Since social assistance burdens would be unevenly distributed amongst local institutions regardless of the legal status of the recipients, this question was answered in the negative, with the Court further elaborating that in this particular case:

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643 Joint Cases C-443/14 & C-444/14, *Kreis Warendorf v Ibrahim Alo & Amira Osso v Region Hannover*, March 1st, 2016.

644 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20.12.2011, p. 9–26 ('Qualification Directive'), formally known as 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 [2004] OJ L 304/12 ('Qualification Directive').

645 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20.12.2011, p. 9–26 ('Qualification Directive'), formally known as 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 [2004] OJ L 304/12 ('Qualification Directive').

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647 Article 33 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20.12.2011, p. 9–26 ('Qualification Directive').

> '[n]ational rules could legitimately provide for a residence condition to be imposed on beneficiaries of subsidiary protection status, without such a condition being imposed on refugees, third-country nationals legally resident in the territory of the Member State concerned on grounds that are not humanitarian or political or based on international law and nationals of that Member State, *if those groups are not in an objectively comparable situation as regards the objective pursued by those rules*' (para. 54) [emphasis added]

> 'In that respect, it must be noted, however, that the grant of social security benefits to a given person will entail costs for the institution that is required to provide those benefits, regardless of whether that person is a beneficiary of subsidiary protection status, a refugee, a third-country national who is legally resident in German territory on grounds that are not humanitarian or political or based on international law or a German national. The movement of recipients of those benefits or the fact that such persons are not equally concentrated throughout the Member State concerned may thus mean that the costs entailed are not evenly distributed among the various competent institutions, irrespective of the potential qualification of such recipients for subsidiary protection status' (para. 55)

Third, the ECJ has to articulate whether such geographical restrictions to the residence of subsidiary protection beneficiaries were compatible with Article 33 of the Qualification Directive when the objective pursued by said restrictions was the appropriate distribution of social assistance burdens among Member State institutions and the avoidance of 'points of social tension as a result of accumulated settlement of foreign nationals in certain municipalities or districts' (para. 21). The Court reiterated that there was room for treating beneficiaries of subsidiary protection differently in the interplay between residence restrictions and integration policies, but only for as long as they are not treated differently from people in a comparable situation. That was a question of fact that was left for the referring court to establish:

> 'The referring court will therefore have to determine whether the fact that a third-country national in receipt of welfare benefits is a beneficiary of international protection — in this case subsidiary protection — means that he will face greater difficulties relating to integration than another third-country national who is legally resident in Germany and in receipt of such benefits' (para. 62)

> 'That might, in particular, be the case if, pursuant to the national rule mentioned by the referring court — under which the stay of third-country nationals legally resident in Germany on grounds that are not humanitarian or political or based on international law is generally subject to a condition that they are able to support themselves —, those nationals were eligible for welfare benefits only after a certain period of continuous legal residence in the host Member State. It could be assumed from such a period of residence that the third-country nationals concerned are sufficiently integrated in that Member State and therefore would not be in a situation comparable with that of beneficiaries of international protection so far as the objective of facilitating the integration of third-country nationals is concerned' (para. 63)

> 'It follows from the foregoing that the answer to the third question in each of the cases in the main proceedings is that Article 33 of Directive 2011/95 must be interpreted as not precluding a residence condition, such as the conditions at issue in the main proceedings, from being imposed on a beneficiary of subsidiary protection status, in receipt of certain specific social security benefits, with the objective of facilitating the integration of third-country nationals in the Member State that has granted that protection — when the applicable national rules do not provide for such a measure to be imposed on third-country nationals legally resident in that Member State on grounds that are not humanitarian or political or based on international law and who are in receipt of those benefits — *if beneficiaries of subsidiary protection status are not in a situation that is objectively comparable, so far as that objective is concerned*, with the situation of third-country nationals legally resident in the Member State concerned on grounds that are not humanitarian or political or based on international law, it being for the referring court to determine whether that is the case.' (para. 64)

All three answers by the Court are an example of its inherent struggle between, on the one hand, pursuing the commitments to the international legal regime present in the recitals of the Qualification Directive[648] and, on the other hand, following what is interpreted as the intention of the legislature beyond the text of the Directive. They are, therefore, responses to the clashes caused in spaces of intense interlegality. The different logics governing the different jurisdictions surface in the shape of technical language aimed at reconciling the resulting overt conflict and thereby sweeping it under the rug. In the judgment, there are a lot of references to both the international legal regime established by the Geneva Convention (paras. 28, 29, 35, 44, 54) and the EU legislative intent (paras. 30, 32, 36). To illustrate, below are some examples of the Court reiterating the significance of the international protection regime as follows:

> 'It must be noted in that regard that it is clear from recitals 4, 23 and 24 of Directive 2011/95 that *the Geneva Convention constitutes the cornerstone of the international legal regime* for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria' (para. 28) [emphasis added]

> 'Directive 2011/95 must, for that reason, be *interpreted* in the light of its general scheme and purpose, and *in a manner consistent with the Geneva Convention* and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 16 in the preamble thereto, the directive must also *be interpreted in a manner consistent with the rights recognised by the Charter of Fundamental Rights of the European Union*' (para. 29) [emphasis added]

Simultaneously, the Court referred back to the legislative intent pursued with the instrument in question:

[648] See Recitals (4), (17), (34), (40), and (48) of the Qualification Directive 2011/95.

> 'Furthermore, it follows from recital 3 of Directive 2011/95 that, drawing on the Conclusions of the Tampere European Council, *the EU legislature intended* to ensure that the European asylum system, to whose definition that directive contributes, is based on the full and inclusive application of the Geneva Convention' (para. 30) [emphasis added]

> 'Nevertheless, recitals 8, 9 and 39 of Directive 2011/95 state that *the EU legislature intended*, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which are necessary and objectively justified' (para. 32) [emphasis added]

> 'In those circumstances, interpreting Article 33 of Directive 2011/95 to the effect that it does not confer on beneficiaries of subsidiary protection status the right to choose their place of residence in the territory of the Member State that has granted them such protection would mean that that right was afforded only to refugees. That would create — *despite the absence of an express provision to that effect* in the directive — a distinction (contrary to the objective referred to in paragraphs 32 and 33 of the present judgment) between the content of the protection afforded in this respect to, on the one hand, refugees and, on the other, beneficiaries of subsidiary protection status' (para. 36)

The last three quotes are significant in several respects. First, they reveal the Court's acute awareness of the legislature's intent. It is reiterated in so many of the cases that come before the Court that said presumed intent has accumulated the power of codified law, which, from the point of view of the rule of law, is a questionable endeavour. Second, these quotes show the Court's proximity to, and concern for, the EU political process. The Court is not just aware of the law, but also of European Council Conclusions and the Stockholm Programme, all political instruments which nonetheless influence the Court's interpretation. Third, the quotes above reiterate the Court's difficult task in balancing competing rights, simultaneously considering the consequences of the different possible interpretations, and thereafter having to exercise a choice between them.

Although the case of *Alo* is about interpreting a provision of national law in light of EU legislation, it is also a good example of the Court using the principle of non-discrimination as guidance in its interpretation. In order to decide whether beneficiaries of the subsidiary protection status can rightly be given a restrictive set of residence rights, the Court had to compare them to people in similar situations. This is where the Court became very vocal about ensuring equal treatment between EU and non-EU nationals. In order to decide whether subsidiary protection beneficiaries would be *de facto* discriminated against, the Court first compared them to other beneficiaries of international protection such as refugees and then it

moved on to compare their situation to that of third-country nationals, who are legally resident in Germany on grounds other than humanitarian, political or based on international law:

> 'Under the national rules at issue in the main proceedings, beneficiaries of subsidiary protection status are thus subject, in that respect, to a more restrictive regime than that applicable, generally, *to refugees and third-country nationals legally resident in Germany on grounds that are not humanitarian or political or based on international law*' (para. 47) [emphasis added]

Afterwards, it compared their situation to that of EU nationals, in the manner provided below:

> 'So far as Article 29 of Directive 2011/95 is concerned, the Court notes that paragraph 1 thereof lays down a general rule that beneficiaries of international protection are to receive, in the Member State that has granted such protection, social assistance *as provided to nationals of that Member State*. That rule implies, in particular, that the access of those beneficiaries to social assistance cannot be dependent on compliance with conditions which are not imposed on nationals of the Member State that has granted the protection' (para. 48) [emphasis added]
>
> 'Article 29(2) of the directive provides that the Member State may derogate from that rule by limiting social assistance granted to beneficiaries of subsidiary protection to core benefits. However, it is clear from that provision that, where a Member State decides to derogate from the rule, those core benefits must be provided under *the same conditions of eligibility as those applicable to nationals of that Member State*' (para. 49) [emphasis added]
>
> 'Accordingly, in the two situations mentioned in Article 29 of Directive 2011/95, the conditions under which beneficiaries of subsidiary protection status are eligible for the social assistance extended to them by the Member State that has granted them that protection must be the same as those under which such assistance is granted to nationals of that Member State' (para. 50)

As is apparent from the four excerpts provided immediately above, in *Alo*, the Court refused to draw a distinction between refugees, people eligible for subsidiary protection, migrants, and nationals. Even though third country nationals do not cease to be non-EU citizens once they are in the European Union, the categorisations which divide them both from one another and from EU nationals appear to dissolve upon crossing the EU borders. This judgment is therefore a fresh reminder of the artificiality of such categories and the arbitrariness of their application. Ultimately, the Court refused to draw a distinction based on nationality that would enable restrictions on the applicants' freedom of movement within a Member State and influence their receipt of welfare benefits (see para. 48 above).

Although it is tempting to read the Court's judgment in *Alo* as a strong move in favour of dismantling artificial categories applied to the way we treat EU-nationals and non-EU nationals, such conclusions are rendered premature once one familiarises oneself with the legislation in question. The Qualification Directive is abundant with references to ensuring equal treatment both with regards to third country nationals and to EU nationals. Therefore, the Court's position was nothing more than a strict interpretation of the instrument at hand and

therefore a proxy for the EU legislator's standing on the matter. This begs the question, however, whether the ECJ has to be activist and to go beyond the legislation for its judgments to qualify as progressive in terms of social policy. Whilst the answer to what counts as the Court being activist lies in the eyes of the beholder, it is worth noting is that the Court could have gone in either direction. Once social assistance is attributed to beneficiaries of international protection, it is arguable that Member States could have been allowed to pursue certain policies such as population movement control through said assistance because the directive in question is silent on the matter. However, the Court prevented that from happening on a general scale. The only exception it allowed for stated that 'national rules could legitimately provide for a residence condition to be imposed on beneficiaries of subsidiary protection, without such a condition being imposed on [other groups] *if those groups are not in an objectively comparable situation* as regards the objective pursued by those rules' (para. 54) [emphasis added]. Suitable examples of such national rules are ones that pursue the objective of facilitating the integration of third-country nationals. Ultimately, the reasoning of the Court in this case is important from a global justice perspective because it represents a situation in which the Court dismantles certain artificially-created, sovereignty-based, categories. It reminds the readers that beneficiaries of subsidiary protection are the same as refugees, who are the same as legally-residing third-country nationals, who are, in turn, not much different from EU nationals.

2. b. The *M'Bodj*[649] Case and the Qualification Directive[650]

In the *M'Bodj* case, the Grand Chamber once again engaged in clarifying the Qualification Directive. The facts of the case were very unique. The applicant, Mr. M'Bodj, was a Mauritanian citizen, who had been granted a residence permit in Belgium for medical reasons (a major eye disability) because it was deemed that the absence of appropriate medical treatment in Mauritania would subject him to a real risk of inhuman or degrading treatment if he were to be returned there. Since he neither qualified for refugee nor for subsidiary protection status under the Qualification Directive, he was refused the income support afforded to the beneficiaries of international protection. Upon the applicant questioning the verdict on his entitlement to financial allowance, the Belgian Constitutional Court referred two questions to the ECJ. First, it asked whether, under the Qualification Directive, 'subsidiary protection' could also be applied to a foreign national who had been authorised by an administrative authority of

649 Case C-542/13, *Mohamed M'Bodj v État belge*, 18 December 2014.

650 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20.12.2011, p. 9–26 ('Qualification Directive'), formally known as 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 [2004] OJ L 304/12 ('Qualification Directive').

a Member State to reside in the territory of that Member State because he suffered from an illness that either posed a real risk to his life or physical integrity, or a real risk of inhuman or degrading treatment should he be returned to his country of origin because the latter could not provide appropriate treatment. Second, the referring court asked whether, if the 'subsidiary protection' category applied in the situation described above, the accompanying social welfare and health care benefits available to subsidiary protection beneficiaries (with the additional benefits for people with disabilities) should have been made available to the applicant in *M'Bodj* as well.

