Refuge from Inhumanity? War Refugees and International Humanitarian Law

Edited by

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Contents

Acknowledgements IX
Abbreviations X
Notes on Contributors XII

PART 1
Introduction

1 **Refuge from Inhumanity? Canvassing the Issues** 3
Jean-François Durieux and David James Cantor

PART 2
Interpretive Guidance from IHL: Cross-Cutting Issues

2 **The 'War Flaw' and Why It Matters** 39
Hugo Storey

3 **Causation in International Protection from Armed Conflict** 57
Hélène Lambert

4 **Expanding Refugee Protection through International Humanitarian Law: Driving on a Highway or Walking near the Edge of the Abyss?** 79
Stéphane Jaquemet

PART 3
Interpretive Guidance from IHL: Inclusion and Exclusion under the Refugee Convention

5 **Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict: Insights from Customary International Humanitarian Law** 101
Vanessa Holzer

6 **Inclusion of Refugees from Armed Conflict: Combatants and Ex-combatants** 128
Eric Fripp

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7 **Exclusion is Not Just about Saying 'No': Taking Exclusion Seriously in Complex Conflicts** 155
Geoff Gilbert

PART 4
Interpretive Guidance from IHL: Regional Definitions and Systems

8 **The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention's Expanded Refugee Definition** 179
Tamara Wood

9 **A Simple Solution to War Refugees? The Latin American Expanded Definition and its relationship to IHL** 204
David James Cantor and Diana Trimiño Mora

10 **Revisiting the Civilian and Humanitarian Character of Refugee Camps** 225
Maja Janmyr

11 **The (Mis)Use of International Humanitarian Law under Article 15(C) of the EU Qualification Directive** 247
Céline Bauloz

12 **What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime** 270
Evangelia (Lilian) Tsourdi

13 **Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law** 295
Violeta Moreno-Lax

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PART 5
IHL Protections for Non-Return to Armed Conflict

14 **Laws of Unintended Consequence? Nationality, Allegiance and the Removal of Refugees during Wartime** 345
David James Cantor

15 **The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict** 373
Françoise J. Hampson

16 ***Non-Refoulement* between 'Common Article 1' and 'Common Article 3'** 386
Reuven (Ruvi) Ziegler

PART 6
Wider Approaches to Protection of War Victims

17 **Protection against the Forced Return of War Refugees: An Interdisciplinary Consensus on Humanitarian *Non-refoulement*** 411
Jennifer Moore

18 ***Non-refoulement*, Temporary Refuge, and the 'New' Asylum Seekers** 433
Guy S. Goodwin-Gill

Bibliography 461
Index 485

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CHAPTER 13

Of Autonomy, Autarky, Purposiveness and Fragmentation

The Relationship between EU Asylum Law and International Humanitarian Law

Violeta Moreno-Lax[1]

Although anchored in the 1951 Convention relating to the Status of Refugees (Refugee Convention),[2] EU asylum law has developed as an autonomous system of international protection.[3] This is particularly evident from the European Court of Justice (CJEU)'s case law on subsidiary protection and the way in which Article 15(c) of the Qualification Directive (QD) has been construed.[4] The lack of an express recourse to international humanitarian law (IHL) in *Elgafaji*[5] to define the notions of 'armed conflict', 'civilian' or 'indiscriminate violence' has, however, prompted interpretative divergences among national judges,[6]

1 I would like to thank Prof Małgosia Fitzmaurice, Dr Paul Gragl and Prof Katja Ziegler and the editors for their insightful comments. The bulk of this chapter was written before the CJEU delivered its judgment in Case C-285/12 *Diakité* (30 January 2014). As a result, the main points of the Court's reasoning have been taken into account, but a full and thorough analysis of the decision has not been incorporated.

2 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

3 See Art 78, Treaty on the Functioning of the European Union [2010] OJEU C83/47 (TFEU).

4 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] OJEU L 304/12 (Qualification Directive or QD). The instrument has been amended by Directive 2011/45/EU 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] OJEU L 337/9 (Recast Qualification Directive or Recast QD).

5 Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921.

6 For an analysis of French and English courts' approaches pre- and post-*Elgafaji* to the interpretation of these terms, see H. Lambert and T. Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence' (2010) 22 IJRL 237.

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resulting in seriously differing recognition rates across the Member States[7] and giving rise to claims of an 'asylum lottery' in the EU.[8]

The definition of subsidiary protection in the Qualification Directive is not self-evident and has contributed to the confusion. The notion denotes the recognition of an applicant for international protection as someone 'who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that …, if returned to his or her country of origin …, would face a real risk of suffering serious harm'.[9] When the definition is met, qualification entails the grant of 'subsidiary protection status'.[10] In turn, serious harm is defined as 'death penalty or execution', in Article 15(a) of the Directive; as 'torture or inhuman or degrading treatment or punishment', in Article 15(b); and as 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict', in Article 15(c).[11] Nowhere does the Directive refer to IHL for the definition of these concepts, either in the Preamble or in its operative part.

In spite of the guidance provided by the CJEU in *Elgafaji*, establishing the (autonomous) meaning of 'indiscriminate violence' as the sort of violence that 'may extend to people irrespective of their personal circumstances', creating a 'general risk of harm' that is 'inherent in a … situation of international or internal armed conflict',[12] doctrinal writers as well as UNHCR are divided as to what the correct course of action should be in the interpretation of Article 15(c).[13]

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7 UNHCR, *Safe at Last? Law and Practice in Selected eu Member States with respect to Asylum-Seekers Fleeing Indiscriminate Violence* (UNHCR July 2011); European Commission, Report on the Application of 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, COM(2010) 314 final (16 June 2010); European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final (21 October 2009).

8 ECRE, *Asylum Lottery in the EU in 2011* (2012) <http://ecre.org/component/content/article/56-ecre-actions/294-asylum-lottery-in-the-eu-in-2011.html> accessed 1 March 2014. See also, ECRE, *Memorandum to the JHA Council: Ending the Asylum Lottery – Guaranteeing Refugee Protection in Europe* (April 2008) <http://www.ecre.org/component/downloads/downloads/93.html> accessed 1 March 2014.

9 Art 2(e) QD (currently 2(f) Recast QD).

10 Art 18 QD (in both versions).

11 See also recital 26 (currently 35 recast QD).

12 *Elgafaji* (n 5) paras 33 and 34.

13 On UNHCR's position see V. Turk, *Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence* (UNHCR 18 January 2011) <http://www.refworld.org/docid/4d37d8402.html> accessed 1 March 2014; and UNHCR, *Safe at Last?*

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Some plead for a paradigm shift, according to which IHL would become the 'primary reference point' with regard to asylum claims brought by victims of armed conflict, invoking IHL as *lex specialis*.[14] Others warn against such recourse, signalling that the incorporation of IHL notions could have the effect of limiting the scope of protection available under refugee law.[15]

In parallel, the relationship between EU law and public international law (PIL) generally has been the subject of much debate, with questions regarding the place and effect of PIL norms within the EU legal system still unresolved. There appears to be an irremediable tension in the approach adopted by the CJEU. While norms of customary law have been recognised to 'form part' of EU law,[16] ever since *Van Gend en Loos*,[17] the Union's system has been considered to form 'a new legal order', growing independently of other branches of international law,[18] and maintaining a complex relationship with it.[19]

(n 7) at 104, urging 'caution in drawing upon IHL and ICL [International Criminal Law] to interpret the scope of Article 15(c)'.

14 H. Storey, 'Armed Conflict in Asylum Law: "The War Flaw"' (2012) 31 RSQ 1, 15. See also, in this line, P. d'Huart, 'Le concept de conflit armé interne ou international de l'article 15, point c, de la directive 2004/83/CE: une référence au droit international humanitaire?' (2012) 168 Revue du droit des étrangers 238; and S. Jaquemet, 'The Cross-fertilization of International Humanitarian Law and International Refugee Law' (2001) 83 IRRC 651.

15 J.F. Durieux, 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31 RSQ 161. See also J. McAdam, 'Individual Risk, Armed Conflict and the Standard of Proof in Complementary Protection Claims: The European Union and Canada Compared' in J.C. Simeon (ed), *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (CUP 2010) 59; J. Perilleux, 'L'interprétation des Notions de « Conflit Armé Interne » et de « Violence Aveugle » dans le Cadre de la Protection Subsidiaire: Le Droit International Humanitaire est-il Une Référence Obligatoire?' (2009) RBDI 113; and the contribution by Bauloz to this volume.

16 Case C-162/96 *Racke* [1998] ECR I-3655, para 46.

17 Case 26/62 *Van Gend en Loos* [1963] ECR 1. See also Case 106/77 *Simmenthal* [1978] ECR 629; and Case 6/64 *Costa v ENEL* [1964] ECR 585.

18 This independence has been captured by the Charter of Fundamental Rights of the European Union [2010] OJEU C 83/389. See Art 53, establishing that: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, *in their respective fields of application*, by Union law and international law and by international agreements to which the Union or all the Member States are party … and by the Member States' constitutions' (emphasis added).

19 See, generally, E. Cannizzaro, P. Palchetti and R.A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012); P. Eeckhout, *EU External Relations Law* (2nd edn OUP 2011); M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders* (Hart 2011); J. Wouters, A. Nollkaemper and E. de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (Asser Press 2008);

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Consequently, the question has been put to the Luxembourg Court in the case of *Diakité* of whether the words 'international or internal armed conflict' in Article 15(c) of the Qualification Directive should be interpreted by reference to IHL or whether an autonomous construction should be preferred.[20] In the latter case, the referring court has also asked which reference framework should be used for the purpose.

This chapter explores the above questions from an integrative perspective, building on the Opinion of the Advocate General[21] and the CJEU's judgment.[22] Taking account of the specificities of the EU legal order and drawing on the jurisprudence of the relevant courts at European and international level, it will advocate for a return to the basics of treaty interpretation, as a way to solving the interpretative impasse. It will propose a method of systemic and (meta-)teleological construction, focusing not only on the object and purpose of the relevant provisions but also those of the EU regime as a whole, relying on the human rights standards contained in the Charter of Fundamental Rights and the founding values of the organisation.[23] This will demonstrate that autonomy and purposiveness in the interpretation of specialised rules do not automatically amount to autarky and fragmentation. The autonomous reading of EU asylum law does not produce a (real) conflict of norms with IHL that would require the invocation of the *lex specialis* standard[24] – in either of the acceptions identified by the International Law Commission ('exclusionary' or 'supplemental').[25] Even though they may overlap by sharing a common object, each regime occupies a different normative space attending to their specific purpose. The basic argument put forward is

M. Cremona and B. de Witte (eds), *EU Foreign Relations Law* (Hart 2008); M. Koskenniemi (ed), *International Law Aspects of the European Union* (Martinus Nijhoff 1998).

20 Reference for a preliminary ruling from the Conseil d'État (Belgium) lodged on 7 June 2012 — Case C-285/12 *A boubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2012] OJEU C 235/21.

21 Opinion of AG Mengozzi, Case C-285/12 *Diakité*, delivered on 18 July 2013.

22 Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2013]. The judgment was issued on 30 January 2014.

23 Charter of Fundamental Rights of the European Union [2010] OJEU C 83/389 (EUCFR). See M. Poiares Maduro, 'Interpreting European Law – Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 EJLS 1, 5 and, further, Section 5 below.

24 *Contra*: H Storey (n 14) at 15.

25 International Law Commission (ILC) *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by M. Koskenniemi* (13 April 2006) paras 56–57 and 88 ff.

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that, following accepted canons of interpretation, it is against Charter provisions, and not against those of IHL or other extrinsic sources, that EU legislative acts must first be appraised to determine their content and scope of application. The conclusion, as we shall see, can be reached by taking either the PIL or the EU law route.

1 Automonous Interpretation under PIL

There has been much discussion of the risks of fragmentation that isolationist interpretations of specialised branches of international law could entail.[26] However, one should not be too quick in equating 'autonomy' with 'isolation'.[27] There are multiple examples of constructive processes of mutual engagement and cross-fertilisation between separate bodies of PIL, with each maintaining its own essence while interacting with other branches and introducing in the system a measure of integration and healthy competition for sounder standards.[28] The object of this section is to determine how autonomy and interaction are substantiated through general rules of interpretation. The point is to identify the norms that are relevant to our enquiry and how they have been interpreted and applied in practice. This will show that, in conformity with the principles of effectiveness and good faith, a certain amount of autonomy is unavoidable in the interpretation of an international legal text in order to account for its specific object and purpose and preserve its *effet utile*.

1.1 *General Principles of Interpretation*

A close look at the Vienna Convention on the Law of Treaties (VCLT)[29] reveals that international law is to be construed according to rules that observe the *pacta sunt servanda* principle and thereby preserve the effectiveness of legal commitments.[30] Through the prism of Article 31 VCLT it becomes apparent why systems of international law develop a degree of self-sufficiency and why

26 See, generally, M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553 and references therein.

27 B. Simma, 'Fragmentation in a Positive Light' (2003–4) 25 Mich JIL 845.

28 See, for instance, P. Sands, 'Treaty, Custom and the Cross-fertilization of International Law' (1999) 1 YHRDLJ 85; F. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' (2003) 38 TILJ 547.

29 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (VCLT).

30 Art 26 VCLT. See also M. Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 AJIL 130.

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recourse to extrinsic sources remains subject to a number of constraints – as we shall see, the filling of any perceived *lacunae* starts from the very norm to be determined, which constitutes the starting point of the interpretative enterprise.

Articles 31 and 32 VCLT constitute accepted canons of customary law generally applicable to the interpretation of treaties and (by analogy) to other instruments of international law.[31] According to the 'general rule of interpretation' in Article 31, 'a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[32] Paragraphs 2 and 3 of that provision elucidate what the 'context' comprises and the additional factors to be considered 'together with the context'.[33] There is no hierarchical relationship between the different paragraphs,[34] they are instead considered to reflect the three logical steps the interpreter shall undertake to establish the meaning and extent of the relevant obligation 'in a single combined operation'.[35] Current jurisprudence confirms this approach, with the ICJ explaining that the 'ordinary meaning' of the terms of a treaty 'cannot be determined in isolation',[36] they are 'fully

31 See, among others, *Territorial Dispute* (*Libyan Arab Jamahiriya v Chad*) [1994] ICJ Rep 6, 19–22, para 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v Bahrain*) [1995] ICJ Rep 6, 21, para 33; *Oil Platforms* (*Islamic Republic of Iran v United States of America*) [1996] ICJ Rep 803, 812, para 23; *Kasiliki v Sedudu Island* (*Botswana v Namibia*) [1999] ICJ Rep 1045, 1059, para 18; *Avena and other Mexican Nationals* (*Mexico v United States of America*) [2004] ICJ Rep 12, 48, para 83.

32 Art 31(1) VCLT.

33 Art 31(2) VCLT stipulates that: 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: a. Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; b. Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. In turn, Art 31(3) VCLT establishes that: 'There shall be taken into account, together with the context: a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; c. Any relevant rules of international law applicable in the relations between the parties'.

34 A. Aust, *Modern Treaty Law and Practice* (2nd edn CUP 2007) 234. See also A.D. McNair, *The Law of Treaties* (Clarendon Press 1961) 367.

35 R. Gardiner, *Treaty Interpretation* (OUP 2008) 10.

36 *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organisation* [1960] ICJ Rep 150, 158; *Certain Expenses by the United Nations* [1962] ICJ Rep 151, Separate Opinion of Judge Spencer, 184 ff.

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qualified' by the context in which they appear as well as the overall object and purpose of the instrument concerned.[37]

The interpretative exercise starts, accordingly, from the wording of the provision(s) in question, bearing in mind that 'a special meaning shall be given to a term' only if it can be unequivocally established that 'the parties so intended'.[38] Otherwise, the plain meaning of the words – free of any special legal connotations – should be maintained. The opposite would exceed the explicit agreement by the parties who may 'become bound by obligations which they did not expressly accept and might not have been willing to accept',[39] running counter to the principles of actuality and ordinary meaning elaborated by the ICJ.[40] The onus of establishing a special meaning thus falls on the party suggesting it,[41] who will have to adduce sufficient evidence in support thereof.[42]

Recourse to preparatory work is secondary and strictly subordinated to the interpretative outcome under Article 31 VCLT being 'manifestly absurd or unreasonable' or leaving the meaning of the text 'ambiguous or obscure'.[43] Records of treaty negotiations should, accordingly, be approached with caution. Although they may reflect the initial position of the parties, they do not automatically constitute proof of a shared understanding. It is commonly appreciated that supplementary means of interpretation should normally be used to confirm, rather than correct, the meaning of the terms of the treaty in question.[44]

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37 *Land, Island and Maritime Frontier Dispute* (*El Salvador v Honduras: Nicaragua intervening*) [1990] ICJ Rep 92, Separate Opinion of Judge Torres, 719.

38 Art 31(4) VCLT.

39 *Brown v Stott* [2003] 1 AC 681, [2001] All ER 97, 703.

40 The systematization of the main principles of interpretation employed by the ICJ and reflected in Art 31 VCLT is by G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 BYIL 1. He distinguishes six major principles: Actuality (based on the literal tenor of the text); natural or ordinary meaning; integration (or the interpretation of treaties as a whole); effectiveness; subsequent practice; and contemporaneity.

41 *Case Concerning the Land, Island and Maritime Frontier Dispute* (*El Salvador v Honduras; Nicaragua intervening*) [2002] ICJ Rep 351, 585, para 377.

42 Gardiner (n 35) notes, at 296–297, that '[t]he most common way in which a special meaning is indicated is by including a definition article in a treaty. Beyond that there is little practice showing clearly what would amount to the necessary 'special evidence". In this connection, the author posits that where a special meaning is recorded during negotiations, 'its effect on interpretation is probably no different from that of other … preparatory work'.

43 Art 32 VCLT.

44 See S. Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?' in J. Makarczyk (ed), *Theory of International Law*

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The context in which the terms occur is relevant as well, since treaties should be interpreted as a whole.[45] For its determination the interpreter must take account of the text of the treaty itself, together with the preamble and annexes.[46] Article 31(3) of the Convention establishes that 'together with the context' subsequent agreements, uniform practice, and 'any relevant rules of international law applicable in the relations between the parties' shall be 'taken into account'. The end result should be appraised 'in light of [the] object and purpose' of the instrument under consideration.[47]

However, that extrinsic rules 'shall be taken into account' does not amount to mean that they should (by themselves) determine the object and purpose of a treaty, which will usually become clear through the specific intentions of the parties as expressly manifested in the treaty itself.[48] Indeed, the identification of the object and purpose of a treaty is usually operated through recourse to intrinsic resources. Extraneous rules should help establish the prevalent legal landscape within which the terms of a particular provision are to operate – so as to ensure its continued effectiveness in contemporary terms and avoid regressive or anachronistic interpretations, but cannot essentially modify the overall object and purpose of the instrument concerned.[49] The Vienna Convention seems thus to distinguish between the *internal* context, within which the words of a particular provision in a treaty occur – inspired by the object and purpose, if not the spirit, of the instrument itself – and the *external* context, determined by 'the framework of the entire legal system prevailing at

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at the Threshold of the 21st Century (Kluwer 1996) 541. See also P. Merkouris, '"*Third Party*" *Considerations* and "Corrective Interpretation" in the Interpretative Use of *Travaux Préparatoires*: Is it Fahrenheit 451 for Preparatory Work?' in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties 30 Years On* (Martinus Nijhoff 2010) 75; and R. Gardiner, 'The Role of Preparatory Work in Treaty Interpretation' in A. Orakhelashvili and S. Williams (eds), *40 Years of the Vienna Convention on the Law of Treaties* (BIICL 2010) 97.

45 See above (n 40) the principle of integration by G. Fitzmaurice.

46 Art 31(2) VCLT.

47 See further M. Fitzmaurice, 'The Practical Working of the Law of Treaties' in M. Evans (ed), *International Law* (3rd edn OUP 2010) 172, 183–9. See also J. Klabbers, 'Virtuous Interpretation' in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010) 17.

48 On this point, see J. Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 FYIL 138. See also I. Buffard and K. Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 ARIEL 311.

49 See *Kasiliki v Sedudu Island* (*Botswana v Namibia*) (n 31) paras 52–79, for a narrow approach to the role played by subsequent practice and subsequent agreements between the parties.

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the time of the interpretation'.[50] The outcome is a scheme of *structured heteronomy* or *selective permeability* whereby 'relevant' rules from that external context are 'taken into account', while the object and purpose of the instrument at hand remain the primary reference point.

The principle of effectiveness of international obligations also plays a role in elevating the status of the 'object and purpose' of a treaty to the main guide, marking the path to follow throughout the interpretative process. In the words of Thirlway, 'the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end' and consequently 'an interpretation which would make the text ineffective to achieve the object in view is … *prima facie* suspect'.[51] When drafting the VCLT, the International Law Commission observed that, in cases in which several interpretations are possible, good faith demands that the interpretation allowing the treaty to deliver 'appropriate effects', according to its object and purpose, must be preferred.[52] Object and purpose occupy a normatively prior space informing the interpretation of the treaty as a whole.[53]

1.2 *Interpreting Human Rights (and Refugee Law) Instruments*

The International Court of Justice has acknowledged the importance of the principles of effectiveness and good faith in the interpretation of international agreements of humanitarian content. In this connection, the Court has asserted that their specific nature cannot be overlooked and must direct the entire interpretative process. In its Advisory Opinion on *Reservations to the Genocide Convention*, it established that 'the Convention was manifestly adopted for a purely humanitarian and civilising purpose', i.e. 'to confirm and endorse the most elementary principles of morality'. As a result, 'in such a

50 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)* [1971] ICJ Rep 16, para 53. See also M. Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties' Part I (2008) 21 THYIL 101, and Part II (2009) 22 THYIL 3; and I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn MUP 1984) 131, speaking of the 'emergent purpose' doctrine. Further on the debate, see T.O. Elias, 'The Doctrine of Intertemporal Law' (1980) 74 AJIL 285; and D.W. Greig, *Intertemporality and the Law of Treaties* (BIICL 2003).

51 H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Part 3' (1991) 62 BYIL 1, 44 ff, on effectiveness, and 60, on 'intertemporal *renvoi*'. See also H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYIL 48.

52 Commentary on Draft Articles [1966] Yearbook of the ILC, vol II, 219, para 6.

53 E. Voyiakis, 'International Law and the Objectivity of Value' (2009) 22 LJIL 51. See also S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP 2010).