The Grand Chamber addressed the first question in detail and the second one more superficially, and its overall answer was very much state-centred as, although not mentioned explicitly, it was very much modelled on the increasingly criticized requirement of establishing persecution, and the accompanying intent, by a state. Unlike a vulnerability analysis which would have enabled looking at the *extent* of the applicant's vulnerability, the judgment thereby focused on the *source* of said vulnerability. In the words of the Court, 'harm must take the form of conduct on the part of a third party and […] it cannot therefore simply be the result of general shortcomings in the health system of the country of origin' (para. 35). Formally, the Court made one reference to a human rights' instrument, namely the Charter (see para. 38), and referred to the case law of the European Court of Human Rights (see para. 39 and para. 40). The context and objectives of the Directive (para. 34), the intention of the Directive (para. 37), and the 'general scheme and objectives of the Directive' and the 'rationale of international protection' (para. 44) were also referred to in the judgment.

On the claimant's eligibility for subsidiary protection status, the Court ruled that the Qualification Directive does not cover an applicant with a deteriorating state of health, when that is not the consequence of an *intentional* deprivation of health care (para. 31). Making references to rulings from the ECtHR, the ECJ also noted that whilst there is jurisprudence in favour of establishing a violation of Article 3 of the ECHR (the prohibition against torture and inhuman or degrading treatment) where a person is to be removed to a state in which the treatment of his her illness would be poorer than the ones in the hosting state (para. 39), establishing this would still not have been enough to grant subsidiary protection to an applicant.

The Court therefore ruled that the Qualification Directive does not oblige a Member State to 'grant social welfare or health care benefits' to applicants who have been granted leave to remain on the grounds of suffering a serious illness which the applicant's country of origin cannot treat suitably. In the words of the Court,

> 'Articles 28 and 29 of 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, read in conjunction with Articles 2(e), 3, 15, and 18 of that directive, are to be interpreted as not requiring a Member State to grant the social welfare and health care benefits provided for in those measures to a third country national who has been granted leave to reside in the territory of that Member State under national legislation such as that at issue in the main proceedings, which allows a foreign national who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment to reside in that Member State, where there is no appropriate treatment in that foreign national's country of origin or in the third country in which he resided previously, unless such a foreign national is *intentionally* deprived of health care in that country' (para. 47) [emphasis added]

The Court's judgment lead to the unfortunate conclusion that despite his deteriorated state of health and increased vulnerability, the applicant in *M'Bodj* could not avail himself of the protection and rights afforded to refugees or subsidiary protection beneficiaries. Those could not be extended to him, unless it was proven that he would be *intentionally deprived* of medical care. This was an example of the Court applying the persecution logic of the international refugee protection regime, which focuses on establishing a perpetrator and an intention to perpetrate harm instead of examining the applicant's vulnerability. In contrast, in *M.P.*[651], the applicant was a third country national who had been tortured in the past. He was no longer at risk of being tortured, but his health could significantly deteriorate if he were to be returned. The Court ruled that the return should not happen and thereby exemplified a combination of following the persecution logic whilst simultaneously examining the applicant's vulnerability. The *M'Bodj* ruling was also very different from the rulings in *K.*[652] and in *C.K. and Others*[653], which also concerned matters of healthcare and are discussed below (see Part V.3). In them, the balance between the effectiveness of the system and the vulnerability of the applicants tipped in the applicants' favour.

[651] Case C-353/16 *MP v Secretary of State for the Home Department*, 24 April 2018.
[652] Case C-245/11 *K v Bundesasylamt*, 6 November 2012.
[653] Case C-578/16 PPU *C. K. and Others v. Supreme Court of Republic Slovenia*, 16 November 2017.

2. c. The *Saciri*[654] Case and the Reception Conditions Directive[655]

The *Saciri*[656] judgment served to fine-tune the meaning of 'material welfare conditions' within the context of Directive 2003/9[657], which lays down the minimum standards for the reception of asylum seekers. The case concerned an appeal by the Saciri family of asylum seekers, to either be provided with material reception conditions or be paid an equivalent amount that would allow the family to provide for its own accommodation. Despite the fiscal nature of the dispute, the case was strongly worded in favour of the applicants. The word 'dignity' was constantly used alongside 'family unity' and the 'best interest of the child'. A prominent example was when the Charter was brought into the interpretation of the instrument without it having been referenced by the parties in the following manner:

> '[T]he general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive' (para 35)

The Court is overwhelmingly referring to human rights and human rights' instruments and there are no mentions of 'effectiveness' or of the legislative intent behind the directive. We see references to the 'observance of fundamental rights' and the EU Charter of Fundamental Rights (para. 35), to the idea that 'human dignity must be respected and protected' (para. 35), to the importance of having a 'dignified standard of living' (paras. 39, 40, 42, 46, 48), and to the need for ensuring the 'best interests of the child' and pursuing policies that preserve 'family unity' (para. 45). The 'general scheme and purpose of the Directive' (35) is only mentioned once and not in the familiar manner of presuming the legislative intent from very limited sources. The directive only explicitly defines 'material reception conditions' as 'the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance'[658]. What the judgement does is explain that where said conditions are provided in the form of financial help, that financial help is put through the same

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654 Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others.*

655 The case concerns the older version of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. There is now a recast version of the directive, namely, Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection. In 2013, the updated Reception Conditions Directive (2013/33/EU) came into force, setting out the common minimum standards for the reception of applicants for international protection across Member States.

656 Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others.*

657 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. There is now a recast version of the directive, namely, Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection.

658 Article 2(j) Directive 2003/9.

test for compliance with human rights as the material conditions are. Therefore, the judgment fills in this gap in the following manner:

> 'Consequently, where a Member State has opted to provide the material reception conditions in the form of financial allowances, those allowances must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence by enabling them to obtain housing, if necessary, on the private rental market' (para. 42)

The Court's robust upholding of asylum seekers' rights to appropriate housing in EU host states should be applauded. In the Court's words, any financial allowance *in lieu* of material reception conditions should be enough to enable the protection of the asylum seekers' dignity, even if that condition can only be fulfilled through the private housing market[659]. Consequently, the fact of exhausted asylum accommodation would not be enough to excuse Member States from their obligations under the law. They would still need to find lodgement for the asylum seekers or provide them with enough money to do that themselves. This is a significant instruction on the Court's part in light of reports of large shortages of housing designated for asylum seekers throughout the Union. A final note to be welcomed by the Court was its reaffirmation that allowance payments need to start as soon an application has been lodged[660]. Overall, *Saciri* is a welcome illustration of the Court's robust commitment to upholding human rights. In *Saciri*, the dignity of the applicants, as opposed to the intention of the legislature, took centre stage. Therefore, in terms of the balance between the formal space being given to the individual and that being given to the bureaucratic voice of the legislature, this judgment is a triumph of the individual against the state. It is therefore also an example of the Court engaging in a vulnerability-akin analysis in evaluating the circumstances of the applicant.

3. The Freedom of Religion Case: *Y and Z*[661]

The 2012 Grand Chamber judgment of *Y and Z* is a fascinating one because of the strong human rights' stance that the Court takes and because of its temporal location. On a purely formal level, the case falls outside of previously observed patterns. It does not strictly adhere to any of the categories I have created; it is neither an 'effectiveness' case, nor a 'human rights language' one. Except for a couple of mentions of the EU Charter, there are no references to human rights' instruments, to 'effectiveness', or to the 'intention of the legislature'. The overall asylum scheme is neither mentioned nor heeded to in trying to address the problem in question. This makes for a fascinating case to examine because, arguably, computational analysis would not have recognized it as the very strong human rights case that it is substantially.

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[659] See *Saciri* at para. 42.
[660] See *Saciri* at para. 33.
[661] Joined Cases C-71/11 and Case C-99/11 *Bundesrepublik Deutschland v Y and Z.*

Despite being delivered in 2012, the case is much more progressive then subsequent pronouncements from the Court (as recent as 2017) within the area of freedom of religion[662]. The applicants in the case were two members of the Muslim Ahmadiyya community in Pakistan, who entered Germany and applied for asylum there. As reasons for their application, both Y. and Z. pointed out that their membership of the religious community had made them the target of mistreatment, threats and potential imprisonment. Most significantly, the Pakistani Criminal Code provided that members of said community could face imprisonment of up to three years or a fine 'if they claim to be Muslim, describe their faith as Islam, preach or propagate their faith or invite others to accept it' (para. 31). That was consequential for the applicants' ability to freely practice their religion in public because they would risk imprisonment if they did. Germany denied both applications for refugee status on account of the unestablished well-founded fear of persecution and ordered their deportation to Pakistan, which both applicants appealed. The subsequent request for a preliminary ruling centred around whether it mattered for the examination of their application that upon returning to Pakistan, the applicants would not be able to continue to practice their religion *in public* without being exposed to the risk of persecution, although they would continue to be able to practice their religion *in private*. That is to say, whether the fact that they could continue practicing privately meant that they could give up the right to public practice of their religion and therefore, return to their country of origin. The request for the preliminary ruling essentially hinged on the differentiation between the public and the private aspects of religion, if such could be drawn. The referring court therefore inquired whether religious practice could be divided into a core area, interference with which would be enough for conferring a refugee status on an applicant, and an area of external manifestations, interference with which would be permissible and not enough to qualify for a refugee status. Furthermore, the German court wanted to establish the 'essential elements' of religious practice and to know whether the core aspects of religious freedom were limited to being free to practice within the confines of the home. The answer to the question would dictate whether the applicants should have been granted refugee status in Germany.

The European Court of Justice delivered a reply with a strong human rights flavour. First, the Court began by listing all of the international instruments, which should be considered when interpreting the Qualification Directive:

> 'It appears from recitals 3, 16 and 17 to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content

[662] For example, read the Court's decisions in *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, Case C-157/15, *March 2017 and Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA, formerly Micropole Univers SA*, Case C-188/15, March 2017.

> of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria' (para. 47)
>
> 'The Directive must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the Directive must also be interpreted in a manner consistent with the rights recognised by the Charter' (para. 48)

On the question of whether religious practice can be divided into 'core areas' and its 'external manifestation', the Court answers in the following way:

> 'For the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the Directive, it is unnecessary to distinguish acts that interfere with the 'core areas' ('forum internum') of the basic right to freedom of religion, which do not include religious activities in public ('forum externum'), from acts which do not affect those purported 'core areas'' (para. 62)
>
> 'Such a distinction is incompatible with the broad definition of 'religion' given by Article 10(1)(b) of the Directive, which encompasses all its constituent components, be they public or private, collective or individual. Acts which may constitute a 'severe violation' within the meaning of Article 9(1)(a) of the Directive include serious acts which interfere with the applicant's freedom not only to practice his faith in private circles but also to live that faith publicly' (para. 63)
>
> 'That interpretation is likely to ensure that Article 9(1) of the Directive is applied in such a manner as to enable the competent authorities to assess all kinds of acts which interfere with the basic right of freedom of religion in order to determine whether, by their nature or repetition, they are sufficiently severe as to be regarded as amounting to persecution' (para. 64)

Upon highlighting that it is important to determine whether 'by their nature or repetition, they are sufficiently severe as to be regarded as amounting to persecution' (para. 64), the Court then proceeds to draw attention to the need to focus the severity and the consequences (as opposed to the particular private or public aspect of religious freedom) of any interference with the right in question. This makes the question of religious persecution hinge on the idea of 'severity' of the infringing acts as shown below:

> 'It follows that acts which, on account of their intrinsic severity as well as the severity of their consequences for the person concerned, may be regarded as constituting persecution must be identified, not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences, as observed by the Advocate General at point 52 of his Opinion' (para. 65)
>
> 'It is therefore the severity of the measures and sanctions adopted or liable to be adopted against the person concerned which will determine whether a violation of the right

> guaranteed by Article 10(1) of the Charter constitutes persecution within the meaning of Article 9(1) of the Directive' (para. 66)

> 'Accordingly, a violation of the right to freedom of religion may constitute persecution within the meaning of Article 9(1)(a) of the Directive where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive' (para. 67)

Alongside ultimately ruling that '[t]he fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant' (para. 79), the Court used its platform in *Y. and Z.* to make grand statements about democratic values and to remind everyone that '[f]reedom of religion is one of the foundations of a democratic society and is a basic human right' (para. 57). Here, the Court reinforces the paramount importance of the right to freedom of religion in a manner which stands in stark contrast to its later decisions in *Achbita*[663] and *Bouganout*[664] discussed below. In delivering its judgment, the Court also strongly advocated against establishing the distinction between core and peripheral aspects of a religious practice the German court inquired about by saying:

> '[s]uch a distinction is incompatible with the broad definition of 'religion' given by Article 10(1)(b) of the Directive which encompasses all its constituent components, be they public or private, collective or individual. Acts which may constitute a 'severe violation' within the meaning of Article 9(1)(a) of the Directive include serious acts which interfere with the applicant's freedom not only to practice his faith in private circles but also to live that faith publicly' (para. 63).

In referring to the Advocate-General Bot's Opinion, the Court also reminded readers that persecution is identified 'not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences' (para. 66). This case is therefore significant not only for future asylum claims that have to do with the right to freedom of religion, but also for those asylum claims based on the remainder of grounds for persecution. Perhaps most fundamentally in relation to this point, the Court clarifies that applicants cannot be expected to be 'discrete' with regards to the exercise of the particular internationally protected right that renders them vulnerable to persecution or serious harm.