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Convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, *the accomplishment of those higher purposes which are the raison d'être of the Convention*'.[54] In a more recent case, Judge Weeramantry expanded upon this finding, linking the teleological reading with an evolutionary understanding of the law in this field, asserting that '[t]reaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application'.[55]

Human rights bodies have endorsed these tenets – somewhat adapting and enlarging them to cater for the specific object of human rights protection.[56] The European Court of Human Rights, especially, has heralded a trend of dynamic and purposive interpretation,[57] based on the 'special character of the [European] Convention [on Human Rights] as a treaty for the collective enforcement of human rights and fundamental freedoms'[58] and the essentially objective and non-reciprocal nature of the obligations it encloses. Paraphrasing the ICJ, the Strasbourg Court has emphasised 'the interests served by the protection of the human rights and fundamental freedoms guaranteed by the Convention', which are considered to 'extend beyond individual interests of the parties'.[59] Establishing that its final aim is to guarantee 'not rights that are theoretical or illusory but rights that are practical and effective',[60] the Court has taken the Convention as a 'living instrument', which 'must be interpreted in the light of present day conditions' to ensure its continuous relevance in meeting that particular objective.[61] This has favoured extensive,

54 *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, para 23 (emphasis added).

55 *Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) [1997] ICJ Rep 7, Separate Opinion of Vice-President Weeramantry, 111–114.

56 See extensively, with special focus on the Strasbourg Court, M. Fitzmaurice and P. Merkouris (eds), *The Interpretation and Application of the European Convention on Human Rights*, (Martinus Nijhoff 2012). See also B. Schlüter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in H. Keller and G. Ulfstein (eds), *Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 317; and L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 EJIL 585.

57 See G. Letsas, 'The ECHR as a Living Instrument: its Meaning and Legitimacy' in G. Ulfstein, A. Follesdal and B. Peters (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 106.

58 ECtHR, *Al-Saadoon and Mufdhi v UK* (2011) 53 EHRR 9, para 127.

59 ECommHR, *HG and WG v Federal Republic of Germany* (1965) VIII Yearbook 320.

60 ECtHR, *Airey v Ireland* (1979) 2 EHRR 305, paras 24 and 32.

61 ECtHR, *Tyrer v UK* (1978) 2 EHRR 1, para 31.

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pro homine interpretations, enhancing the importance of the object and purpose of the treaty, possibly beyond what the drafters may have foreseen. To this end, recourse has been had to the principles of effectiveness[62] and systemic integration[63] for the development, in particular, of the doctrines of 'evolutive interpretation'[64] and 'autonomous concepts',[65] arguably at the expense of the strict wording of legal provisions.[66] Borrowing from Letsas, the 'interpretative ethic' of the Strasbourg Court has become one 'of looking at the substance of the human right at issue and the moral value it serves in a democratic society, rather than engaging in linguistic exercises about the meaning of words or in empirical searches about the intentions of the drafters'.[67] In the Court's view, this is necessary to account for '[t]he increasingly high standards required' for the protection of human rights and fundamental freedoms.[68] Apparently, what matters is the *objective* substance of rights – as formulated by the Court,

62 See, for instance, D. Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*' (2010) 79 NJIL 245.

63 J. Combacau and S. Sur, 'Principe d'intégration' in *Droit international public* (Montchrestien 2004) 175; and C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279.

64 See, for instance, use made of Art 31(3)(c) VCLT in ECtHR, *Golder v UK* (1975) 1 EHRR 524, para 35 or in *Demir and Baykara v Turkey* [2008] ECHR 135, para 67 ff. For commentary, see V.P. Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 Mich JIL 621.

65 ECtHR, *Engel v The Netherlands* (1976) 1 EHRR 647, para 81. For analysis, see G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 EJIL 279.

66 See M. Fitzmaurice, 'Interpretation of Human Rights Treaties' in D. Shelton, *The Oxford Handbook of International Human Rights Law* (OUP 2013) 739, at 758–759 and references therein. Fitzmaurice, at 742, identifies the ethical origin of obligations, or the 'concept that the parties to a human rights treaty do not create the rights that the treaties protect; rather, they recognize rights that arise from the very nature of man, quite independently of the will or volition of the parties', as the reason underpinning this approach. At 770, she warns of 'the danger of over-stepping the proper limits of the judicial function' and of neglecting 'the consensual basis of international law and state sovereignty' in the process.

67 G. Letsas 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509, at 520. The author speaks of 'the moral reading of the Convention' at 512, 528, and 538 ff.

68 ECtHR, *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 277.

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regardless of whether there is concrete consensus about it among contracting States.[69]

National courts have also subscribed to this technique of teleological and dynamic interpretation in relation to the 1951 Refugee Convention.[70] The UK House of Lords, for instance, has recognised it as a 'living instrument',[71] warranting an 'evolutionary approach' that 'enables account to be taken of changes … and circumstances which may not have been obvious to the delegates when the Convention was being framed'.[72] Above all, the Law Lords have asserted that 'the Refugee Convention must be given a *purposive* construction consistent with its humanitarian aims'.[73] Along these lines, the Canadian Supreme Court has equally ascertained that the Convention 'must be interpreted in the light of current conditions',[74] in accordance with its underlying objective of ensuring 'basic human rights without discrimination'.[75] The Australian High Court has followed suit, establishing that the instrument shall be construed 'in the context of the problems of refugee displacement'[76] and its terms inspired by the 'chief object' of 'provid[ing] protection and equality of treatment for the nationals of countries who cannot obtain protection from their own countries'.[77]

1.3 *The Limits of Systemic Integration*

However, domestic judges have generally been wary of importing ready-made definitions from other branches of international law (besides human rights) to interpret the terms of the Refugee Convention, particularly when that could

69 A. Mowbray, 'Between the Will of the Contracting Parties and the Needs of Today: Extending the Scope of Convention Rights and Freedoms Beyond What Could Have Been Foreseen by the Drafters of the ECHR' in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR* (CUP 2014) 17.

70 See J. McAdam, 'Interpretation of the 1951 Convention' in A. Zimmermann et al (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2010) 75, 103 ff.

71 *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, para 6 (Lord Bingham).

72 *Islam v Secretary of State for the Home Department, R v Immigration Appeal Tribunal and another, ex parte Shah*, [1999] 2 AC 629, at 657 (Lord Hope).

73 *R v Asfaw* [2008] UKHL 31, para 11 (Lord Bingham) (emphasis added).

74 *Suresh v Canada* (*Minister of Citizenship and Immigration*) [2002] 1 SCR 3, para 87.

75 *Canada* (*Attorney General*) *v Ward* [1993] 2 SCR 689, para 733.

76 *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] 190 CLR 225, at 293 (Justice Kirby).

77 *Minister for Immigration and Multicultural Affairs v Respondents S152/2003*, [2004] 222 CLR 1, para 53 (Justice McHugh).

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lead to an unjustified reduction of the scope of application of particular clauses and thus to a misconstruction of the content and extent of treaty obligations. They have, instead, promoted autonomous interpretations, to avoid deviations from the instrument's object and intent.[78] In this, national courts have followed the trend of international tribunals, warning against the incorporation of 'identical or similar provisions of different treaties' for the purposes of interpretation, considering that 'differences in the respective contexts, objects and purposes … may not yield the same results'.[79]

Foster discusses this phenomenon, highlighting the dangers inherent in 'transplanting approaches developed in an area with one set of objectives into a field that has quite different policy aims'.[80] She refers, in particular, to the inaptness of transposing terms of art – bearing a specific *legal* meaning, such as 'persecution', from international criminal law (ICL) into refugee law. Indeed, if the component of *mens rea* in Article 7 of the Rome Statute[81] was required as part of the status determination analysis under the refugee definition in Article 1(A)2 of the Refugee Convention, it would be necessary to show the *intention* to persecute of the persecutor for the victim to qualify as a refugee – this would be on top of the other elements found in the definition, unreasonably restraining its scope through the introduction of an additional qualification criterion from an external source.[82] The *mens rea* standard within the remit of the Rome Statute responds to the particular aim of defining with the maximum accuracy and foreseeability the components of individual criminal responsibility, in accordance with the presumption of innocence and the principles of legality and proportionality[83] – none of which are of immediate relevance (at least without some adaptation) to refugee law.[84]

78 See G.S. Goodwin-Gill, 'The Search for the One, True Meaning…' in G.S. Goodwin-Gill and H. Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonisation and Judicial Dialogue in the European Union* (CUP 2010) 204 and references therein.

79 ITLOS, *The MOX Plant Case* (*Ireland v UK*) Order (3 December 2001) para 51.

80 M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2009) 57 ff and references therein.

81 Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (as subsequently corrected).

82 This may amount to a reservation in disguise, which is prohibited by Art 42 of the Refugee Convention.

83 See, extensively, W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 137 ff.

84 For the necessary adaptation of international criminal law terms for the purposes of Art 1F of the Refugee Convention, see A. Zimmermann and P. Wennholz, 'Article 1F 1951 Convention' in A. Zimmermann et al (eds), *The 1951 Convention Relating to the Status of*

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Something similar happens in relation to international humanitarian law. If the notion of 'persecution' in the context of armed conflict were strictly limited to violations of IHL the risk is that a persecutory use of force under refugee law – pursuing, for instance, a religious motive – might be considered lawful under the rules of war,[85] because the meaning of 'indiscriminate' violence (or attacks) differs in each body of law.[86] This would be an undesirable outcome, incongruent with the ultimate goals and diminishing the effectiveness of the Refugee Convention. As Holzer points out, important differences remain between the two legal regimes that must be taken into account in the construction of persecution.[87] The point that they are 'interconnected' and grounded in overarching considerations of humanity does not warrant an assimilation of their specific (and immediate) purposes so as to support an identical interpretation of its terms. IHL aspires to regulate the conduct of belligerents in a state of war, introducing not only minimum standards of treatment of non-combatants, but also considerations of military necessity.[88] Refugee law, by contrast, creates obligations on third States (not taking part in the conflagration) for the provision of international protection to those who manage to escape.[89] As a result, identical terms, occurring in different contexts and pursuing different aims, can hardly be synonymous. The fact that

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Refugees and Its 1967 Protocol: A Commentary (OUP 2010) 579, 592 ff. See also the contribution by Gilbert to this volume.

85 Discussing a similar paradox in the relationship between IHL and international human rights law in situations of armed conflict, see C. Garraway, '"To Kill or Not to Kill?" Dilemmas on the Use of Force' (2009) 14 JCSL 499.

86 See, extensively, the contribution by Bauloz to this volume, discussing the principle of distinction between military and non-military targets governing IHL, as implied in Art 51(4) and (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (Protocol I).

87 V. Holzer, 'The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' (2012) UNHCR Legal and Protection Policy Research Series <http://www.unhcr.org/refworld/docid/50474f062.html> accessed 1 March 2014, 22.

88 See C. Greenwood, 'Historical Development and Legal Basis' in D. Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn OUP 2008). See also, generally, J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) and L.C. Green, *The Contemporary Law of Armed Conflict* (3rd edn MUP 2008).

89 AG Mengozzi reaches a similar conclusion regarding the object, purpose and means employed by IHL, on the one hand, and subsidiary protection, on the other hand, in his Opinion on Case C-285/12 *Diakité* (n 21) paras 29 ff and 56 ff. The CJEU has followed Mengozzi in its judgment (n 22) paras 22–24.

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violations of IHL may amount to persecutory acts under refugee law does not, in the reverse, reduce persecution for the purposes of qualification as a refugee to conduct contrary to IHL – IHL notions 'are neither exhaustive, nor necessary, to establish the existence of … refugee-producing events'.[90] That would make definitions in IHL into an applicability threshold, rendering the interpretation of refugee law concepts dependent on pre-emptive legal qualifications, potentially overriding its distinct object and purpose.[91]

In sum, as much as 'the Refugee Convention must be given an independent meaning … without taking colour from distinctive features of the legal system of any individual contracting state',[92] the same may be deemed to apply (by analogy) to the borrowing from related 'rules of international law applicable in the relations between the parties' to the extent that they are 'relevant'.[93] Hence, for our purposes, although IHL may, in principle, be 'taken into account' to inform the interpretation of Article 15(c) of the Qualification Directive, such recourse should not ultimately lead to an alteration of the specific object and purpose of the provision or the deprivation of its *effet utile*. Following Article 31 VCLT, its terms should be taken at face value, as denoting facts,[94] looking to the text, object and purpose of the provision, not to their legal characterisation elsewhere.[95] But before determining the extent to which IHL may play a part in this framework, we need to turn our attention to the specificities of the EU legal system, to which the Qualification Directive belongs.

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90 See the contribution by Wood to this volume.

91 In this line, see the CJEU in *Diakité* (n 22) establishing in para 26 that 'it is not possible … to make eligibility for subsidiary protection conditional upon a finding that the conditions for applying international humanitarian law have been met'.

92 *Adan* (*Lul Omar*) *v Secretary of State for the Home Department* [2001] 2 AC 477, paras 513–515.

93 Art 31(3)(c) VCLT.

94 For a discussion of this approach by the ECtHR in *Sufi and Elmi v UK* [2011] ECHR 1045, see below and also the contribution by Tsourdi to this volume.

95 See, *mutatis mutandis*, the ICTY, interpreting the 'nationality' requirement in Art 4 of Geneva Convention IV within the context of the object and purpose of humanitarian law 'and not as referring to domestic legislation', understanding that 'Article 4 intends to look to the substance of relations, not to their legal characterisation as such' in *Delalic*, IT-96-21-A, Appeals Chamber (20 February 2001) paras 74–81; and *Tadic* (Appeal Judgment) IT-94-1-A (15 Jul. 1999) paras 167–168. See also the PCIJ, interpreting the term 'established' in an agreement concerning the exchange of populations between Greece and Turkey as 'a mere situation of fact' to be determined 'in accordance with the spirit of the Convention', see *Exchange of Greek and Turkish Populations* (*Advisory Opinion*) [1923] PCIJ Series B – No. 10, 17–26.

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2 Autonomous Interpretation under EU Law

Drawing on the findings above, this section will examine the way in which the relationship between the EU legal system and PIL has been configured in EU law, exploring the place and effects of international norms within the EU legal order, starting with the re-elaboration by the CJEU of customary rules of interpretation. The analysis of Luxembourg case law will disclose an open-ended (if not casuistic) articulation of this relationship, determined by the character of the norms at play, their rank in the hierarchy of sources (of EU law), and the particular function they are called upon to perform in a given situation. The role of direct effect, the doctrine of harmonious or conform interpretation of EU instruments with international law, as well as the technique of 'substantive borrowing' will be elucidated and their limits exposed, particularly when founding values or fundamental constitutional norms of EU law are at stake. The special position of human rights and refugee law standards within the system – as 'Europeanised' sources – will become clear at the end.

2.1 *The EU's Re-elaboration of VCLT Rules*

The relevance of Article 31 of the Vienna Convention on the Law of Treaties for the interpretation of EU law has generally been accepted. The substance has, however, been re-elaborated by the Luxembourg Court,[96] considering that 'in interpreting a provision of [EU] law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part'.[97] Furthering this line, the Court has also asserted

96 See P.J. Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969' (1998) 25 LIEI 1; J. Klabbers, 'Re-inventing the Law of Treaties: the Contribution of the EC Courts' (1999) 30 NYIL 45.

97 Case C-84/12 *Koushkaki*, Judgment 19 December 2013 (nyr) para 34; Case C-442/12 *Sneller*, Judgment 7 November 2013 (nyr) para 21; Case C-115/12 P *France v European Commission*, Judgement 26 September 2013 (nyr) para 20; Case C-251/12 *Van Buggenhout*, Judgment 19 September 2013 (nyr) para 26; Case C-11/12 *Maatschap*, Judgment 13 December 2012 (nyr) para 27; Case C-550/08 *British American Tobacco* [2010] ECR I-5515, para 35; Case C-466/07 *Klarenberg* [2009] ECR I-803, para 37; Case C-403/09 PPU *Detiček* [2009] ECR I-12193, para 33; Case C-315/00 *Maierhofer* [2003] ECR I-563, para 27; Case C-191/99 Case C-156/98 *Germany v Commission* [2000] ECR I-6857, para 50; Case C-191/99 *Kvaerner* [2001] ECR I-4447, para 30; Case C-301/98 *KVS Int.* [2000] *ECR* I-3583, para 21; Case C-223/98 *Adidas* [1999] ECR I-7081, para 23; Case C-1/96 *The Queen v Minister of Agriculture* [1998] ECR I-1251, para 24; Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251, para 49; Case C-128/94 *Hönig* [1995] ECR I-3389, para 9; Case 337/82 *St Nikolaus Brennerei* [1984] ECR 1051, para 10; Case 292/82 *Merck* [1983] ECR 3781, para 12. There are also examples of this

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that 'every provision of [EU] law must be … interpreted in the light of the provisions of [EU] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied'.[98] This has prompted claims that the CJEU 'takes a teleological approach, much more than sanctioned by the Vienna Convention'.[99] In fact, the Court takes account not only of the object and purpose of single norms, but also of the *telos* of the instruments in which they appear and of the EU system as a whole – thereby contributing to its 'constitutionalisation'.

On the other hand, direct references to the Vienna Convention are rare and have been reserved to instances in which the Court has been called upon to interpret provisions of treaties with third parties binding on the EU.[100] In these cases, the Court has considered that, even though the Convention 'does not bind either the European Union or all its Member States', it reflects, nonetheless, 'the rules of customary international law which, as such, are binding upon the EU institutions and form part of the legal order of the European Union'.[101]

This binary approach to the Vienna Convention, distinguishing intra-EU relationships from relationships of the EU with the rest of the world, and the fact that the EU employs 'terminology that is peculiar to it' has been interpreted as a factor reinforcing the autonomy of the system –from both PIL and domestic regimes.[102]

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technique being employed in the interpretation of asylum instruments. See, for example, Case C-648/11 *MA*, Judgment 6 June 2013 (nyr) para 50; Case C-19/08 *Petrosian* [2009] ECR I-495, para 34.

98 Case 283/81 *CILFIT* [1982] ECR I-3415, para 20.

99 D. Shelton, 'Reconcilable Differences? The Interpretation of Multilingual Treaties' (1997) 20 HICLR 611, 631. See also H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff 2006) 42–43.

100 Case C-70/09 *Hengartner* [2010] ECR I-7233, para 36 (EC-Switzerland Agreement on the free movement of persons); Case C-386/08 *Brita* [2010] ECR I-1289, paras 43 (EC-Israel Association Agreement); Case C-203/07 P *Greece v European Commission* [2008] ECR I-8161, para 3 (Project to set up a common diplomatic representation in Abuja); Case C-344/04 *IATA* [2006] ECR I-403, para 40 (Montreal Convention for the Unification of Certain Rules for International Carriage by Air); Case C-268/99 *Jany* [2001] ECR I-8615, para 35 (Association Agreement between the Communities and Poland); Case C-416/96 *El-Yassini* [1999] ECR I-1209, para 47 (EEC-Morocco Cooperation Agreement); Case C-432/92 *Anastasiou* [1994] ECR I-3087, para 43 (EEC-Cyprus Association Agreement); Case C-312/91 *Metalsa* [1993] ECR I-3751, para 12 (EEC-Austria Free Trade Agreement); and Opinion 1/91 [1991] ECR I-6079, para 14 (Draft EEA Agreement).

101 Case C-410/11 *Iberia*, Judgment 22 November 2012 (nyr) para 21 and authorities cited therein.

102 G. Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 GLJ 537, 551.

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2.2 *The Place of PIL in the EU Legal Order*

The relationship between PIL and EU law is not straightforward. Although publicists tend to presume the direct applicability of general international norms to the organisation – particularly taking into account its treaty origins and distinct legal personality,[103] there are complex ramifications originating in its *sui generis* nature as a (constitutionalising) system of supranational law[104] – or, as expressed in *Kadi*, an 'internal and autonomous legal order'.[105]

The European Court of Justice has repeated its commitment to PIL in constant jurisprudence, reiterating that the Union 'must respect international law in the exercise of its powers'[106] and that provisions in agreements signed by the organisation 'form an integral part of [EU] law' from the moment in which they come into force.[107] The principle has now entered the founding treaties – at least, in relation to 'mixed agreements',[108] with Article 216(2) TFEU establishing that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States', thereby recognizing the obligatory character of international (contractual) commitments of the EU.

However, this recognition has resulted in varying strategies of integration of PIL into EU law, ranging from unswerving compliance to instrumentalisation.[109] Since the Lisbon Treaty came into force it is, furthermore, an explicit objective of the Union to 'uphold and promote' its values in the relations established with the wider world, thereby contributing not only to 'the strict observance' but also to 'the development of international law'.[110] The EU, therefore,

103 Art 47 TEU: 'The EU shall have legal personality'.

104 J. Klabbers, 'The Changing Image of International Organisations' in J.M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organisations* (UNUP 2001) 221; T. Hartley, 'International Law and the Law of the European Union – A Reassessment' (2001) 71 BYIL 1; R. Barents, *The Autonomy of Community Law* (Kluwer 2004); B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 EJIL 483, 505 ff; B. de Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) 65 ZÖR 141.

105 Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, para 317.

106 Case C-286/90 *Poulsen* [1992] ECR I-6019, para 9; Case C-405/92 *Mondiet* [1993] ECR I-6133, paras 13–15; *Racke* (n 16) para 45; Case C-308/06 *Intertanko* [2008] ECR I-4057, para 51.

107 Case 181/73 *Haegeman* [1974] ECR 449, para 5; Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; Case C-311/04 *Dordrecht* [2006] ECR I-609, para 25.

108 See, generally, C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited* (Hart 2010).

109 B. de Witte, 'International Law as a Tool for the European Union' (2009) 5 ECLR 265.

110 Art 3(5) TEU. See also Art 21(1) TEU, establishing that: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation … and which it seeks to advance in the wider world'. According to Art 21(2)(b) TEU, this should

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according to the literal tenor of Article 3(5) TEU, should emerge not only as a passive norm-recipient, but also as a shaper and generator of international norms.[111]

There is, nonetheless, nothing in the EU Treaties determining the place of PIL rules within the hierarchy of sources of EU law,[112] nor in relation to its particular effects – whether direct applicability, primacy or otherwise.[113] The limits of dichotomous accounts to describe the impact of PIL in the EU system – relying on concepts such as 'monism' and 'dualism', from the international/domestic discourse – have been exposed by several commentators, who focus instead on the asymmetric and constantly adjusting nature of this relationship.[114]

In the absence of specific provisions, the systematisation of this relationship has been articulated *ad hoc* by the European Court of Justice.[115] The case law in this matter has been nuanced, allocating different ranking and effects to

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be in order to 'consolidate and support democracy, the rule of law, human rights and the principles of international law'.