Additionally, in a very cosmopolitan fashion, the Court concerns itself with the individual fate and the subjective state of mind of the applicants, calling on national courts to

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663 Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, Case C-157/15, March 2017.

664 Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA, formerly Micropole Univers SA, Case C-188/15, March 2017.

take those into consideration. The strongest human rights language that the Court utilises therefore appears when it rules:

> 'In assessing such a risk [of persecution], the competent authorities must take account of a number of factors, both objective and subjective. The *subjective circumstances* that the observance of a certain religious practice in public, which is subject to the restrictions at issue, *is of particular importance to the person concerned in order to preserve his religious identity* is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, *even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned*' [emphasis added] (para. 70).

This is arguably an instance of the Court coming very close to the cosmopolitan stance within its asylum jurisprudence. It puts the individuals and their subjective feelings centre-stage and it does so with regards to applicants who are not EU citizens. This cosmopolitan undertone of the Court's judgment concerning third country nationals exacerbates the stark contrast between *Y and Z* and subsequent freedom of religion cases concerning EU nationals. To illustrate the point better, one needs to go beyond the asylum jurisprudence of the Court and examine two of its 2017 freedom of religion cases, namely *Achbita*[665] and *Bougnaoui*[666], which appear in stark contrast to *Y and Z*.

Both *Achbita* and *Bougnaoui* belong to the freedom of religion jurisprudence of the European Court of Justice and concerned religious dress in the private workplace. The applicants in both instances were Muslim women, who faced being dismissed because they wore the Islamic headscarf. Ultimately, the Court subordinated the applicants' freedom of religion to corporate interests and ruled in favour of allowing 'neutrality' policies that would *de facto* discriminate against Muslim women. Although these cases are necessarily different to *Y and Z* because of what was at stake and the different balance of interests that had to be made, they are an excellent illustration of the alternative approach the Court could have taken in its *Y and Z* ruling. Because of the different contexts of the cases, one could argue that there were significantly different associated risks with each. On the surface, Mr. Y. and Mr. Z. risked imprisonment, whilst Ms. Achbita and Ms. Bougnaoui 'merely' risked losing their jobs. Yet, such a comparison would be unfair and short-sighted. The decisions in *Achbita* and *Bougnaoui* basically gave a green light to private companies to pull individuals wearing religious garments from jobs with client interaction. In our increasingly automated world, where the only jobs that

[665] Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, Case C-157/15, March 2017.

[666] Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA, formerly Micropole Univers SA, Case C-188/15, March 2017.

would not be robotised would be the ones involving empathy and human interaction, these decisions are the equivalent to a lifetime ban from the private workplace. Therefore, the risks at stake are not as far from each other as one would initially think. What is different, however, is the corporate nature of the stakeholders in the headscarf cases, although arguably, their monetary interests should not have been put before the individual applicant's fundamental rights. In any case, one can mark an inconsistency within the reasoning itself. Whereas interference with the public practice of religion was a grave enough interference with the right to freedom of religion so as to amount to persecution (in *Y and Z*), the ban on the Islamic headscarf, a quintessential element of practicing their religion for the women who wear it, was decidedly not. All in all, the short examination of the cases of *Achbita* and *Bougnaoui* serves an important multifaceted purpose. It serves as evidence of the different outcomes that might result upon clashes of different ruling rationalities. Despite all concerning the holistic nature of the right to religion, in *Y and Z*, the ruling rationality was that of human rights, whereas in *Achbita* and *Bougnaoui*, it was that of preserving the integrity of private corporate interests. It therefore not only reveals the Court's ability to rule differently depending on the ruling rationality, but also stresses the cosmopolitan aspect of its generosity in *Y and Z* when juxtaposed with rigid decisions with regards to EU nationals.

4. The LGBTQIA+ Cases Trio and Judicial Impact

There are three cases within the ECJ asylum jurisprudence that concerned LGBTQIA+ matters, which were, in chronological order: the Dutch cases *X, Y, and Z*[667] and *A, B, and C*[668], and the Hungarian case *F.*[669]. I have chosen to elaborate on them because they are relevant insofar as they concern marginalised minorities and span the period before and after the refugee crisis. They are also excellent examples of instances where a vulnerability analysis could have exposed the structural prejudices against people covered by certain identity categories and provided a safety net for them. Yet, despite the intimate nature of the interviews and the applicants' well-founded fear of being persecuted, their vulnerability was not mentioned anywhere in the judgments. The results were some unfortunate pronouncements which *de facto* allow the continued reliance on certain prejudiced practices.

In terms of LGBTQIA+ asylum applications, the 2013 *X, Y, and Z* case made history by establishing that foreign nationals with a homosexual orientation form a 'particular social group' as referred to in Article 10(1)(d) of the Qualification Directive[670] and can therefore seek

[667] Joined Cases C-199/12 and C-201/12 Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel.
[668] Joined Cases C-148/13 and C-150/13 A and Others v Staatssecretaris van Veiligheid en Justitie.
[669] Case C-473/16 *F.*
[670] 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 [2004] OJ L 304/12 ('Qualification Directive').

asylum if they are being persecuted because of their sexuality. As to the particular facts of the case, the reference for a preliminary ruling concerned three applicants from Sierra Leone, Uganda, and Senegal, where homosexuality is a criminal offence punishable by imprisonment. None of the applicants had shown that they had already been subjected to, or threatened with, persecution because of their sexuality. The ECJ was therefore faced with three questions from the referring court in the Netherlands. The first question was whether asylum applicants with homosexual orientation counted as members of a 'particular social group' under Article 10(1)(d) of the Qualification Directive[671]. This question the ECJ answered in the positive in the following manner:

> 'According to that definition, a group is regarded as a 'particular social group' where, inter alia, two conditions are met. First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society' (para. 45)
>
> 'As far as concerns the first of those conditions, it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it. That interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic' (para. 46)
>
> 'The second condition assumes that, in the country of origin concerned, the group whose members share the same sexual orientation has a distinct identity because it is perceived by the surrounding society as being different' (para. 47)
>
> 'In that connection, it should be acknowledged that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different' (para. 48)

In terms of general asylum law, this answer meant that from that point on, to qualify as belonging to a particular social group, one should be able to show that first, she or he shares a characteristic with others that is so fundamental to her or his identity that she or he should not be asked to change it, and second, that there exist criminalising or degrading laws which specifically target individuals sharing those characteristics. As with the historical achievements of non-discrimination laws, this too, was a welcome development by the Court. However, it still fell short of capturing the vulnerabilities that could be caused by the interaction of structural and institutional factors. For example, the same applicants could have been in a situation in

[671] 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 [2004] OJ L 304/12 ('Qualification Directive').

which, although the state was not persecuting them, state and societal structures worked in a manner that kept them off fully participating in the labour market and thereby condemned them to a life of destitution. A vulnerability analysis would be able to capture and address such a scenario and thereby offer a safety net for those individuals whose identity would not qualify them for international protection under the current regime even though they are equally vulnerable.

With its second question, the referring court asked whether the asylum applicants could be expected to hide or restrain the expression of their sexuality in public with a view to minimising the risk of persecution. Here, the Court ruled that the chance to conceal one's sexual orientation is irrelevant to establishing the risk of persecution. This was a reasoning similar to the one provided in *Y and Z* where the opportunity to avoid the risk of persecution by abstaining from religious practice did not qualify as a relevant consideration in deciding whether there was a risk of persecution. In the same manner, the Court ruled that 'requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it' (para. 70). This is a welcome observation by the Court.

Finally, the ECJ was asked to rule on the question of to what degree the criminalisation of homosexual acts amounted to persecution. Here, the Court answered that the mere existence of such laws did not amount to persecution by stating that '[t]he criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution' (para. 61). The Court noted this as a question of fact and left it to the national authorities to examine whether such laws were, in fact, being exercised, concluding that imprisonment as a result of criminalising homosexual acts, which is applied as a matter of fact, did amount to persecution.

In the 2014 Dutch *A, B, and C*[672] case, all three applicants feared persecution due to their homosexuality in their country of origin. In all three cases, the applications had been rejected at the national level because they were vague and lacked credibility. On appeal, the Dutch instance was unsure whether the EU Charter of Fundamental Rights did not set restrictions on the manner in which sexual orientation claims were being verified. Therefore, the referring court decided to inquire regarding the limits set by the Charter on the kind of evidence that can be taken into account and the weight that can be given to them in evaluating the credibility of an

[672] CJEU, Joined cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014 (hereafter 'A.B.C.').

applicant's claim concerning her or his sexual orientation. The European Court of Justice was thereby given the opportunity to reiterate the boundaries that the EU Charter sets on the methods allowed for assessing the declared sexual orientation of asylum seekers.

The language of the Court was abundant with references to the Geneva Convention and the EU Charter. To begin with, it denied the applicants' proposal that the establishment of the applicant's sexual orientation should be exclusively based on the applicants' statements, and instead stressed the need for the *assessment* of his claims:

> '[i]n that regard, it should be noted at the outset that, contrary to the submissions made by the applicants in the main proceedings, according to which the competent authorities examining an application for asylum based on a fear of persecution on grounds of the sexual orientation of the applicant for asylum must hold the declared sexual orientation to be an established fact on the basis solely of the declarations of the applicant, those declarations constitute, having regard to the particular context in which the applications for asylum are made, merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4 of Directive 2004/83' (para. 49)

> '[i]t follows that, although it is for the applicant for asylum to identify his sexual orientation, which is an aspect of his personal identity, applications for the grant of refugee status on the basis of a fear of persecution on grounds of that sexual orientation may, in the same way as applications based on other grounds for persecution, be subject to an assessment process, provided for in Article 4 of that directive' (para. 52)

Alongside the expected need for individual assessment of the facts of the case, however, the ECJ issued a number of warnings that any such assessment should be done in light of existing human rights' commitments and noted that the EU Charter establishes a number of limits on the process of assessing the facts and circumstances surrounding the applicants' claim:

> '[h]owever, the methods used by the competent authorities to assess the statements and documentary or other evidence submitted in support of those applications must be consistent with the provisions of Directive 2004/83 and 2005/85 and, as is clear from recitals 10 and 8 in the preambles to those directives respectively, with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life guaranteed by Article 7 thereof' (para. 53)

> '[e]ven though Article 4 of Directive 2004/83 is applicable to all applications for international protection, whatever the ground for persecution relied on in support of those applications, it remains the case that it is for the competent authorities to modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for asylum, in observance of the rights guaranteed by the Charter' (para. 54)

This repeated reference to the rights enshrined in the Charter is welcome in terms of the setting the groundwork for the assessment of asylum claims based on sexual orientation. The judgment was additionally very progressive because, first, it banned questions that inquire into the details of the sexual practices of the applicants,

> '[i]n the second place, while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof' (para. 64)

and second, it barred local authorities from asking applicants to provide 'evidence' of sexual acts, even that was to be done on a voluntary basis because of its potential effects,

> 'In relation, in the third place, to the option for the national authorities of allowing, as certain applicants in the main proceedings proposed, homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter' (para. 65)
>
> 'Furthermore, the effect of authorising or accepting such types of evidence would be to incite other applicants to offer the same and would lead, de facto, to requiring applicants to provide such evidence' para. 66).

Both quotes show that questions concerning the details of the applicants' sexual practices, including the provision of tests or evidence, were all deemed in breach of the EU Charter and the Court even took the extra step to say that such evidence cannot be accepted even if the applicants submit to it voluntarily because it would have the *de facto* effect of pushing other applicants to do the same. Last, but not least, the Court denied local authorities the possibility of relying on any delay of disclosing one's sexuality as a reason for discarding an application for lack of credibility:

> '[h]owever, having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset' (para. 69)

Indeed, the failure to declare one's sexuality outright cannot automatically lead to the conclusion that the claim is fabricated. What needs to be done instead is for an individual assessment of the applicant to be conducted, keeping in mind her or his vulnerabilities and circumstances (para. 69). Yet, the progressive nature of the above instructions, was ultimately undermined by the Court leaving unwelcome room for the continued use of 'useful' stereotypical questions:

> '[w]hile questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not, nevertheless, satisfy the requirements of the provisions referred to in the previous paragraph, in that it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned' (para. 62)

All the progress achieved by the preceding parts of the judgment seems to be largely undone by the last quote. The decision not to ban all stereotyped questions and to even go further by saying that some of them might prove 'useful' (para. 62) is worrying. It was a step that has been strongly criticized by academics and human rights' organisations alike. Accompanied by the absence of further clarifications as to which are the stereotypical notions that might be allowed, the Court's reasoning in this aspect ended up leaving too much discretion to Member States in their assessments.[673] At the very least, however, evaluating cases exclusively on the basis of stereotyped notions failed to satisfy the individualised assessment necessary to comply with human rights, the Qualification Directive and the Procedures Directive. The language throughout the case reiterated the importance of the applicant and his individual assessment. The overall reasoning of the Court has received both praise and criticism. The Court's decision to ban sexually explicit inquiries and the submission of any kind of evidence, even if voluntary, in assessing the credibility of an individual has been welcomed. The inconclusiveness of an applicant's initial failure to disclose his or her sexual orientation has also been greatly received.