111 For a detailed review, see D. Kochenov and F. Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013).

112 *Cf.* A. Gianelli, 'Customary International Law in the European Union' in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 93, 103 ff, arguing that Arts 3 and 21 TEU should be given a more substantive interpretation.

113 Art 351 TFEU provides that: 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties …'. In the words of the CJEU, this is 'designed to permit the Member States concerned to perform their obligations under a prior agreement and does not bind the EU as regards the third States party to that agreement'. See Case C-366/10 *Air Transport Association of America* (*ATAA*) Judgment of 21 December 2011 (nyr) para 61, referring to Case 812/79 *Burgoa* [1980] ECR 2787, paras 8 and 9.

114 K.S. Ziegler, 'International Law and EU Law: Between Asymmetric Constitutionalisation and Fragmentation' in A. Orakhelashvili (ed), *Research Handbook on the Theory of International Law* (Edward Elgar 2011) 268. See also, E. Cannizzaro, 'The Neo-Monism of the European Legal Order' in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 35.

115 The CJEU understands this falls within the remit of its competences, unless the question has been settled explicitly, with the specific agreement establishing 'what effect [its] provisions … are to have in the internal legal order of the contracting parties' (i.e. the EU/Member States, on one side, and the third States concerned, on the other side). *ATAA* (n 113) para 49.

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PIL, depending on the type of instrument and the function it may perform in the particular circumstances.

Treaties entered into by the EU – on its own or together with its Member States – become, as already stated, 'an integral part' of EU law and should, accordingly, be observed and implemented within the EU legal order.[116] Treaties that the Union has not ratified, but to which *all* Member States are parties, may also bind the organisation through the succession principle. Where it can be determined that the EU has assumed *all* powers previously exercised by the Member States in a particular field, the Luxembourg Court has interpreted that, although lacking formal accession, the Union is bound by the obligations concerned.[117] However, in the absence of a 'full transfer of powers', succession plays no role.[118] Treaty law of either of these kinds is accorded a position in the system of sources that is superior to EU legislation – including Directives, Regulations and Decisions,[119] but inferior to the founding treaties and primary law.[120]

In the absence of succession, treaties that the EU has not ratified and to which either all or some Member States are parties may, nonetheless, have an impact, if they constitute, for instance, a codification of customary law. Like treaty law, customary norms – whether subsequently codified or not – have been recognised as forming also 'an integral part' of the EU legal order.[121] Post Lisbon, the Court considers that implicit in Article 3(5) TEU is the obligation for the Union 'to observe international law in its entirety, including customary international law, which is binding upon the institutions of the EU'.[122] Its ranking in the system of sources is similar to treaty law, standing above secondary EU legislation.[123]

This is the position in which IHL instruments find themselves within the system of EU sources. Although the EU as such has not acceded to the 1949

116 Art 216(2) TFEU.

117 Joined Cases C-21-24/72 *International Fruit Company* [1972] ECR 1219, para 10 ff.

118 Case C-379/92 *Peralta* [1994] ECR I-3453, para 16; *Intertanko* (n 106) para 49; Case C-301/08 *Bogiatzi* [2009] ECR I-10185, para 25.

119 Art 288 TFEU.

120 E.g. *Intertanko* (n 106) para 42; *Dordrecht* (n 107) para 25.

121 *Poulsen* (n 106) paras 9–10; *Racke* (n 16) para 45–46; *Intertanko* (n 106) para 51.

122 *ATAA* (n 113) para 101.

123 This is deduced from the fact that customary law may serve, as it will be shown below, as standard of validity review of EU acts. See J. Kokott and F. Hoffmeister, 'A Racke GmbH and Co v Hauptzollamt Mainz, Case C-162/96' (1999) 92 AJIL 205, 207.

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Geneva Conventions[124] or to the 1977 Additional Protocols,[125] IHL remains relevant both as treaty law to which all Member States are parties, and as sources of customary law.[126] This is especially true in the field of Common Security and Defence Policy (CSDP) operations in which the EU takes part.[127]

2.3 *The Effects of PIL within EU Law*

The fact that PIL rules may be binding and have a place within the hierarchy of sources does not automatically imply that they are self-executing within the EU regime.[128] The Court of Justice has distinguished several degrees of intensity in the effects of international law, differentiating several methods of incorporation, each of them subject to different conditions. Ziegler discerns, at least, three distinct mechanisms: direct effect; indirect effect or conform interpretation; and substantive borrowing.[129] While the first two are subject to a number of criteria, depending on the function the international norm assumes, the third is rather unstructured and usually occurs on an informal (or semi-automatic) basis.

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124 Geneva Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (No. II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (No. III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); particularly Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

125 Protocol I (n 86); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (Protocol II).

126 *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para 8–79.

127 See F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations' in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 189. See also V. Falco, 'L'applicabilité du droit international humanitaire à l'Union européenne: évolutions normatives' in A.S. Millet-Devalle (ed), *L'Union européennes et le droit international humanitaire* (Pedone 2010) 77.

128 R.A. Wessel, 'Close Encounters of the Third Kind: The Interface between the EU and International Law after the Treaty of Lisbon' (Swedish Institute of European Policy Studies 2013) <http://www.sieps.se/en/publikationer/close-encounters-of-the-third-kind-the-interface-between-the-eu-and-international-law-after-the-treat> accessed 1 March 2014. Compare A. Rosas, 'The European Court of Justice and Public International Law' in J. Wouters, A. Nollkaemper and E. de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (Asser Press 2008) 75, 80.

129 See K.S. Ziegler, 'The Relationship between EU Law and International Law' (2013) 13–17 Leicester School of Law Research Paper Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373296> accessed 1 March 2014. See also Ziegler (n 114) 298 ff.

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2.3.1 Direct Effect

Direct effect is the most intense form of integration, allowing for direct reliance on PIL and the potential displacement of conflicting rules of EU legislation. In the words of the CJEU, the consequence of direct effect is that 'the validity of an act of the European Union may be affected by the fact that it is incompatible with … rules of international law'.[130] Where such invalidity is pleaded on grounds of incompatibility with treaty obligations, three conditions must be met. First, the Union must be bound by the relevant agreement. Second, the 'nature and broad logic' of the agreement must be such as to allow an examination of the validity of EU rules in light of its terms.[131] And third, the specific provisions relied upon must appear, 'as regards their content', to be 'unconditional and sufficiently precise' – this happens when there is 'a clear and precise obligation which is not subject … to the adoption of any subsequent measure',[132] usually in the form of a grant of subjective rights.[133]

The fact that the EU act concerned 'may have the object or effect' of transposing into EU law the substance of an international agreement that may be obligatory on the EU and/or its Member States is not sufficient in itself to call the validity of the EU act in question, if these three conditions are not met.[134] So, direct references to IHL in EU instruments – such as in those regarding development cooperation with third countries in post-conflict situations[135] – are not enough *per se* to produce direct effect and lead to the invalidity of the acts concerned in case of (a hypothetical) conflict.

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130 *ATAA* (n 113) para 51.

131 Up to the decisions of the Court in Joined Cases C-120/06 P and C-121/06 P *FIAMM and Fedon* [2008] ECR I-6513 (regarding the GATT/WTO); *Intertanko* (n 106) (regarding the LOS and MARPOL Conventions); and *Kadi* (n 105) (regarding the UN Charter) there appeared to be a presumption in favor of direct effect. See Ziegler (n 114) 298 ff.

132 *ATAA* (n 113) paras 52–55 and authorities cited therein.

133 Ibid, para 84. See also *Intertanko* (n 106) para 59, 61 and 64.

134 Ibid, para 63. The agreement, however, may produce 'indirect effect' (see below).

135 Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms [1999] OJEU L 120/1; and Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, [1999] OJEU L 120/8. See recital 8 in each preamble.

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For our purposes, this scenario is of limited relevance as there are no express references to IHL in the Qualification Directive. Attempts, during negotiations, at tying up Article 15(c) to the 1949 Geneva Conventions did not make their way into the final text,[136] and there are, otherwise, no indications that the Directive was intended to implement, or that it has had the effect of implementing, IHL. According to its Preamble, the Directive's primary function is to contribute to the creation of a Common European Asylum System,[137] 'based on the full and inclusive application of the [Refugee] Convention',[138] 'complemented by measures on subsidiary protection',[139] 'drawn from international obligations under human rights instruments …',[140] and observing the rights and principles recognised by the EU Charter of Fundamental Rights – particularly the right to asylum.[141] The CJEU has expressly recognised this in *Diakité*, establishing that the purpose of subsidiary protection is 'to complement and add to the protection of refugees enshrined in the [1951] Convention'.[142]

By contrast, when the PIL norm of reference is one of customary law the conditions to be met are more stringent.[143] This is due to the fact that the Court considers that determining the existence and scope of customary rules is inherently difficult and subject to contestation.[144] As a result, the norm invoked must, firstly, be capable of 'calling into question the competence of the European Union to adopt the [disputed] act'. Secondly, it is required that the EU act at stake be 'liable to affect rights which the individual derives from EU law or to create obligations under EU law in his regard [i.e. in respect of the individual]'.[145] In any event, the depth of the review conducted by the Court will be limited to the determination of whether, in adopting the contested act, 'the institutions of the European Union made manifest errors of assessment concerning the conditions for applying [the customary law] principles [invoked]'.[146]

136 See Council doc. 12620/02 and 13354/02, 23 October 2002.

137 Recital 1, Preamble to QD (currently recital 2).

138 Recital 2, Preamble to QD (currently recital 3).

139 Recitals 5 and 24, Preamble to QD (currently recitals 4 and 33).

140 Recital 25, Preamble to QD (currently recital 34).

141 Recital 10, Preamble to QD (currently recital 16).

142 *Diakité* (n 22) para 33.

143 *ATAA* (n 113) para 110.

144 Note, in this regard, that it is not excluded that PIL recognizes the existence of a right of withdrawal from custom – except from *jus cogens* norms. See W.S. Dodge, 'Withdrawing from Customary International Law: Lessons from History' (2010) 120 YLJ 169 and references therein.

145 *ATAA* (n 113) para 107 and authorities cited.