The most recent LGBTQ+ case in the Court's asylum jurisprudence is called *F*. It concerned a Nigerian national who had applied for asylum in Hungary, where he was the subject of personal interviews and meetings with a psychologist, who was to test the applicant's credibility with regards to his sexual orientation. More particularly, the 'expert's report entailed an exploratory examination, an examination of personality and several personality tests, namely the 'Draw-A-Person-In-The-Rain' test and the Rorschach and Szondi tests' (para. 22). These tests concluded that F's contention about his sexual orientation could not be confirmed and he was subsequently denied international protection. The applicant protested the reliability of such tests and argued that they infringed his fundamental rights as protected by the Charter. Two questions were referred for a preliminary ruling. The first one asked whether forensic psychologist's expert opinion based on projective personality tests could be used to formulate an opinion on an applicant's sexuality claim when there are no additional questions about the sexual habits of the applicant for asylum and that applicant is not subject to a physical

[673] Please see ECRE, at 36, and also for commentaries which assess all of these points please see: S Chelvan, 'C-148/13, C-149/13 and C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*: Stop Filming and Start Listening – a judicial black list for gay asylum claims', 12 December 2014 and S Peers, 'LGBTI asylum-seekers: the CJEU sends mixed messages', 2 December 2014, and also 'Tell Me What You see and I'll Tell You If You're Gay'.

examination. The second question inquired whether, if such expert opinions could not be used as proof, neither national administrative authorities nor courts have any possibility of examining, by expert methods, the truthfulness of the claims of an asylum application arguing persecution based on sexual orientation grounds. The Court allowed the use of expert reports when assessing an applicant's credibility, but only in a manner consistent with the Charter of Fundamental Rights of the European Union which would mean to neither base a decision exclusively on such reports, nor be considered bound by them. It banned, however, reliance on projective personality tests and delivered a judgment which was very robust in protecting the right to privacy of asylum applicants and was rigorous in its proportionality analysis of balancing the aims pursued by personality tests against the rights of asylum seekers.

The Court began by ruling that the commissioning of expert reports is permissible, but was careful to emphasise the need for keeping any examinations in line with the rights enshrined in the EU Charter, saying:

> '[a]lthough Article 4 of Directive 2011/95 does not prevent the determining authority or the courts or tribunals seized of an action against a decision of that authority from ordering, in circumstances such as those at issue in the main proceedings, that an expert's report be obtained, the procedures for recourse to such a report must be consistent with, in particular, the fundamental rights guaranteed by the Charter' (para. 48)

> 'The right to respect for private and family life, as affirmed in Article 7 of the Charter, in particular, is among the fundamental rights having specific relevance in the context of the assessment of the statements made by an applicant for international protection relating to his sexual orientation' (para. 49)

Simultaneously, the Court was very articulate and exhaustive in listing its reasons for banning projective personality tests, supporting its conclusion with interference to internationally drawn principles,

> 'It is also necessary to take account, in order to assess the seriousness of the interference arising from the preparation and use of a psychologist's expert report, such as that at issue in the main proceedings, of Principle 18 of the Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, to which the French and Netherlands Governments have referred, which states, inter alia, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity' (para. 62)

the need for an acknowledgment by the international scientific community and the 'vigorous' contestation of such tests by some EU Member States and the Commission,

> 'In this respect, it should be noted that the suitability of an expert's report such as that at issue in the main proceedings may be accepted only if it is based on sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community. It should be noted in that regard that, although it is not for the Court to rule on

> this issue, which is, as an assessment of the facts, a matter within the national court's jurisdiction, the reliability of such an expert's report has been vigorously contested by the French and Netherlands Governments as well as by the Commission' (para. 58)

It concluded that the report was in no way essential to supporting the asylum claim of an applicant alleging fear from persecution based on sexual grounds:

> 'In this context, such an expert's report cannot be considered essential for the purpose of confirming the statements of an applicant for international protection relating to his sexual orientation in order to adjudicate on an application for international protection based on a fear of persecution on grounds of that orientation' (para. 65)

> 'Second, it is apparent from Article 4(5) of Directive 2011/95 that, where the Member States apply the principle that it is the duty of the applicant to substantiate his application, the applicant's statements concerning his sexual orientation which are not substantiated by documentary evidence or evidence of another kind do not need confirmation when the conditions set out in that provision are fulfilled: those conditions refer, inter alia, to the consistency and plausibility of those statements and do not make any mention of the preparation or use of an expert's report' (para. 68)

> 'Furthermore, even assuming that an expert's report based on projective personality tests, such as that at issue in the main proceedings, may contribute to identifying with a degree of reliability the sexual orientation of the person concerned, it follows from the statements of the referring court that the conclusions of such an expert's report are only capable of giving an indication of that sexual orientation. Accordingly, those conclusions are, in any event, approximate in nature and are therefore of only limited interest for the purpose of assessing the statements of an applicant for international protection, in particular where, as in the case at issue in the main proceedings, those statements are not contradictory' (para. 69)

Perhaps most importantly, the Court delved into a rigorous consideration of the human rights' threatening consequences of personality tests and gave a very strong judgment in terms of privacy protection. It went to great lengths to engage with the question of proportionality and to explain why projective personality tests are not sufficiently necessary to justify their interference with the right to privacy. First, it created a reminder of the proportionality test (para. 56) and then grounded it in the facts of the particular case (para. 57):

> 'As regards, in particular, the proportionality of the interference that has been found to exist, it should be recalled that the principle of proportionality requires, according to the settled case law of the Court, that the measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued' (para. 56)

> 'In this context, although interference with an applicant's private life can be justified by the search for information enabling his actual need for international protection to be assessed, it

> is for the determining authority to assess, under the court's supervision, whether a psychologist's expert report which it intends to commission or wishes to take into account is appropriate and necessary in order to achieve that objective' (para. 57).

The 2018 *F.* case concludes with the Court's full rejection of the utility of projective personality alongside a robust reiteration of the importance of the right to privacy. It is a huge step forward in the right direction when compared to the 2014 judgment in *A, B, and C*[674] which left room for stereotypical questioning, calling it 'useful' (see *A, B, and C* at para. 62).

Ultimately, in all of the LGBTQ+ cases, the Court took a stance which very carefully considered the rights and the circumstances of the individual applicants and paid more attention to them than to the overall legislative intent behind the establishment of the asylum system. Through its interpretation of the Qualification Directive in *X, Y, and Z*, the Court expanded the group which could qualify for international protection to people persecuted because of their sexual orientation and thereby delivered substantially human rights-heeding judgments. It also dismissed the possibility of concealing one's sexuality as a relevant consideration in establishing persecution, thereby acknowledging the importance of not having to hide such an integral part of one's personality in public. Through its blanket denial of the acceptability of evidence of explicit content in assessing an applicant's credibility in *A, B, and C*, the Court also protected the dignity of asylum applicants, although it left room for stereotypical questioning. In *F.*, the Court conclusively banned projective personality tests, as unreliable and unnecessarily interfering with the rights of asylum applicants. All in all, the ECJ reiterated the importance of individual assessment and impacted the national practices of certain Member States. In fact, the 2017 ECRE Report examined the effect of the abovementioned cases in eight EU Member State jurisdictions and noted that even in the absence of legislative changes, the cases had a progressive influence on policy and practice in those Member States.[675] Importantly, any impact these decisions might have had depended on the legislative and the policy history of the Member States studied, making it less visible in countries where state practice was already aligned with the judgments themselves.[676] Yet, the reverberations of the judicial reasoning in the societies from which the requests for preliminary ruling originated is an significant indication of the societal impact the European Court of Justice has. It once again reiterates the significance of works such as this, which are firmly based on its jurisprudence.

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674 CJEU, Joined cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014.
675 ECRE, Preliminary Deference, March 2017, p. 32.
676 Ibid.

3. Vulnerability as the Antidote to the Overwhelming Pursuit of Effectiveness: Cases Where The Two Can Meet

The third and very potent space for applying the vulnerability thesis to the Court's asylum jurisprudence would be formed by those instances where the Court seeks to preserve the effectiveness of the asylum system. In those cases, a vulnerability analysis can have an offsetting effect. This part therefore conceptualises the vulnerability of an applicant as a counterbalancing force to the Court's commitment to preserve the effectiveness of the asylum system. It argues that the more vulnerable an applicant is, the greater consideration her interests must heed in balancing her rights against said principle. To illustrate the feasibility of this proposal, the following section examines three 'effectiveness' cases, where the Court already used the individual circumstances of the applicants to loosen the requirement of observing the principle of effectiveness; namely, *C.K. and Others*[677], the case of *K.*[678], and the case of *Jawo*[679]. Before delving into those, however, it studies the controversial *X and X v. Belgium*[680] case because a credible discussion of the Court's decisions within EU asylum law cannot exist without touching upon it. Although the case does not explicitly reference the 'effectiveness' of the asylum system, its reasoning is rooted in preserving it. So much so, that the vulnerability of the applicants is completely side-lined in the reasoning of the Court. Therefore, the case could serve as a vivid illustration of the drawbacks of a Court decision that exclusively focuses on saving the system and present an instance in which inclusion of a vulnerability analysis could have nuanced its reasoning. That this case is considered before the remaining three where the Court is actually paying attention to the applicants' vulnerability is a purposeful choice. It is the intent of the author to finish this work on a positive note and highlight a new trend in the Court's judgments whereby socio-economic conditions and the applicants' context, in a way similar to the one endorsed by Martha Fineman, is gaining traction as a relevant consideration in its decisions.

3.1. *X and X v. Belgium*[681]

On March 7th, 2017 the European Court of Justice delivered its preliminary ruling in the case of *X and X v. Belgium*[682]. Alongside its ECJ classification, C-638/16, which follows the standard format, one also sees the abbreviation 'PPU'. The acronym stands for *procédure préjudicielle d'urgence* and denotes the fast-track procedure introduced by the court in 2008, which allows it to hear urgent cases which fall within the areas covered by Title V of Part III of the

677 Case C-578/16 PPU *C. K. and Others v. Supreme Court of Republic Slovenia.*
678 Case C-245/11 *K v Bundesasylamt.*
679 Case C-163/17 *Jawo.*
680 Case C-638/16 PPU, *X, and X v. Belgium.*
681 Case C-638/16 PPU, *X, and X v. Belgium.*
682 Ibid.

TFEU (Area of Freedom, Security and Justice).[683] The procedure itself simplifies the ordinary preliminary ruling procedure in the following manner: firstly, it limits the right to submit written observations to either the referring state or the referring EU institutions, with other Member States being restricted to oral observations only; and secondly, it allows for PPU cases to be decided without a written submission by the Advocate General.[684] The latter limiting procedure is especially relevant to the present case, as despite having the option of not submitting a written submission, Advocate General Mengozzi nonetheless did so in an opinion which was ultimately ignored in the judgment, despite its significant length.

The preliminary ruling request was made in a case concerning two Syrian nationals and their three young children, who lived in Aleppo, Syria, and whom the Belgian state refused visas with limited territorial validity on humanitarian grounds, made through Article 25(1)(a) of the EU Visa Code. The application for the visas took place extraterritorially, at the Belgian Embassy in Lebanon, and the stated purpose for the visas was to allow the family to escape besieged Aleppo with the explicit intention of applying for asylum in Belgium. The claim made by the applicants was firstly, that under the EU Charter of Fundamental Rights ('the Charter') there was a positive obligation for Member States to guarantee the right to asylum; and secondly, that giving them international protection was the only way to eschew the risk of breaching Article 3 ECHR and Article 4 of the Charter, both of which refer to the freedom from torture or inhuman and degrading treatment or punishment. The Belgian Immigration Office's refusal was based on the observation that issuing the entry visa when the explicit intent was for the applicants to be able to lodge an asylum application in Belgium would be equivalent to permitting such applications to be lodged at a diplomatic post. The refusal incited an appeal by the applicants to the Council for Alien Law Litigation, which observed that the applicants may rely on the potential breach of Article 3 only if they fell within Belgian 'jurisdiction'. The institution thereafter submitted an urgent preliminary ruling request asking the question whether the implementation of a visa procedure could be considered as the exercise of such jurisdiction and if so, whether, keeping in mind the circumstances at hand, an obligation to allow entry would derive from it.

The first thing that strikes one upon reading the Grand Chamber decision is its length. The ECJ's response to the preliminary ruling request is short, concise, and technical. Whilst the mere seventeen paragraphs devoted to the 'consideration of the questions referred'[685] might have had something to do with the urgency of the procedure, the credibility of such an observation is significantly weakened when one is faced with the Opinion of Advocate-General

[683] D. J. V. Dutra, Human Rights and the Debate on Legal Positivism, *Dialogue and Universalism*, (1), 2015, p. 264.
[684] Beck, 2013, p. 433.
[685] See *X and X v. Belgium* (2017), at para. 35-52.

Mengozzi, delivered a month before the judgment, which included a hundred and five paragraphs [686] (six times the size of the judgment). Granted, comparing the number of the paragraphs devoted to the substantive examination of an issue is an arbitrary exercise as paragraph lengths always vary, but a proportion of 6:1 is nonetheless worth noting. Especially because the judgment concerned justifying a visa refusal to claimants in an extremely vulnerable position (as the Court itself explicitly recognised) and yet any reference to the extensive Advocate General opinion was completely absent. This was but an instance of the Court's 'increasingly frequent practice of dispensing with the opinion of an Advocate General' (de Burca, 2013, 180). In light of the strong human rights aspect of this case, however, de Burca's call to the Court to reconsider said practice and to acknowledge and substantively consider Advocate-General Mengozzi's opinion would have been fitting. Moreover, as we will later see, the length is especially contentious in light of the fact that not all of the important aspects of the case were discussed by the Court.

As the Court points out, both Article 1 of the Visa Code and Article 62 of the EC Treaty, based on which the former instrument was adopted, limit any stay allowed under a visa to a maximum of 90 days.[687] Given that the applications for the visas on humanitarian grounds would lead to applications for asylum and thereby result in residence permits with a duration exceeding 90 days, the ECJ concluded that the applications would be beyond the scope of the Visa Code, and exclusively fall within national law. Coupled with the fact that 'no measure has been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) TFEU, with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds, the application at issue in the main proceedings falls solely within the scope of national law'[688]. The Court also noted that any differing conclusion would amount to permitting non-EU nationals to use the Visa Code to apply for visas in a Member State of their choosing and thereby undermine the Dublin System. Furthermore, it considered its decision as cohering with both the Asylum Procedures Directive[689], which excludes applying for asylum at diplomatic posts and the Dublin Regulation, which only obliges Member States to examine asylum applications when they are made within the state territory in question.

The language of the short judgment is very dry and technical. Contrary to some expectations and despite the Court's initial acknowledgement of the desperate situation of the claimants, there is no recourse to human rights language. In examining whether the claim is

[686] See paragraphs 71-176, Opinion of Advocate General Mengozzi, *X and X v. Belgium,* delivered on 7 February 2017.
[687] See *X and X v. Belgium* (2017), at para. 40-32.
[688] See *X and X v. Belgium* (2017), at para. 44.
[689] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95.

rightfully urgent, the ECJ highlights the following information from the referring court: 'the serious armed conflict in Syria, the young age of the children of the applicants in the main proceedings, their particular vulnerability, associated with their belonging to the Orthodox Christian community'[690]. It also adds that 'it is *not disputed* that […] the applicants in the main proceedings were facing a *real risk* of being subjected to inhuman and degrading treatment'[691] [emphasis added]. It is exclusively in these two statements that some consideration for the particular situation of the claimants and language of a human rights character is present in the judgment. Despite being short, these sentences are of paramount importance because of the information they nonetheless manage to communicate: vulnerable applicants are facing the real risk of treatment that is in breach of the non-derogable rights protected under Article 3 of the European Convention on Human Rights. Yet, there is no further mention of the situation in question. More than an opportunity to grant inquiries of a similar nature a human face, the case is turned into a dry discussion of the technicalities of the legal provision in question, completely abstracted from the particular facts. In the Court's opinion, 'the defining feature of the situation at issue is […] the fact that the purpose of the application differs from that of a short-term visa'[692], and not the life-threatening risk to five individuals, including three children. It is precisely here that the Court could have spent some time discussing the vulnerability of the applicants. In fact, had the Court wished to do so, it could have highlighted the uniqueness of their circumstances, and the many factors exacerbating their vulnerability to escape the floodgates scenario it wishes to avoid by stopping short of undertaking that discussion. It does not do so, however. The Court's decision as to which is the most important aspect of the case, namely, the purpose of the application, as opposed to the acute vulnerability of the applicants, is a clear example of the consequences of the 'game of jurisdiction'. What appears as a technical, matter-of-fact choice on part of the Court is actually a decision with normative weight. Valverde poignantly noted that 'jurisdiction sorts the 'where', the 'who', the 'what', and the 'how' of governance through a kind of chain reaction'.[693] In this case, the Court relocated the 'who' of governance to national jurisdiction, and thereby cleared itself of the need to decide the rationalities which should govern how the decision is taken.

Whilst the applicants' vulnerability was not balanced against the principle of preserving the effectiveness of the system, it could have still been touched upon in the subsequent direction given to the referring instance. However, there was no direction to the national court to also consider the applicants in question and that makes the instructions to the referring court non-

[690] See *X and X v. Belgium* (2017), at para. 30.
[691] Ibid, at para. 33.
[692] Ibid, at para. 47.
[693] Valverde, 2009, p. 144.

exhaustive. The ECJ failed to remind the national instance that whilst the EU Charter remains inapplicable, and therefore makes the examination of a potential breach of its Article 4 unnecessary, the question of whether there is a risk of an Article 3 ECHR breach remains for consideration. One could argue that such a reminder would be superfluous and unnecessary, but that would undermine the instructive power ECJ decisions hold for national courts. Indeed, beyond entering the public discourse,[694] the discussions of a human rights nature in ECJ preliminary rulings serve as important examples to national courts on how international human rights' norms can be incorporated into an ossified judicial tradition. Moreover, no instruction to consider human rights can be superfluous when there are human lives on the line. Therefore, the Court should have submitted its directions under the presumption that national courts require a recapitulation of the whole picture with all the necessary information being mentioned, regardless of how petty the exercise might seem. Whilst there is neither human rights language, nor an attentive discussion of the particular situation of the claimants, the Court reiterates Member State sovereignty, reminding its audience that 'the issue in the main proceedings falls solely within the scope of national law'[695]. There is also the use of an overtly political argument, whereby the Court considers how certain interpretation of the law 'would undermine the general structure of the system established by Regulation No 604/2013'.[696] That is to say that even though the ECJ failed to mention or address the *immediate* applicants in the case and their dire circumstances, it nonetheless took the time to consider the *potential* consequences that *might* flow from deciding this particular case one way or the other. Of course, the European Court of Justice is an institution embedded with the European Union and has an interest in protecting the latter form the crisis that could potentially follow an undermined Dublin System. What is advanced here as an argument, however, is that within the context of this case, drawing attention to the particular circumstances of the applicants was equally, if not more important than that general abstract discussion.

It is imperative to highlight here that the ongoing critical analysis of the judgments does not aim to take a normative stance regarding the outcome of the decisions, but instead wishes to draw attention to the language the Court chooses to utilise. The Court has a role to *guide* the referring national courts in interpreting EU law. It has the authority, legitimacy, and mandate to do so within the preliminary ruling procedure. It needs to draw attention to the considerations the national courts should keep in mind and be objective in doing so. One way to ensure that is by spending an equal amount of time on all important aspects of the issue at hand so as to avoid

694 For a more detailed discussion of this argument, please see: Shai Dothan, 'International Courts Improve Public Deliberation', *Michigan Journal of International Law* 39:2, 2018, 217-240.
695 See *X and X v. Belgium* (2017), at paras. 44, 52.
696 Ibid, at para. 48.

being or appearing biased. Otherwise, by not offering national courts a balanced guidance, the ECJ is giving them not merely the *interpretation* of the question but also the *answer* to it. Yet, this fact becomes obscured underneath the legal veneer of objectivity. In line with the overall Law and Society tradition, this work posits that even if the ECJ fails to address certain issues of importance, thus compromising its own objectivity, the law's authoritative veil coupled with the Court's celebrated legitimacy will obscure its subjectivity. This idiosyncratic situation makes all the more important the European Court of Justice's responsibility to discharge its instructive burden in an exhaustive manner. At the end of the day, the purpose of the preliminary ruling procedure is for the Court to give guidance on the interpretation of EU law. The ECJ is not to make grand pronouncements on whether the human aspect or the technical aspect of a question under consideration should outweigh the other in the referring Court's considerations. And yet, by not giving equal discussion time to both, or rather, by completely side-lining the human discussion in favour of the technical one, the Court is taking a stance. It is foregoing its own responsibility, inherent in its authoritative voice, on ensuring that its guidance to national courts includes considerations of a human rights nature especially when the latter would be evaluating matters of real and immediate concern to people at risk. Delving into the Court's motivations would be a speculative and hardly useful exercise; and yet, certain questions persist. Is the Court's silence on the particular facts of the case deliberate? Does the Court fear that addressing the human side of the story would discredit its ultimate decision?

For Iris Goldner Lang, the Court's overall approach in the case is an example of the its 'passivism in the narrow sense' because it chose not to rule on the matter by stating that it lacked jurisdiction.[697] For Advocate-General Sharpston, this was an example of 'negative judicial passivism' because the Court engaged with the issue to begin with, but thereafter offered a restrictive interpretation of EU law in order to allow for the problem to be resolved by national law.[698] An interpretation of the case from within Valverde and de Sousa Santos' theoretical framework offers different insight and yet another way of understanding it. It allows us to read the case as a strong manifestation of the metaphorical clash of jurisdictions underlying the asylum sphere and a very useful illustration of the different logics that follow after answering the 'where' and the 'how' of governance in the 'game of jurisdiction'. The Court's decision concerning which jurisdiction was applicable in this particular case was therefore consequential for the jurisdictional apparatuses that would thereafter be mobilised and the rationalities that would apply.

Ultimately, a close reading of the decision reveals that there are many things absent from

[697] Lang, 2018.
[698] Sharpston, 2018.

the ECJ decision: any reference to the extensive opinion of Advocate-General Mengozzi, any substantive human rights language, a proper discussion of the particular situation of the claimants. Yet, state sovereignty is there, and so are considerations of a political nature, such as the ones concerning the potential ramifications of the decision for the Dublin system. In the end, it appears as though this case demonstrates the language of statism, as represented by state sovereignty being prioritised over that of cosmopolitanism, which would have highlighted the importance of the individual. Were this to be the case on which one would base a conclusion on the distributive justice account the overall asylum jurisprudence of the Court aligns with, it would have been one of statism. However, there were tracks through which a vulnerability analysis could have transpired and had that happened, it could have allowed for taking account of the applicants circumstances. This would have been a valuable exercise even if such reflection would not have changed the Court's decision.

3.2. The Case of *C.K. and Others*[699]

The most recent case[700] of implicit engagement with the applicant's vulnerability is *C.K. and Others*[701]. The case was related to the Dublin transfer of a couple and their new-born child from Slovenia to Croatia, the Member State responsible for examining their application. However, after the psychiatric assessments of the mother, she and the child were allowed to remain at the reception centre in Slovenia because they were in need of care. The Court's decision was very firmly footed in human rights' considerations:

> 'It follows from all of the preceding considerations that the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which preclude that transfer from resulting in a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter' (para. 65).

> 'In that regard, it is not possible to exclude from the outset the possibility that, given the particularly serious state of health of an asylum seeker, his transfer pursuant to the Dublin III Regulation may result in such a risk for him' (para. 66).

In addition, the Court was adamant to note that the protection offered by the EU Charter cannot fall below the one offered by the ECHR. It referenced ECtHR jurisprudence and noted that suffering following naturally occurring illness can qualify as risking breach of the rights protected under Article 4 of the Charter and Article 3 of the ECHR if it would be exacerbated by measures taken by local authorities,

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699 Case C-578/16 PPU *C. K. and Others v Republika Slovenija*, 16 February 2017.
700 The most recent case as of January 2019.
701 Case C-578/16 PPU *C. K. and Others v Republika Slovenija*, 16 February 2017.

> 'It must be recalled that the prohibition of inhuman or degrading treatment laid down in Article 4 of the Charter corresponds to that laid down in Article 3 of the ECHR and that, to that extent, its meaning and scope are, in accordance with Article 52(3) of the Charter, the same as those conferred on it by that convention' (para. 67)
>
> 'It follows from the case-law of the European Court of Human Rights relating to Article 3 of the ECHR, which must be taken into account when interpreting Article 4 of the Charter (see, to that effect, judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 87 to 91), that the suffering which flows from naturally occurring illness, whether physical or mental, may be covered by Article 3 of the ECHR if it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible, provided that the resulting suffering attains the minimum level of severity required by that article (see, to that effect, ECtHR, 13 December 2016, *Paposhvili v. Belgium*, CE:ECHR:2016:1213JUD004173810, § 174 and 175)' (para. 68)

The Court therefore ruled that the Dublin transfer could not take place when it would be hurting the health of a transferee. The language of the Court, with its emphasis on human rights and the human rights tradition flowing from the practice of the ECtHR is all the more striking when juxtaposed with the Court's decision in *X and X* discussed immediately above. It serves to illustrate how substantial the consequences of resolving jurisdictional clashes one way or the other can be, and just how much the language of the Court can change depending on in which direction it wishes to steer their resolution. In addition, as has been shown from **Chapter IV**, the principle of effectiveness is most commonly invoked in the context of the Dublin regulation; therefore, the Court's decision to weight the health of a transferee as more important in than preserving the effectiveness of the system is noteworthy. A significant detail about the case was that the Court's ruling was applicable to the asylum seeker in question, even before his need for international protection was established. Therefore, the extent of her vulnerability, in this case caused by the state of her mental health, trumped considerations of the effectiveness of the asylum system, which is otherwise dependent on the effective and timely execution of transfers. The vulnerability of the applicant therefore established a caveat in the most solid pillar of the Court's reasoning within its asylum cases, namely the effectiveness of the asylum system.