146 Ibid, para 110. See also, *Racke* (n 16) para 52.

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These criteria have translated into a notable absence of examples of EU acts declared void for incompatibility with international custom.[147] Suspecting that the Qualification Directive could not be perceived as being *in conflict* with IHL and considering that it is improbable the CJEU would deem these criteria met in any such case, we may safely conclude that IHL definitions – *qua* customary law – would not have the effect of invalidating the wording of Article 15(c) of the Qualification Directive. This is the position adopted in *Diakité*, where the Court not only fails to perceive an incompatibility with IHL, but considers the IHL notions of 'international armed conflict' and 'non-international armed conflict' as being narrower and subsumable within the larger concept of 'international or internal armed conflict' used in the Directive.[148]

2.3.2 Indirect Effect: The Principle of Harmonious Interpretation

When the conditions for direct effect are not met, international rules may still produce *indirect* effect.[149] In this instance, they may be taken into account, serving as an aid to interpretation. In relation to treaty law which is binding on the EU, the Court has established that norms of EU legislation that are 'open to more than one interpretation' must, 'as far as possible', be given an interpretation that is in line with the treaty in question.[150] This is also true with regard to treaties which are not binding on the EU, but to which all the Member States are party – the examples in the case law concern, especially, the UN Charter and UN Security Council Resolutions.[151] The same appears to apply in relation to customary rules.[152]

147 Case T-115/94 *Opel Austria* [1997] ECR II-39 constitutes the only example of an EU act being invalidated for an indirect breach of the customary law principle of good faith, enshrined in Art 18 VCLT. The direct ground of invalidity, however, was the incompatibility with the EU general principle of protection of legitimate expectations. Further on this point, see T. Konstadinides, 'When in Europe: Customary International Law and EU Competence in the Sphere of External Action' (2012) 13 GLJ 1177, 1187 ff.

148 *Diakité* (n 22) paras 20–21.

149 See extensively, F. Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 395.

150 Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; Case C-53/96 *Hermès* [1998] ECR I-3603, para 28.

151 Case C-84/95 *Bosphorus* [1996] ECR I-3953, para 14; Case C-177/95 *Ebony Maritime* [1996] ECR I-1111, para 3 and 20; and *Kadi* (n 105) para 296 and 297.

152 *Intertanko* (n 106) para 51–52.

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The Court's impetus to provide for consistent interpretation stems from the principle of loyal cooperation and the related (implicit) duty not to create conflicting obligations on the Member States.[153] Nevertheless, as with direct effect, there are no examples of EU acts being invalidated due to such a conflict. The strategy of the CJEU is usually the reverse – not to contest the validity of EU norms on the basis of PIL, but to legitimise an expansive reading of EU obligations on the ground that they tend to realise objectives shared with PIL rules. In *Poulsen*, for instance, the Court concluded that a particular provision of an EC Regulation on the conservation of fisheries had to be interpreted 'so as to give it the greatest practical effect'. In so far as that interpretation was 'within the limits of international law' and corresponded to the spirit of the 1958 Geneva Convention on Fishing,[154] the Court did not see any obstacle to give full teleological strength to the EU instrument.[155]

Nonetheless, there are limits to conform interpretation. These include *contra legem* readings and constructions against 'rules and principles which take precedence over the [EU's] obligations under international law'.[156] *Microsoft* confirms that 'the principle of consistent interpretation … applies only where the international [norm] at issue prevails over the provision of [EU] law concerned', which does not include EU primary law.[157] This, therefore, may constitute a way of penetration of IHL rules in the interpretation of Article 15(c) of the Qualification Directive, provided that superior principles of EU primary law are taken in consideration. Indeed, consistent interpretation requires a construction of EU secondary law that is sustainable, coherent with IHL, but cannot demand complete alignment or uniformity, in disregard of EU primary law standards. As elaborated below, IHL can, thus, operate *in addition to*, but not *in replacement of* general principles and founding values of the EU.

2.3.3 Substantive Borrowing and the Special Case of Human Rights (Including Refugee Law)

'Substantive borrowing' is a technique of penetration of PIL into EU law that has been used on a rather selective basis by the CJEU.[158] For instance, as regards custom, the Court has distinguished between primary norms and secondary

153 Art 4(3) TEU.

154 Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966).

155 *Poulsen* (n 106) para 11.

156 Opinion of AG Kokott, Case C-308/06 *Intertanko*, delivered on 20 November 2007, para 108.

157 Case T-201/04 *Microsoft* [2007] ECR II-3601, para 798.

158 See, further, Ziegler (n 114) at 308 ff.

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norms of general international law. Rules on the delimitation of jurisdiction[159] as well as those regarding the law of treaties[160] have been adopted and applied quasi-automatically – sometimes through the medium of EU general principles[161] – without the Court analysing whether direct or indirect effect was possible or appropriate.

This technique of substantive assimilation is the one that has been employed vis-à-vis international human rights law. First of all, human rights have been 'Europeanised' as 'fundamental rights' and 'embedded' in the rest of the EU legal framework.[162] Up to the adoption of the Charter of Fundamental Rights – which will be discussed in the next section – the EU did not have its own catalogue of rights. Instead, the CJEU 'transformed' international standards into EU law, borrowing from international instruments, which were (and, for the most part, continue to be) not formally binding on the EU. It was in *Internationale Handelsgesellschaft*, where it was first established that 'respect for fundamental rights forms *an integral part* of the general principles of [EU] law protected by the Court of Justice'.[163] And as general principles, unlike treaty law or international custom, fundamental rights pertain to the (highest) category of EU primary law. This has subsequently been codified in today's Article 6(3) TEU and elevated to the status of 'founding values' of the Union in Article 2 TEU.

'[I]nternational treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' are key sources of 'inspiration' from which general principles have been drawn. In particular, they have supplied 'guidelines which should be followed within the framework of [EU] law'.[164] Although not (yet) formally binding on the Union,[165]

159 Joined cases 3, 4 and 6–76 *Kramer* ECR 1279, para 30–33; Cases 89, 104, 114, 116, 117 and 125-129/85 *Ahlström* [1988] ECR 5193, para 18; *Poulsen* (n 106) para 12–16; *ATAA* (n 113) para 114 ff.

160 See Section 2.1 above on rules of interpretation and the use of Art 31 VCLT by the CJEU.

161 See, for instance, *Racke* (n 16) para 49 (*pacta sunt servanda*). See also Joined Cases C-20/01 and C-28/01 *Commission v Germany*, [2003] ECR I-3609 para 24; Joined Cases C-120/06 P and C-121/06 P *FIAMM and Fedon* [2008] ECR I-6513, para 92.

162 P. Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66 CLP 169.

163 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4 (emphasis added). See also U. Scheuner, 'Fundamental Rights in European Community Law and in National Constitutional Law' (1975) 12 CML Rev 171; and M. Akehurst, 'The Application of General Principles of Law by the Court of Justice of the European Communities' (1981) 52 BYIL 29.

164 Case 4/73 *Nold* [1974] ECR 491, para 13.

165 Art 6(2) TEU obliges the EU to accede to the ECHR and negotiations in this regard are well advanced. See Draft Agreement on the European Union's Accession to the European

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the European Convention on Human Rights (ECHR)[166] has been recognised to bear 'particular significance' in this context.[167] But there are other examples: the Universal Declaration of Human Rights,[168] the International Covenant on Civil and Political Rights[169] as well as the International Covenant on Economic, Social and Cultural Rights,[170] among other instruments, have also been taken into account.

Fundamental rights as general principles of EU law fulfil a dual function. They provide a means of interpretation as well as a standard of legality of EU rules. Indeed, 'respect for human rights is a condition of the lawfulness of [EU] acts'[171] and, consequently, 'measures incompatible with respect for human rights are not acceptable in the [EU]'.[172] One could argue that these are, *prima facie*, the same functions (potentially) performed by other PIL sources. The difference, though, is that human rights have been internalised and operate from within, *as a matter of* EU *law*. Any incompatibility of an act of the Union with human rights is one of internal inconsistency with the own constitutional values of the organisation.

Therefore, fundamental/human rights have been positioned at the top of the pyramid of sources,[173] above and beyond other sources of PIL (including

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Convention on Human Rights, 10 June 2013, 47+1(2013)008 rev 2. See also, T. Lock, 'Walking on Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 CML Rev 1025; C. Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 MLR 254; and P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart 2013).

166 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 005 CETS 1 (entered into force 3 September 1953) as amended by Protocol 14, 13 May 2004, 194 CETS 1 (entered into force 1 June 2010) (ECHR).

167 Joined Cases 46/87 and 227/88 *Hoechst* [1989] ECR 2852, para 13; Case C-260/89 ERT [1991] ECR I-2925, para 41; Case C-299/95 *Kremzow* [1997] ECR I-2629, para 14; Case C-274/99 P *Connolly* [2001] ECR I-1611, para 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 25; Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para 35. For a critical review, see S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 CML Rev 629.

168 In Case C-135/08 *Rottmann* [2010] ECR I-1449, para 53.

169 In Case C-244/06 *Dynamic Medien* [2008] ECR I-505, para 39 ff; Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para 37.

170 In Case C-73/08 *Bressol* [2010] ECR I-2735, para 85 ff.

171 Opinion 2/94 [1996] ECR I-1759, para 34.

172 *Kadi* (n 105) para 284.

173 Ibid, para 283 ff, 326 and 330. See also (confirming this approach) Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi*, Judgment 18 July 2013 (nyr) para 66.

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IHL)[174] – so much so that in case of conflict with rules of international law they are bound to prevail.[175] As the findings of the CJEU in *Kadi* confirm, fundamental rights are placed at an even higher level than 'ordinary' EU primary law – including the founding treaties and general principles, they constitute a special breed of constitutional provisions.[176] In a conflict with UN Charter norms – as was the case in *Kadi* – the Court appeared to admit that, for instance, market freedoms could exceptionally be derogated from in accordance with today's Article 351 TFEU. By contrast, 'any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article [2 TEU] as a foundation of the Union' was forbidden.[177] No source of international law – including the UN Charter and Security Council Resolutions – could lead to an interpretation of EU rules in contravention of fundamental rights. And this tenet – although not explicitly recognised in *Diakité* – must guide the interpretation of EU asylum legislation, comprising Article 15(c) of the Qualification Directive.[178]

The method of substantive borrowing is, however, flexible and formally unstructured, which leaves the Court at freedom to be selective – and thereby preserve the autonomy and integrity of EU law. As a result, international instruments have usually been taken as a minimum threshold, without preventing the Union from providing a higher level of protection on account of its specific constitutional requirements.[179]

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174 Ibid, para 307.

175 Ibid, para 285: '… obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [EU] Treaty, which include the principle that all [EU] acts must respect fundamental rights …'.

176 Note, in this connection, that certain provisions of human rights protection constitute 'intransgressible principles of customary international law'. See *Legality of the Threat or Use of Nuclear Weapons* (n 126) para 79.

177 *Kadi* (n 105) para 303.

178 Case C-305/05 *Ordre des barreaux* [2007] ECR I-5305, para 28, noting that: 'the Court has consistently held that, if the wording of secondary [EU] law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the [EU] Treaty rather than to the interpretation which leads to its being incompatible with the Treaty. Member States must not only interpret their national law in a manner consistent with [EU] law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the [EU] legal order or with the other general principles of [EU] law' (references omitted).