3.3. The Case of *K.*[702]

The case of *K.*[703] concerned an applicant with mental health concerns. Here, the humanitarian clause was used to decide the MSR for the applicant's case, but, in contrast to *C.K.*

[702] Case C-245/11 *K v Bundesasylamt*.
[703] Ibid.

and Others[704], only after the applicant was granted a protection status. What was interesting about the situation was that it was not the asylum seeker, but her daughter-in-law who was mentally ill and needed help. The applicant therefore wanted to be in Austria, which was not the MSR for her application, to be able provide that help. The importance of the Court's ruling in this case cannot be overstated because, by taking account of the wishes of the applicant, is goes against one of the main rationales for having the Dublin system; namely, that applicants should not be given a choice as to where they can apply for asylum so as to avoid forum shopping. The fact that the vulnerability, not of the applicant, but of her daughter-in-law, was a sufficient consideration to outweigh the principle of preserving the effectiveness of the asylum system is therefore very progressive. It reveals the power a vulnerability analysis can have in the exercise of balancing an applicant's interests against that of preserving the system. The Court once again gave wider interpretation and more extensive coverage to the notions of 'inhuman treatment' and 'family' (paras. 38, 40, 41). First, it noted that,

> '…notwithstanding the fact that the definition of 'family members' within the meaning of Article 2(i) of Regulation No 343/2003 does not cover the daughter-in-law or grandchildren of an asylum seeker, Article 15 of that regulation must nonetheless be interpreted as meaning that such persons are covered by the words 'another relative' used in Article 15(2)' (para. 38)

> '…given that Regulation No 343/2003 contains, in Articles 6 to 8, binding provisions which seek to preserve family unity in accordance with recital 6 in the preamble to the regulation, the humanitarian clause contained in Article 15, since its purpose is to permit Member States to derogate from the criteria regarding sharing of competences between the Member States in order to facilitate the bringing together of family members where that is necessary on humanitarian grounds, must be capable of applying to situations going beyond those which are the subject of Articles 6 to 8 of Regulation No 343/2003, even though they concern persons who do not fall within the definition of 'family members' within the meaning of Article 2(i) of Regulation No 343/2003' (para. 40)

The Court was generous and considerate of the applicant's circumstances even though she wished to be reunited with a person who was not her direct relative. Despite the presence of references to 'effectiveness' (para. 31), legislative intent (para. 33), and the objective of the Regulation (paras. 35, 36, 49, 52), the Court gave heavy consideration to the applicant's context. The decision was therefore a generous balancing exercise between preserving the effectiveness of the system and taking note of the desires of the applicant and her social vulnerability.

[704] Case C-578/16 PPU *C.K. and Others v. Supreme Court of Republic Slovenia.*

Both the ruling in *C.K. and Others*[705] and *K.*[706] were very different from the Grand Chamber ruling in *M'Bodj*[707], where, even though the applicant was sick, the Court ruled that the protection and rights afforded to refugees or subsidiary protection beneficiaries could not be afforded to a third country national, unless it was proven that he would be *intentionally deprived* of medical care. In *M'Bodj*, we witnessed the Court applying the persecution logic of the international protection regime to justify the extension of rights by searching for intention and a perpetrator, instead of looking into the applicant's vulnerability. Arguably, had the Court chosen to instead focus on the extent of the applicant's vulnerability, the case would have, at the very least, been based on different rationales. It is also worth reflecting on how, had Mr. M'Bodj submitted an asylum seeker application, the ruling in *C.K. and Others*[708] would have set precedent for his case being handled differently. As we were reminded, in the latter case, the status of the applicant did not have to be proven (i.e. she was still an asylum seeker at the time of the judgment) for the Court to decide that a transfer would breach her rights. The heavy requirement of following a persecution logic was dispelled and what mattered was the extent of her vulnerability instead. This means that had Mr. M'Bodj's case been examined under a different jurisdiction, albeit still one in charge of third country nationals, his case would have been treated differently despite having the very same circumstances. It is therefore important to consider how much the justice extended to an applicant can vary with the type of jurisdiction extended to deal with her case. The loss and gain of rights with the travel between jurisdictions therefore reveals that the apparent technicality of the Court exercising jurisdictional choices is misleading. A vulnerability analysis that puts an applicant at the spotlight of any decision could avoid the differential treatment resulting applying different jurisdictions to comparable cases and grant legal practice a more coherent flavour.

3.4. The Grand Chamber Case of *Jawo*[709]

On March 19th, 2019, the ECJ delivered the ground-breaking Grand Chamber judgments in the case of *Jawo*[710] on the threshold for stopping a transfer to the Member State Responsible for examining an asylum application under the Dublin III Regulation. The Court ruled that an asylum seeker may not be transferred to the Member State originally responsible for her application even where that Member State has granted her protection, if it is established that the living conditions in said Member State would expose the asylum seeker to a situation of such extreme material poverty that it might amount to inhuman and degrading treatment.

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[705] Ibid.
[706] Case C-245/11 *K v Bundesasylamt.*
[707] Case C-542/13 *Mohamed M'Bodj v État belge*, 18 December 2018.
[708] Case C-578/16 PPU *C. K. and Others.*
[709] Case C-163/17 *Jawo.*
[710] Ibid.

The cases were ground-breaking because for the first time the Court ruled that exposure to 'extreme material poverty' (see paras. 92-95) could amount to inhuman and degrading treatment in breach of Article 4 of the EU Charter. The outcome of the cases and the reasoning of the Court remind one of the ECtHR's decision in the infamous *M.S.S. v Belgium and Greece*[711] case, where the latter court ruled, amongst other things, that Belgium has violated Article 3 of the ECHR by sending the applicant to Greece, where he was exposed to risks arising from the deficiencies in the asylum procedure as well as detention and living conditions also in breach of Article 3 ECHR. In terms of a vulnerability analysis, the ECJ's approach to in *Jawo* echoed *M.S.S.* and established the 'institutional production of vulnerability'[712] for asylum seekers in Italy.

The applicant in *Jawo* was a Gambian citizen who had first applied for asylum in Italy, following which he submitted a second asylum application in Germany. The latter application was rejected by the German authorities on the ground that it was inadmissible, and the German instance ordered the removal of the applicant to Italy, the Member State responsible for his case. When the authorities attempted to remove him, however, Jawo was at the accommodation centre where he lived in because, as he later told the authorities, he had left the centre to go and visit a friend. The timing of the visit was not intentionally coinciding with the removal because the applicant had not been informed about when he would be removed. Afterwards, Jawo challenged the order for removal to Italy on the basis that his transfer to Italy had not occurred within the six-month time limit outlined in the Dublin III Regulation. The time limit itself could not be extended to the maximum of eighteen months (which is otherwise possible in cases of absconding) because Jawo had merely gone to visit a friend on the day of his intended removal from Germany. The applicant also argued that his removal would be against the law in any case due to the systemic deficiencies in the asylum procedure, reception conditions for applicants, and the living conditions afforded to the beneficiaries of international protection in Italy. The ECJ was therefore asked to interpret the Dublin III Regulation and the prohibition of inhuman or degrading treatment. In its reasoning, the Court referred to the Swiss Refugee Council's 2016 report which contained specific evidence to the fact that beneficiaries of international protection in Italy: are 'exposed to the risk of becoming homeless and reduced to destitution in a life on the margins of society'[713]; live at the mercy of the inadequately developed Italian social system, which does not provide them with any aid; and find themselves at the receiving end of inadequate integration arrangements in Italy. The Court concluded that a removal or a rejection of an application for international protection on the basis of inadmissibility because of

[711] *M.S.S. v Belgium and Greece* [GC], Application No. 30696/09.
[712] Peroni and Timmer, 2013, p. 1069.
[713] See *Jawo*, at para. 47.

previously granted subsidiary protection in another Member State is permissible except when it is established that such transfer would lead to the applicant being left in a situation of extreme poverty.

The wording of the judgment is worth a deeper investigation. In it, the ECJ put a lot of emphasis on the principle of mutual trust between EU Member States as the foundation of the CEAS, which in practice allows the Court to presume that any successful application for international protection in the EU, means the rights espoused in the EU Charter, the 1951 Refugee Convention, and the ECHR would be upheld for the applicant. It reminded the reader just how much is possible because of said principle and how it sits at the foundation of the internally cosmopolitan, border-overlooking Schengen area of the EU:

> In the second place, it should be recalled that EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected […] and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, particularly Articles 1 and 4 thereof, which enshrine one of the fundamental values of the Union and its Member States' (para. 80).
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> 'The principle of mutual trust between the Member States is, in EU law, of fundamental importance given that it allows an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law' (para. 81).
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> 'Accordingly, in the context of the Common European Asylum System, and in particular the Dublin III Regulation, which is based on the principle of mutual trust and which aims, by streamlining applications for international protection, to accelerate their processing in the interest both of applicants and participating States, it must be presumed that the treatment of applicants for international protection in all Member States complies with the requirements of the Charter, the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951' (para. 82).

Albeit a cornerstone of the CEAS, the principle of mutual trust is, however, rebuttable, in instances such as the one in *Jawo*. Whenever an applicant challenges a transfer decision or a rejection of a further application for international protection on grounds of inadmissibility, the

Court is required to assess the claim of the applicant and whether there might be certain deficiencies that affect certain groups of people in said Member State. Such deficiencies would be considered in breach of the prohibition against inhuman or degrading treatment only if they reach a significantly high level of severity, which is to be established on a case-by-case basis. The Court ruled that this threshold would also be reached when the indifference of the Member State authorities can lead to the person dependent on State support finding oneself in a situation of extreme material poverty that does not allow the applicant to meet his most basic needs or have a place to live and thereby jeopardises the person's physical or mental health to the extent of harming her human dignity. The ground-breaking instances of the discussion engaged both poverty and its effect on exacerbating human vulnerability, showing that a vulnerability analysis which takes context into account is able to prevent the breach of fundamental human rights. In answering what level of severity of conditions applicants find themselves in would fall within the prohibition of inhuman and degrading treatment under Article 4 of the EU Charter, the Court noted,

> '[t]hat particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity (see, to that effect, ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, CE:ECHR:2011:0121JUD003069609, paragraphs 252 to 263)' (para. 92)

> 'That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment' (para. 93)

As noted by the Court, the requirement is quite high, in that it needs to be one of 'extreme material poverty', as opposed to 'high degree of insecurity of degradation'. Yet, the fact that poverty is capable of engaging Article 4 of the Charter is significant for the future of the asylum system and for the people caught in it. Quite importantly, mere *indifference* on part of Member State authorities that causes 'extreme material poverty' would be enough to engage the article. This is in stark contrast to Court's requirements in previous cases such as *M'Bodj* for example. There, a third country national, with leave to reside in Belgium because he suffered from an illness occasioning a real risk to his life, was required by the Court to establish the *intentional*

deprivation of medical care in his country of origin before he would be entitled to health care in Belgium.

Alongside paying attention to the vulnerability of the applicants caused by their material conditions, the Court also highlighted their social vulnerability. It stated:

> '[a] circumstance such as that mentioned by the referring court, according to which, as stated in the report referred to in paragraph 47 of the present judgment, the forms of support in family structures, available to the nationals of the Member State normally responsible for examining the application for international protection to deal with the inadequacies of that Member State's social system, are generally lacking for the beneficiaries of international protection in that Member State, is not sufficient ground for a finding that an applicant for international protection would, in the event of transfer to that Member State, be faced with such a situation of extreme material poverty' (para. 94).

> 'Nonetheless, it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances that are unique to him and mean that, in the event of transfer to the Member State normally responsible for processing his application for international protection, he would find himself, because of his particular *vulnerability*, irrespective of his wishes and personal choices, in a situation of extreme material poverty meeting the criteria set out in paragraphs 91 to 93 of the present judgment after having been granted international protection' (para. 95) [emphasis added]

Above, the Court explicitly refers to the applicant's 'particular vulnerability'. This reference echoes Fineman's idea, which universal, vulnerability is experienced in an individualized manner by different people because '[t]here are two relevant forms of individual difference in a vulnerability approach—those that arise because we are *embodied* beings and those that arise because we are social beings *embedded* in social institutions and relationships'.[714] The fact that the Court takes into consideration the 'forms of support in family structures' is incredibly encouraging. In engaged in an analysis very close to Fineman's approach which, as she reiterates, 'is a "post-identity" inquiry in that it is not focused only on discrimination against defined groups, but concerned with privilege and favour conferred on limited segments of the population by the state and broader society through their institutions. As such, vulnerability analysis concentrates on the structures our society has and will establish to manage our common vulnerabilities'.[715] The fact that the Court so explicitly accounts the privilege-endowing and disadvantage-producing *structures* and *processes* of our society, combined with the fact that

[714] Fineman, 2017, p. 143.
[715] Fineman, 2008, p. 1.

Fineman's theory enables one to analyse them in a systematic manner, once again proves the utility of applying the theory to the Court's jurisprudence.

The case of *Jawo* stands in stark contrast to previous cases in the Court's asylum jurisprudence. One example is the case of *Moussa Sacko*[716], where the Court did not even question the preliminary finding that an application was manifestly unfounded because of the presumed economic grounds for the application by the Malian national. Examining the vulnerability of the applicant was therefore out of the question. This approach was in opposition to Fineman's because it rested on the underlying presumption that economic circumstances cannot be a reasonable ground for offering protection. On the surface, this is merely a loyal interpretation of the international protection regime which prohibits any conclusions to the opposite. Yet, with the tools provided by Fineman's vulnerability thesis and her post-identity systemic approach, one can see this decision as the materialisation of the unfair bias towards only recognising that inequality which is contingent on the automatic application of identity categories. A vulnerability analysis might have led to the same result, but it would have been more fair in terms of acknowledging the individual circumstances of the applicant.

What the fate of the *Jawo* case will be in the future remains uncertain, but it is the most progressive asylum judgment by the Court to date. Previous empirical studies of the Court's jurisprudence[717] reveal that the legal relevance of a case is, to a large extent, contingent on how old it is[718] as 'a case can become 'embedded' in a long process of reinterpretation by legal actors'[719]. Yet, the number of the Court's own references back to the case is not directly proportional to the case's popularity in the academic literature.[720] Instead, what seems to be more definitive (for the time being) is its age in addition to the amount of attention it gets in academic writing. With the advent of empirical studies that rely on computational analyses to determine the importance of a case, this might be about to change, and *Jawo* might gain the attention it deserves.

716 Case C-348/16 *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017.
717 See for example: Palmer and Küçüksu, 'Finding Hidden Patterns in ECtHRs Case Law: On how citation network analysis can improve our knowledge of ECtHRs Article 14 practice', *International Journal of Discrimination and the Law,* 2017, pp. 1-19.
718 Palmer & Küçüksu, 2017.
719 Sald & Panagis, 2015, p. 15.
720 Palmer & Küçüksu, 2016.

CHAPTER VI

Conclusions

This work establishes the absence of dialogue where it was intuitively expected. There is no overlap, in substance or form, between the way asylum is discussed in political philosophy debates on global justice and the way it is handled in judicial practice. Despite catching the author by surprise, this gap opened a door for creativity and led to an unconventional effort at interdisciplinarity. This thesis bridges the gap between the two academic spheres in a manner that is not only informed by philosophy's normativity, but is also cognizant of the practical reality of pursuing justice. It demonstrates that a critical examination of the European Court of Justice's asylum jurisprudence through a philosophical lens can be revelatory in a number of respects and it thereby serves as evidence of the immense insight that interdisciplinarity, both theoretical and methodological, can offer. Beyond answering a number of important questions, this work also sparks many other, equally important ones. The pursuit of resolving those could open valuable avenues for further research. Before examining them in more detail, however, it is worth recapitulating the main arguments of this endeavour. A reflection on the new research paths this work can offer will follow thereafter.

1. Recapitulation of the Main Arguments

The argument in my thesis unfolded in several steps. The **Introduction** revealed the major finding that there was no overlap between the treatment of migration in political philosophy and the legal practice on asylum flowing from the ECJ. Despite eliminating the element of surprise, mentioning the gap at the outset of the work was necessary in order for the audience to understand how the argument was going to be built thereafter and why there would be a need to resort to Martha Fineman's theory of vulnerability. Once mentioned, the gap gave way to a discussion of this work's theoretical foundation and commitment to the Law and Society legal tradition. The Introduction highlighted the interdisciplinary methodology of the research and the sociological element inherent in the decision to conduct interviews at the Court.

Chapter II outlined the political philosophy literature that was most relevant to the project. It explained in what form migration figures in debates on global justice (II.1.) and then went onto outlining the difference between statism and cosmopolitanism as a useful dichotomy on which one could build one's understanding of the area (II.2.). Thereafter, significant portion of the chapter was devoted to the idea of humanitarianism (II.3.); explaining how it differs from full-blown duties of justice (II.3.1.) and how it could be relied on to transform international

protection without doing away with nation-state borders (II.3.2.). The examination of humanitarianism was rounded off by an explanation of how its underlying rationale would offer wider protection than the current international protection regime and why that would be a positive development in light of the changing nature of forced displacement (II.2.3.). Thereafter, the chapter was devoted to unpacking Martha Fineman's 'vulnerability thesis' because of its ability to bridge the gap between political philosophy and judicial practice (II.5.). It was argued that the 'vulnerability thesis' could be conceptualised as a 'legal twin' to the idea of humanitarianism proposed by political philosophy, whilst having the added advantage that, albeit implicitly, its fundamental tenets are already observable in the case law of the European Court of Justice.

Chapter III set the context for the European Court of Justice and its role within the Common European Asylum System (CEAS), whilst also outlining the interpretative techniques used by the Court (III.5.). **Chapter IV** begun by outlining the absence of overlap between the asylum jurisprudence of the European Court of Justice and the substantive principles espoused by global justice discussions on migration. It followed by shedding light on them by presenting the empirical findings from the qualitative interviews. Thereafter, the chapter established the principle of 'effectiveness' as the 'ECJ refrain' in its asylum jurisprudence, basing the claim on an empirical analysis which revealed 'effectiveness' as a recurrent rationale in a significant portion of it. It began by noting that despite its practical, day-to-day engagement with asylum matters, the Court made no recourse to grander narratives or discussions about asylum of the kind espoused by political philosophy. Quite the contrary, the chapter demonstrated that the Court has adopted an administrative, passivist role within the area of asylum. The chapter concluded by reflecting on the implications of this verdict in light of the Court's 'celebrity for dynamic interpretation'[721] (IV.2.).

Chapter V explained why Martha Fineman's 'vulnerability thesis' could bridge the gap between the *ideal* in global justice theories on migration and the *non-ideal* in the Court's practice within the field. The central rationale for reliance on the idea was that it already figures in the lexicon of the Court and would therefore make for a less intrusive endeavour. Here, a special taxonomy was devised to trace the theory's implicit presence in the Court's case law even when no explicit references to 'vulnerability' were being made. The taxonomy divided the discussion into cases where the Court *explicitly* referred to the concept (V.1.) and cases where it *implicitly* engaged with the idea (V.2.). The chapter also offered a close reading on a number of cases where applicant vulnerability served as the antidote to the consequences of preserving the effectiveness of the asylum system (V.3.). Importantly, this chapter established several practical

[721] Hailbronner & Thym, 2016, p. 7.

applications to the theory of vulnerability, which will be outlined in further detail upon reflecting on the contributions of this work below.

2. Empirical Contributions

The empirical contributions of this work derive from the insight gained through the close legal reading of the ECJ's complete asylum jurisprudence, as nuanced through a dozen of interviews undertaken at the Court. This combination of interdisciplinary methodological tools offered a unique angle into EU judicial practice within the area. The first, and perhaps most overwhelming finding from engaging the ECJ's case law was that there is no empirical evidence of global justice discussions on migration feeding into the asylum practice of the European Court of Justice. This finding has put under question the presumption that political philosophy has any concrete influence on everyday practices of rendering justice, such as the ones that take place at the highest court of the European Union.

Second, the empirical evidence revealed that the European Court of Justice has abandoned its constitutional cloak and taken on a more administrative role within the asylum sphere. This claim is empirically rooted in the legal analysis of the Court's complete asylum jurisprudence, where the majority of judgments are decided in a very technical, matter-of-fact manner despite the large variation of issues involved. The Court's case law is most often reasoned through reliance on the following three rationales: the 'effectiveness' of the asylum system, the intention of the legislature, and the objective of the instrument in question. The fact that the rules within the CEAS are mainly procedural, as opposed to substantive, and that technical language distances the judgments from more abstract and theoretical debates have provided the Court with a comfortable pretext for preoccupying itself with exclusively administrative discussions.

Third, the information gathered through interviews conducted at the Court sheds a new light on the possible rationales behind the empirically-backed finding that the Court has taken on an administrative role within the asylum sphere. The interviews enhanced the empirical findings by broadening the understanding of the additional motivations which stir the Court. They revealed that judges are not immune to the fallout of the politization of the asylum process and they are acutely aware of the intensity of the spotlight pointed at them in this specific arena. Different media outlets' portrayal of the Court has also captured its imagination. Therefore, certain rationales emerged as serving the Court's desire to grant democratic pedigree to its decisions, whilst strictly observing the doctrine of the separation of powers. Additionally, contrary to expectation that the Court would be most preoccupied with how *just* it appears, it was equally, if not more, apprehensive of how *activist* it was portrayed to be. This was an insight that would not have been available from a purely legal analysis of the Court's decisions and

speaks to the benefits of extending interdisciplinarity to the methods one utilises to conduct one's study.

Fourth, the interviews pushed against the preoccupation with *substantial* justice prevalent in political philosophy by highlighting the Court's self-identification with the *procedural* achievement of justice. This is a valuable contribution of this project as it cautions political philosophers against conflating matters of substantive justice with matters of procedural justice. Therefore, the observed gap between political philosophy discussions on migration and legal practice within asylum is more consequential for the question of whether political philosophy has any bearing on judicial practice than for the absolute engagement of the Court with more abstract matters of justice. Fifth, alongside underlining a difference of *type* between political philosophers' and judges' understanding of justice, this observation also exposed a distance of *scope* between the two groups' engagement with the idea. Whilst for political philosophers theorising justice occurs in global terms, for judges it is limited to the *personal* scope of the applicants whose cases come before it.

3. Theoretical Contributions

The major theoretical contributions of this work can be separated into two groups: on the one hand, there are those deriving from the application of de Sousa Santos' and Valverde's work to the context of judicial practice within the EU asylum space; on the other hand, there are those resulting from its use of Fineman's vulnerability theory in an effort to bridge the gap between political philosophy and judicial practice within asylum. The contributions from each group are presented separately.

Bringing the synthesis of de Sousa Santos' theory on a 'scale conception of law' and Valverde's work on 'the game of jurisdiction' to the EU asylum space has had immense productive power in terms of generating a more nuanced understanding of the empirical evidence gathered from the Court. The technical language of the Court, its recurrent recourse to the principle of 'effectiveness', and the changing nature of principle's definition all gained an innovative explanation that contributed to existing debates with nuance and sophistication. First, I was able to theorise the conflicting obligations that are permeating the AFSJ and the CEAS instruments by conceptualising the AFSJ as a 'site of intense interlegality' (**Chapter III.5.**). Doing so had productive value in terms of explaining why it is that such contradictory calls emerge within the same space. It also produced a more nuanced understanding of Court's ongoing struggle to reconcile them. Second, I presented the Court's frequent recourse to the principle of 'effectiveness' as the symptom of jurisdictional clashes between heterogeneous modes of governance, which otherwise remain hidden beneath the appearance of a peaceful

asylum space.[722] I applied the 'scale conception of law' to the EU asylum regime in order to argue that conflict between different 'legalities' and 'scales' of governance might be the rule, rather than the exception, within the EU asylum space. I explained the ongoing difficulty with harmonising the Common European Asylum System despite numerous efforts as a result of said conflicts. Horizontally, conflicts resulted from the Regulations governing the area and the opt-outs by some Member States. Vertically, those were inherent in the shared competence in governing asylum between the Union and its Member States[723] and the idiosyncratic relationship of the EU to the 1951 Refugee Convention (whereby the EU is not a party to it, but each EU Member State is). Deploying the tools of 'scale' and 'interlegality' allowed me to provide the reader with a more nuanced picture of how different legalities converge within the EU asylum space and elaborate on the implications of this reality. Third, I was able to explain and theorise the changing nature of the principle of *effectiveness* when it travels between EU market integration jurisprudence and EU asylum jurisprudence. Applying the 'scale conception of law', I offered an original answer to the question of why the 'human rights' logic of the *effectiveness* principle is replied upon within the integration jurisprudence, but disappears within the asylum case law (**Chapter IV**). The discussion contributed to a new understanding of the Court's behaviour and opened avenues for further research in which the premises of the 'scale conception of law' and the 'game of jurisdiction' can be used to illuminate the Court's jurisprudence.

The second set of theoretical contributions of this work centred around its empirical finding that despite the gap between law and political philosophy, ideas from the latter can be translated into judicial practice through the concept of vulnerability, which is already present in both. To this purpose, this work relied on Martha Fineman's vulnerability theory, which took a 'term in common use, but also grossly under-theorized, and thus ambiguous' and used it as 'an opportunity to begin to explore and excavate the unarticulated and complex relationships inherent but latent in the term'.[724] Since it was in abundant use by the ECJ, the idea of vulnerability, as rendered coherent by Fineman's theory, could be used as the brokering agent for bridging the gap between political philosophy and legal practice in a familiar way. This would require neither the taking of a huge leap of faith, nor the making of a compromise for any of the stakeholders involved. The theory of vulnerability is especially relevant in today's ever-growing market economy and increasing globalisation. Being limited to all natural, as opposed to legal, persons, it accounts for the market economy and prevents any misuse to further market ends. The theory can be used as the basis for revisiting and revising the existing international protection regime; it can speak with equal intelligibility to political philosophers and to judges;

[722] (Valverde, 2009, p. 141).
[723] See Article 79(5) TFEU.
[724] Fineman, 2008, p. 9.

and last, but not least, it can mainstream the otherwise incoherent use of the term in the Court's case-law. The novel application of the theory as a brokering agent and as a coherence-granting force for the Court's jurisprudence gave birth to a number of related theoretical contributions.