179 For instance, on the principle of judicial protection as encompassing both Arts 6 and 13 ECHR, see Case C-432/05 *Unibet* [2007] ECR I-2271, para 37; on the right to family reunification, going beyond the right to family life enshrined in Art 8 ECHR, see Case C-540/03

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The only instrument of international human rights protection in relation to which the EU treaties offer some guidance regarding its incorporation into EU law is, precisely, the Refugee Convention.[180] Article 78 TFEU requires the Union to adopt a common asylum policy 'ensuring compliance with the principle of *non-refoulement*' and in full 'accordance with the [1951] Geneva Convention', 'with a view to offering appropriate status to any third-country national requiring international protection'. This has determined that, in interpreting the common asylum *acquis* and in establishing its validity, the CJEU has taken the Refugee Convention as a main reference – together with fundamental rights. The instrument has been acknowledged to constitute 'the cornerstone of the international legal regime for the protection of refugees' – direct references in the preambles of *all* legislative acts adopted in the asylum field support this interpretation. Legislation forming the Common European Asylum System, especially the Qualification Directive, is deemed to have been 'adopted to guide the competent authorities … in the application of that Convention'. These measures 'must for that reason be interpreted in the light of [their] general scheme and purpose, while respecting the [Refugee] Convention …'.[181] In relation to the Procedures Directive,[182] it has been said that its purpose 'is to establish a common system of safeguards serving to ensure that the [Refugee] Convention and fundamental rights are fully complied with'.[183] In turn, the Court has also noted that the objective pursued by the Dublin Regulation[184] is

Parliament v Council [2006] ECR I-5769, para 60 and Case C-578/08 *Chakroun* [2010] ECR I-1839, para 41.

180 The only other *regional* human rights instrument mentioned in the EU Treaties, beside the ECHR and the EUCFR, is the European Social Charter [1961] *CETS* 35, in the Preamble to the TEU and Art 151 TFEU, for the purposes of 'having [it] in mind' when developing social policy. The instrument has, accordingly, inspired the codification of social and economic rights in the EU Charter of Fundamental Rights.

181 Joined Cases C-175, 176, 178 and 179/08 *Abdulla* [2010] ECR I-1493, paras 51–53; Case C-31/09 *Bolbol* [2010] ECR I-5539, paras 36–38; and Joined Cases C-57 and 101/09 *B and D* [2010] ECR I- 979, paras 76–78.

182 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJEU L 326/13. The instrument has been revised by Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJEU L 180/60.

183 Case C-69/10 *Diouf* [2011] ECR I-7151, para 61.

184 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJEU L 50/1. The instrument has been replaced with Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State

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'to ensure full observance of the right to asylum'.[185] As a result, the Refugee Convention must be considered to constitute a minimum standard of protection within the EU asylum context, equivalent to the ECHR in general terms.[186]

2.4 *The Limits of the 'Gap-filling' Function of PIL*

Because Article 78 TFEU also mentions that the design and implementation of the EU policy on asylum shall be congruent, not only with the Refugee Convention, but also with 'other relevant treaties', this may be interpreted by some as an indirect allusion to IHL. In fact, through the technique of substantive borrowing, non-human rights PIL rules have occasionally been used as 'gap-fillers'.[187]

Wouters and van Eeckhoutte have identified a few examples in which the CJEU has been willing to integrate *lacunae* in EU regulation through PIL. In *Factortame*, for instance, the Court conceded that, due to a lack of specific rules in EU law on the registration of vessels, 'it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered [with that Member State]'.[188] A similar methodology was applied in *Micheletti*, where the Court stated that '[u]nder international law, it is for each Member State … to lay down the conditions for the acquisition and loss of nationality'.[189] However, in neither case were Member States given total freedom. The Court established that, in exercising those powers, Member States must 'comply with the rules of [EU] law'[190] and have 'due regard' to any specific EU requirements

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responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast) [2013] OJEU L 180/31.

185 *Petrosian* (n 97) para 4.

186 Before the EU used its competence to regulate asylum matters under the Treaty of Amsterdam, the Court relied on the Refugee Convention to determine the scope and conditions of application of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, [1986] OJEU L 334/56, which included refugees amongst its beneficiaries. See Joined Cases C-95 to 98/99 *Khalil* [2001] ECR I-7413, paras 4, 44, 45 and 56. *Cf* H. Battjes (n 100) at 101, speaking of the Refugee Convention as 'a direct standard of decision'.

187 The terminology is taken from J. Wouters and D. van Eeckhoutte, 'Giving Effect to Customary International law Through European Community Law' (2002) 25 KU Leuven Institute for International Law Working Paper Series <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP25e.pdf> accessed 1 March 2014.

188 Ibid, at 14, referring to Case C-221/89 *Factortame* [1991] ECR I-3905, para 17.

189 Ibid, referring to Case C-369/90 *Micheletti* [1992] ECR I-4239, para 10.

190 *Factortame* (n 188) para 17.

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applicable.[191] The Court would not accept a use of those powers to unilaterally alter or disregard EU law obligations, especially fundamental values of the organisation.[192] Therefore, while one may agree that IHL norms may be taken into account as part of the (external) context of Article 15(c) of the Qualification Directive, this must be in addition to (internal) conditions ensuing directly from EU law and, in particular, fundamental rights.

Considering the (semi-)perfect correlation between the terms of Article 15(c) of the Directive and those of IHL – including 'civilian', 'indiscriminate violence' and 'international or internal armed conflict', a final observation is in order. The CJEU has already had occasion to pronounce itself in a similar situation. In Opinion 1/91 on the conclusion of the EEA Agreement, the Court, once again, stressed the importance of observing the constitutional requirements of the EU legal order. And in a question regarding specifically the wording of the agreement, it concluded that '[t]he fact that the provisions of the agreement and the corresponding [EU] provisions are identically worded does not mean that they must necessarily be interpreted identically'.[193] The particular purpose of EU norms and their ultimate objective towards achieving closer economic integration had to be taken into account in the construction of the relevant clauses.

Transposing this finding to our domain, and following the Opinion of Advocate General Mengozzi in this respect,[194] a coincidence of formulation is not enough to warrant a complete transplantation of IHL notions into Article 15(c) of the Qualification Directive – especially if that would reduce its *effet utile* or run counter to the objective of setting up a common asylum system 'with a view to offering appropriate status to any third-country national requiring international protection'.[195] First, regard must be had to 'its general scheme and purpose' and the EU requirements of 'respecting the [Refugee] Convention and … fundamental rights'.[196] In these circumstances, albeit that the CJEU has not acknowledged it in so many words in *Diakité*, the analysis of the terms of Article 15(c) of the Directive must be inspired, not immediately by IHL, but, as elaborated below, by the EU Charter of Fundamental Rights.[197] This

191 *Micheletti* (n 189) para 10.

192 Case C-146/89 *Commission v UK* [1991] ECR I-3533, para 25 ff.

193 Opinion 1/91 [1991] ECR I-6079, para 14.

194 Opinion of AG Mengozzi (n 21) para 19 ff.

195 Art 78(1) TFEU.

196 See, for example, *Abdulla* (n 181) paras 53–54; *Bolbol* (n 181) para 38; *B and D* (n 181) paras 78.

197 The CJEU relates to the 'usual meaning' of 'internal armed conflict' to distance itself from IHL definitions, but fails to make express reference to the EUCFR. See *Diakité* (n 22) paras 27–28.

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conclusion is reached (linking with Section 2, above) both through a direct application of Article 31 VCLT and from the perspective of EU law.

3 The Charter of Fundamental Rights as Primary Reference Framework

Building on the previous sections, this part of the chapter will expound the importance of the Charter of Fundamental Rights as (*the*) primary reference framework for the interpretation of EU law norms.[198] The Charter codifies (part of) those essential constitutional aspects identified in Section 3 the respect of which is a condition of validity of EU acts. The examination begins with a brief account of the origin, purpose and significance of the instrument in general, to turn to its role in the construction of EU asylum norms. The final sub-section will deal with the consequences of this pre-eminence of the Charter, delineating the limits of the possible impact of external (non-EU or non-*Europeanised*) sources in the interpretation of EU refugee protection standards.

3.1 *Genesis, Object and (Added) Value of the Charter of Fundamental Rights*

Since the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights of the EU has gained the 'same value' as the founding treaties and has given renewed visibility to fundamental rights.[199] The Charter gives expression to the founding values of the organisation mentioned in *Kadi*, translating in concrete terms the generic allusion to 'human rights and fundamental freedoms' enclosed in Article 2 of the EU Treaty. It 'reaffirms' and is, therefore, based on the shared constitutional traditions of the Member States and their common international obligations.[200] Its final goal is to '*strengthen* the protection of fundamental rights' within the EU legal order.[201]

Post Lisbon, the Charter has become the primary reference point in cases involving fundamental rights disputes.[202] When the rights and freedoms

198 For an elaboration, see V. Moreno-Lax, *Seeking Asylum in Europe: Border Controls and Refugee Rights under EU Law* (OUP forthcoming) Chapter 7.

199 Art 6(1) TEU.

200 Recital 5, Preamble EUCFR.

201 Recital 4, Preamble EUCFR (emphasis added).

202 See, for instance, Case C-243/09 *Fuß* [2010] ECR I-9849, para 66; Case C-339/10 *Asparuhov* [2010] ECR I-11465, para 12; Case C-145/09 *Tsakouridis* [2010] ECR I-11979, para 52; Case

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recognised in the Charter are at stake, the instrument provides the reference framework for analysis, so that recourse to general principles or external sources such as the ECHR is no longer the priority.[203]

The relationship with other instruments of human rights protection is regulated by the Charter itself in its horizontal provisions. Article 52(3) provides that when Charter rights have a counterpart in the ECHR, to avoid possible conflicts, 'the meaning and scope of those rights shall be the same'. However – and as a way of reaffirming the autonomy of the EU system of fundamental rights protection, the clause also asserts that it 'shall not prevent Union law providing more extensive protection'.

The parallelism between Charter and ECHR provisions shall not preclude the emergence of a 'separate identity and substance' of Charter rights, building on their common content, but also accounting for the EU's integrating purpose and the specificities of its constitutional setup.[204] In this line, Strasbourg case law – although not formally binding – shall be taken into account,[205] but it cannot limit the level of protection afforded by a particular right within the

C-279/09 *DEB* [2010] ECR I-13849, para 30 ff; Joined Cases C-92/09 and C-93/09 *Schecke*, [2010] ECR I-11063, para 45 ff; Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para 52; Joined Cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* [2010] ECR I-14031, para 75; Case C-491/10 PPU *Aguirre Zarraga* [2010] ECR I-14247, para 59 ff; Case C-236/09 *Test-Achats* [2011] ECR I-773, para 16–17. For analysis refer to S. Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 CML Rev 1565.

203 Opinion of AG Cruz Villalón, Case C-70/10 *Scarlet*, delivered on 14 April 2011, para 30: 'Since the rights, freedoms and principles stated in the Charter have, in themselves, a legal value which, furthermore, is of the highest level, recourse to the aforementioned general principles is, in so far as the former may be identified with the latter, no longer necessary. That is a first point in favour of examining the question in the light of the provisions of the Charter rather than in relation to those of the ECHR, *ceteris paribus*'.

204 Opinion of AG Cruz Villalón, Case C-69/10 *Diouf*, delivered on 1 March 2011, para 39.

205 In the period 2009–2012, the CJEU referred to and approved of the reasoning of the Strasbourg Court in 10 out of the 27 cases decided by reference to the Charter: Joined Cases C-411/10 and C-493/10 *NS and ME*, Judgment 21 December 2011 (nyr); Case C-400/10 *JMcB* [2010] ECR I-8965; *Tsakouridis* (n 202); Case C-507/10 *Criminal Proceedings against X*, Judgement 21 December 2011 (nyr); Joined Cases C-317 to 320/08 *Alassini* [2010] ECR I-2213; *Schecke* (n 202); *Sayn-Wittgenstein* (n 202); *DEB* (n 202); Case C-292/10 *Cornelius de Visser*, Judgment 15 March 2012 (nyr); Case C-199/11 *Otis*, Judgement 6 November 2012 (nyr). These data have been retrieved from G. De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator ?' (2013) 20 MJ 168, who identifies a decline in direct reliance on the ECHR and other external human rights sources and perceives the approach as a strategic move of the CJEU to preserve the autonomy of the EU system and its own authority.