First, in an effort to bridge the disciplines of law and political philosophy, this work built a unique analogy between the idea of humanitarianism and Fineman's vulnerability theory. Through conceptualising Fineman's idea of vulnerability as 'the legal twin sister' of humanitarianism, this thesis opened a unique pathway through which ideas of global justice could feed into judicial practice where before there was none. As it is not far-fetched to surmise that political philosophers do wish to have their important discussions reflected in the practice of justice and that judicial actors are not indifferent to abstract discussions of justice, this analogy will prove an invaluable contribution to both disciplines.

Second, in setting Fineman's vulnerability theory as the theoretical background for the Court's practice within the asylum sphere, this work imbued it with a coherent narrative that can free it from being held hostage to (con)temporary political whims. The approach made the jurisprudence more consistent, safeguarded the principle of legality, and established pathways through which the Court could have recourse to, and benefit from, the abstraction and the permanence so intrinsic to political philosophy in making its decisions.

Third, this work illustrated how a vulnerability inquiry could act as an additional safeguard in any human rights analysis performed by a judicial instance. By virtue of opening any case-by-case analysis to a structural interrogation of the applicant's circumstances, the vulnerability theory can enhance individual protection. This is a valuable contribution to both disciplines at the centre of this work because of vulnerability's potency in improving access to justice. However, is important here is to stress that utilising a vulnerability analysis as a safety net to a human rights analysis should be performed by a judicial instance without any additional burdens being put on the asylum seeker. The wider protection that a vulnerability analysis is capable of offering through extending the spotlight from the individual to her context warrants serious consideration from both law and political philosophy.

Fourth, by basing itself in solid empirical findings, this work has shown how the vulnerability of an applicant (to be established on a case-by-case basis) could, and should, always counterbalance the ECJ's commitment to preserving the effectiveness of the asylum system. It has revealed that the standard reliance on the principle of effectiveness in the Court's non-asylum jurisprudence, where it stands as a conduit for individual rights, is completely distorted within the area of asylum, where the principle of effectiveness eclipses the rights of the individual. Therefore, the more vulnerable an applicant is, the greater consideration her interests must heed in balancing her rights against the principle of preserving the effectiveness of the

asylum system. This would allow the vulnerability analysis to offset the heavy weight given to protecting the functioning of the system. Whilst applied within the idiosyncratic conditions of the asylum system, the conceptualisation of the findings from a vulnerability analysis as a weighty consideration capable of offsetting the effects of a system can be applied within the context of any structure which accrues rights or responsibilities, and advantages or disadvantages, upon its participants.

Fifth, the taxonomy that was devised to apply Fineman's theory to the Court's jurisprudence can also be conceptualised as an important contribution of this work. Whilst the presence of Fineman's ideas in case law has been previously explored to a certain extent by Peroni and Timmer within the context of the ECtHR and 'vulnerable groups',[725] this work was has been unique in three respects; namely, looking at it from an individual point of view, applying it within the context of the ECJ, and most importantly, devising a way for tracing its presence even when there is no explicit use of the term itself. The final point is especially significant because alongside permitting to test the extent to which ideas reflecting human vulnerability have infiltrated the Court's jurisprudence in asylum, it also enables applying this taxonomy in the context of case law that: concerns other areas of law, is generated by different courts, or is more akin to administrative decisions than to jurisprudence. In that sense, the various applications for the taxonomy presented here are far from exhausted and offer a wide range of opportunities for further research.

4. Avenues for Further Research

The benefits reaped from bringing political philosophy and law together open a number of unexplored avenues for interdisciplinary research. With the proliferation of international courts, legal interest towards the behaviour of judges is ever-growing. From a legal perspective, political philosophy can serve as a novel paradigm through which to engage in interdisciplinary research and gain original insight into international courts that pushes against the boundaries of the existing state of the art. This is equally applicable to political philosophy discussions, which would find that there is a lot of unrefined raw material in judicial decisions, which can serve as evidence of the non-ideal reality of everyday life and fuel their otherwise abstract debates. For the future, similar undertakings might include a wider range of Court documents, such as the opinions of Advocate-Generals, for example. If applied to a different international court such as the ECtHR, the study could be tweaked around concurring or dissenting opinions too. With the passing of time since the adoption of the Global Compacts, new studies on the framing power that the ECJ is exerting over their role in the international arena could also prove a very interesting undertaking, especially if enriched by political philosophy discussions. Whilst

[725] Peroni & Timmer, 2013.

interdisciplinarity at the crossroads of these two disciplines opens a number of doors, Fineman's theory of vulnerability leads to its own set of pathways for further research.

To begin with, Martha Fineman's vulnerability theory is itself a potent conduit for interdisciplinarity. Scholars from many different fields from law, to public health, to bioethics have found it elucidating for the injustices hidden within the ontological foundations of their disciplines and have been inspired to question the fundamental presumptions found therein. They have mobilised its productive value in their own efforts at achieving more equitable and substantively just approaches to science. The cross-disciplinary applicability of the theory means that it is capable of bridging the artificial gap that exists between many fields that might be approaching the same subject from different angles. In her work on the relevance of the vulnerability theory for bioethics for example, Florencia Luna argues that it is 'essential to bioethics'[726] because it is capable of illuminating the previously unexamined aspect of 'how new vulnerabilities arise from conditions of economic, social, and political exclusion'[727]. In Anna Grear's opinion '[t]he concept of vulnerability holds particular promise for an ethico-material turn' because 'it has inherent links with a wide range of fundamentally material, context-sensitive concerns'.[728] Listing different works to support her argument, she concludes that 'vulnerability has […] rich theoretical potential in a wide range of fields, contexts and arguments'.[729]

In addition, the idea of vulnerability is flexible and dynamic, rather than fixed; this allows to factor in an individual's life experiences in any analysis involving that individual's rights. The vulnerable individual comes in stark opposition to the liberal individual that has until now defined the model for legal policies with 'idealized views of agent, human agency, and even justice'[730] as well as rationality and autonomy. The liberal subject is not only idealised, but also static, and fails to capture the nuances of the human experience in the way that the vulnerable subject can. Viewing our inherent vulnerability in this manner offers us 'a fine grain tool to analyse, interpret, and evaluate' those situations 'where multiple, diverse, and even contradictory variables interact'.[731] The dynamic nature of the concept allows for the recognising that a person's vulnerability might change and be altered.[732] This, in turn, is a cure to stereotyping. The fluidity of the concept, which could be the target of a lot of legal positivist critique should be taken as figuring among its strongest appeals. Firstly, it 'promotes more flexible and creative thinking in order to design or suggest adequate protection'.[733] Secondly, it stirs away from the

[726] F. Luna, Elucidating the Concept of Vulnerability: Layers Not Labels. *International Journal of Feminist Approaches to Bioethics*, *2*(1), 2009, p. 120.
[727] Ibid.
[728] M.A. Fineman & Anna Grear (eds.),*Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. Ashgate, p. 2.
[729] Ibid, p. 3.
[730] Luna, 2009, p. 134.
[731] Ibid, p. 130.
[732] Luna, 2009, p. 133.
[733] Ibid, p. 134.

idealized views of the human condition which ignore the ephemeral nature of the human body. Thirdly, it allows for taking a more sophisticated account of our rich and complex reality which cannot be exhausted by a simple taxonomy. Efforts by writers such as Kipnis, who searches for a taxonomy of 'characteristics that are criteria for vulnerability'[734] in order to establish fixed categories do more harm than good by virtue of being too constraining. Similar efforts at inferring 'necessary and sufficient conditions' are equally unhelpful.[735] Fixing vulnerability to a set of criteria would therefore be a problem.

Furthermore, the vulnerability theory offers a potent tool against stereotyping. Fineman is adamant to 'reject both the past and present deployment of the term 'vulnerability' to stigmatise certain 'populations': Vulnerability is to be understood as being emphatically universal in scope – as an intrinsic, ineluctable characteristic (or given) of the human condition itself'.[736] By denying group-based assignment of vulnerability, the theory recognises that people within the same group might be vulnerable to different extents, catering protection that responds to their particular needs. This is especially relevant in the context of migrant populations, who often suffer under the stigmatizing effects of the political process.

The vulnerability theory is also especially suited to more generous engagement with the topic of migration because it is an antidote to 'other'-ing, although it need not be limited to that area of judicial practice. Quite the contrary, because of its universal applicability, the ECJ can resort to it in all cases involving human beings, regardless of whether they are relevant for third country nationals or EU citizens. As it is already present in the Court's decisions, Fineman's theory can be a powerful instrument for re-framing and unifying all of its existing legislation involving particularly vulnerable individuals. More innovatively, it would enable the consideration of applicants whose suffering is caused by external factors such as poverty and the economy on equal footing with those whose rights have been infringed by the state. Adapting Fineman's vulnerability theory to the Court's judicial practice in asylum can have positive spillover effects within other areas of judicial practice. In addition, the theory hardly needs to be limited to the jurisprudence of the ECJ. The vulnerability theory can be applied to the case law or decisions of any judicial or administrative instance, regardless of whether it is a national or an international one. As my taxonomy allows for tracing the idea's presence in more subtle cases, the vulnerability thesis could also be applied in the absence of the explicit use of the term. Further studies that wish to capture those disadvantages that systematically accumulate as a result or structural interactions, but cannot be gleaned through the mere application of

734 K. Kipnis, Vulnerability in research subjects: A bioethical taxonomy. *Ethical and Policy Issues in Research Involving Human Research Participants.*, G1–G12, 2001.
735 Luna, 2009, p. 128.
736 Fineman & Grear, 2013, p. 4.

certain identity categories can also benefit. Martha Fineman's vulnerability thesis allows one to see how systems interact to confer privileges or disadvantages to people in a manner not readily visible through the identity paradigm that dominates today's legal discourse and human rights examinations.

The vulnerability theory is a potent heuristic device that could guide noble pursuits into designing a just society, whether or not those are taken by lawyers, political philosophers or someone completely different. The vulnerability theory has 'rich theoretical potential in a wide range of fields, contexts, and arguments'.[737] Its most appealing aspect is not the answers that it is capable of giving, but the potent questions it is capable of fashioning. The greatest value of Fineman's vulnerability theory is therefore that it can, and continues to be, 'invoked and explored precisely in order to open out new possibilities, fresh questions and invigorating avenues of critique in the search for a more substantively just and equal social order'.[738]

Many have called for the reform of the international refugee regime before and many will continue to do so until a more comprehensive vision of it emerges. Even political philosophers have critiqued the persecution centrism of the regime and urged for a more compassionate, up-to-date rationale for granting refuge to asylum seekers. Yet, the fear of 'losing even the narrow ground staked out to protect refugees' is real.[739] Whilst reform at the international level might seem unlikely in the near future following the divided reactions to the GCM and the GCR, reform to asylum practices at the European level has happened before and can happen again. In such an endeavour, academics have an important role to play. As Daniel Sarmiento notes, the European legal community[740] has a responsibility 'to engage with the Court in its new capacity as a human rights jurisdiction'.[741] It is a role which we have failed to completely embrace in much the same way the Court of Justice has had 'little appetite to become a human rights court', but it is a role whose performance remains in our hands.[742] It is also a role whose substance is very relevant to the international refugee protection regime as human rights and matters of asylum are closely intertwined. Sarmiento faults the European legal community for failing to engage in the common European legal project when it comes to human rights and for providing scarce materials for the Court to reflect on, thereby preventing the Court's quicker assumption of its role as a human rights instance. What the Court's asylum

737 Fineman & Grear, 2013, p. 3.
738 Ibid, p. 4.
739 Ramji-Nogales, 2017, p. 8.
740 In his Editorial entitled, 'A Court that Dare Not Speak its Name: Human Rights at the Court of Justice', Daniel Sarmiento defines the European legal community as 'academics, commentators, practitioners and civil servants from the EU Institutions and the Member States [which] is broad and intellectually powerful, exerting at the same time a significant influence over the Court of Justice, its judges, its advocates general, its legal secretaries and all the actors that play a role in the decision-making process in Luxembourg' (see online).
741 Sarmiento, 2018.
742 Ibid.

decisions therefore provide us with is fuel for said collaboration to take place. As Weiler notes, we find ourselves 'at a delicate moment in the social and political life of Europe, where the Court of Justice of the European Union is an important actor in shaping the climate and defining the moral identity in and of Europe'.[743] The need for reform is ripe and that need is a meeting point for both political philosophers and lawyers who contemplate ways of reforming the international protection regime and transcending the so-called 'refugee law paradigm' and its eclipsing effect.[744] The momentum built by the attention paid to the asylum sphere can ignite a close reading of the Court's decisions in a manner that opens up alternative avenues for their interpretation and reconceptualises the ECJ as a powerful site for recognising applicants' vulnerability.

[743] J. Weiler, Je suis Achbita, *EJIL! Talk*, February 19 2018, Available here: https://www.ejiltalk.org/je-suis-achbita/.
[744] Ramji-Nogales, 2017, p. 8.

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