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Charter system. ECHR protection, as interpreted by the Strasbourg Court, has in fact been conceptualised as a minimum standard, not as a maximum ceiling of protection.[206] Autonomous requirements under EU law have also been considered, so as to achieve the objectives specific to the Treaties and the instruments concerned, and observe the singularities of the EU legal order.[207]

The relationship with other instruments of human rights protection is more diffuse. Article 53 of the Charter introduces a 'savings clause', according to which nothing in the Charter should be interpreted as diminishing the level of protection that other instruments may afford within 'their respective fields of application'.[208] Although the provision may be perceived as fostering an isolationist interpretation of Charter rights, it should not be overlooked that the Charter is not self-sufficient. As stated above, its content originates in common human rights obligations of the Member States – stemming from shared constitutional traditions and joint international commitments – which the Charter 'reaffirms',[209] and which also enter the EU legal regime as 'general principles' of EU law.[210] Both the Charter and general principles thereby coexist as mutually reinforcing standards of human rights protection, constantly influencing the interpretation thereof.[211] Through this organic interpenetration of human rights norms at these different levels (i.e. as unwritten principles and/or as codified standards of EU primary law inspired by the international *acquis*), the risk of autarky and self-reference in relation to Charter rights is negligible.[212] Lenaerts has posited that, in fact, Article 53 should best be understood as a 'stand-still clause', precluding regressive interpretations of Charter rights in light of developments occurring at either of these levels.[213]

206 See, for example, *Schecke* (n 202) (data protection).

207 For other examples of higher protection, building upon ECHR standards and going beyond them, refer to: *Chakroun* (n 179) (family reunification); Case C-357/09 PPU *Kadzoev* [2009] ECR I-11189 (pre-removal detention); Case C-571/10 *Kamberaj*, Judgment 24 April 2012 (equal treatment).

208 Art 53 EUCFR establishes that: '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions'.

209 Recital 5, Preamble to EUCFR.

210 Art 6(3) TEU.

211 See, for instance, Case C-144/44 *Mangold* [2005] ECR I-9981 (pre Lisbon); Case C-555/07 *Kücükdeveci* [2010] ECR I-365 (post Lisbon).

212 Eeckhout (n 162) (Advanced Access version, at 4 and 21). *Contra*: De Búrca (n 205).

213 K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 ECLR 375, at 394. Applying this approach in a case concerning noise pollution and the protection

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3.2 *The Charter and EU Asylum law*

This multi-level scheme has influenced the adjudication of asylum cases in the post-Lisbon era. Since *Abdulla*, the CJEU has consistently maintained that the Qualification Directive 'must … be interpreted in the light of its general scheme and purpose, while respecting the [Refugee] Convention, … in a manner which respects the fundamental rights and the principles recognised … by the Charter'.[214] The primacy of the Charter as a main reference framework was apparent, in particular, in *Diouf* and *Z and Y*, where Charter provisions – and not their counterparts in the ECHR or parallel instruments – were taken as main guidance to determine the context and inform the object and purpose of the provisions concerned.[215]

The importance of references to Article 18 of the Charter in the preambles of *all* asylum instruments adopted so far has also been highlighted by the Court. In *NS*, it underscored how 'each of those texts states that it respects the fundamental rights and observes the principles recognised … by the Charter … seek[ing] to ensure full observance of the right to asylum guaranteed by Article 18'.[216]

Significantly in this respect, the Court has acknowledged the importance of Article 13 of the Qualification Directive, corroborating, as it did in *Abdulla*, that '[u]nder Article 13 of the Directive, the Member State is required to grant refugee status to the applicant if he qualifies …'.[217] In relation to subsidiary protection, Article 18 of the Directive enshrines a similar guarantee, specifying (in imperative terms) that 'Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary

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of the environment, see Opinion of AG Cruz Villalón, Case C-120/10 *European Air Transport*, delivered on 17 February 2011, para 80 ff. For a more sceptical position in relation to Art 53 EUCFR, see L.S. Rossi, 'How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon' (2008) 27 YEL 65.

214 *Abdulla* (n 181) paras 53–54; *Bolbol* (n 181) para 38; *B and D* (n 181) para 78; Joined Cases C-71/11 and C-99/11 *Y and Z*, Judgement 5 September 2012 (nyr) para 48; Case C-364/11 *El Kott*, Judgment 19 December 2012 (nyr) para 43; Joined Cases C-199/12 to C-201/12, *X, Y and Z*, Judgment of 7 November 2013 (nyr) para 40.

215 *Y and Z* (n 214) para 49 ff, referring to Art 10 EUCFR; and *Diouf* (n 183) para 48–49 ff, referring to Art 47 EUCFR.

216 *NS and ME* (n 205) para 15. Although the Court was asked whether the right to asylum provided wider protection against *refoulement* than that accorded by Art 4 of the Charter – the provision equivalent to Art 3 ECHR, it avoided the question, leaving the door open to a progressive interpretation. See paras 109 ff.

217 *Abdulla* (n 181) para 62.

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protection'. Going beyond what the Refugee Convention explicitly requires,[218] among the rights refugee status and subsidiary protection comprise under the Directive, Article 24 confers an entitlement to a residence permit, reinforcing the understanding that the right to asylum under EU law entails a subjective claim to territorial protection that Member States are required to fulfil.[219]

3.3 *The Limits of 'Cross-fertilisation' in the Interpretation of EU Refugee Protection Norms*

In contrast to the approach adopted towards fundamental/human rights issues, the Court has been cautious in integrating exogenous material as relevant sources of interpretation of asylum legislation. It has focused instead on the object and purpose of the provisions concerned, in light of the reference instruments explicitly cited therein. In *B and D*,[220] regarding the application of the exclusion clauses from refugee status in the Directive and the interpretation of 'serious non-political crime' and 'acts contrary to the purposes and principles of the United Nations', the Court refused to make automatic assimilations.[221] Although the notions of 'terrorism' and 'terrorist act' were defined in a series of UN Security Council Resolutions and EU instruments adopted within the Common Foreign and Security Policy (CFSP) to give them effect, the Court rejected the idea of taking the corresponding definitions as a starting point – or as a shortcut pre-empting full status determination.

Common Position 2001/93,[222] in particular, defined membership in a terrorist organisation as a 'terrorist act' and introduced a list of groupings, which were considered as such, including the PKK[223] to which the claimants had links. In addition, Framework Decision 2002/475 required the Member States

218 See Arts 2 to 34 of the Refugee Convention. Note, also, that according to Art 20(1) QD (both versions) Chapter VII rights are 'without prejudice to the rights laid down in the Geneva Convention'.

219 For an elaboration, see M.T. Gil-Bazo, 'Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum' in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice?* (Hart 2007) 229. See also Moreno-Lax (n 198) Chapter 9.

220 *B and D* (n 181).

221 See further V. Moreno-Lax and M. Garlick, 'The Qualification Directive' in S. Peers et al (eds), *EU Immigration and Asylum Law*, vol 3 (2nd edn Martinus Nijhoff forthcoming).

222 Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJEU L 344/93.

223 Ibid, Art 1 and Annex, Section 2 'Groups and Entities', as updated by Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism [2002] OJEU L 116/75 and

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to define such terrorist acts as '[criminal] offences relating to a terrorist group' and to repress them accordingly.[224] The Court considered that there was 'no direct relationship' between the Common Position together with the Framework Decision, on the one hand, and the Qualification Directive, on the other hand, 'in terms of the aims pursued'. Therefore, 'it [was] not justifiable for a competent authority, when considering whether to exclude a person from refugee status … to base its decision solely on that person's membership of an organisation which is on a list adopted outside the framework set up by [the] Directive'.[225] The Court concluded that 'the inclusion of an organisation on [such] a list … makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is *a factor* which the competent authority must take into account'.[226]

As a result, inclusion in a list or definition as a terrorist according to criteria extraneous to the international protection terrain could not substitute for 'the individual assessment of the specific facts' and 'a full investigation into all the circumstances of each individual case', as called for by the Qualification Directive.[227] Neither could 'participation in the activities of a terrorist group … come *necessarily and automatically* within the grounds for exclusion laid down in [the] Directive'.[228] That could only constitute an element among the multiplicity of variables to consider for qualification as a refugee,[229] without altering the humanitarian resolve of the Directive to 'guide the competent authorities of the Member States in the application of [the Refugee] Convention' for the purpose of 'determining who qualifies for refugee status and the content of that status'.[230]

The (implicit) semantic connection between the notion of 'serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations' in Article 12 of the Directive and the concept of 'terrorist act' in the CSFP instruments at hand could not be taken to pre-empt a full and thorough

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subsequently retained in Council Decision 2010/386/CFSP of 12 July 2010 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism [2010] OJEU L 178/28.

224 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJEU L 164/3.

225 *B and D* (n 181) para 89.

226 Ibid, para 90 (emphasis added).

227 Ibid, paras 91 and 93. See also para 99.

228 Ibid, para 92 (emphasis added).

229 Ibid, para 96. See also *Y and Z* (n 214) paras 68–72, on the need to consider both objective and subjective factors when carrying out refugee status determination and Art 4 QD (both versions).

230 *B and D* (n 181) para 93 and 77.

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scrutiny of the asylum application, 'in light of the general scheme and purpose' of the Directive and 'in a manner consistent with the [Refugee] Convention and … the Charter of Fundamental Rights'.[231] Borrowing from Advocate General Mengozzi – as endorsed by the Court in *Diakité*, in the absence of 'hermeneutic coherence' between the instruments in question – each pursuing different aims through different means – the coincidence in wording cannot displace the canon of interpretation according to text, context, object and purpose.[232]

Applying the above considerations to the examination of Article 15(c) of the Qualification Directive, it should become apparent that the construction of the terms 'civilian', 'indiscriminate violence' and 'international or internal armed conflict', in spite of their similarity to IHL vocabulary, cannot be given a meaning that would lead to a reduction of its scope of application. As in *B and D* in relation to terrorism and refugee status, IHL terminology may be used as 'a factor' aiding interpretation, but, as an extraneous source not explicitly referred to in the Directive and not sharing a common rationale with it, it cannot replace a construction of Article 15(c) in light of its object and purpose, taking the Refugee Convention and the Charter of Fundamental Rights as the primary reference framework.

4 Implications for Subsidiary Protection Determination

The fact that the terms 'civilian', 'indiscriminate violence' and 'international or internal armed conflict' in Article 15(c) of the Qualification Directive have not been explicitly defined is, indeed, problematic. What the previous sections show, however, is that there are rules to follow in the construction of these terms – that the interpreter is not given the freedom to choose how best to define them. The logic stems from Article 31 VCLT and has been refined by the Luxembourg Court for the purposes of EU law.

As recognised in *Diakité*, the starting point is thus the very wording of the terms, considered against their context, the object and purpose of the provision, those of the Qualification Directive, and those of the EU regime at large.[233] The idea is to progress in concentric circles, taking account of proximate and more distant frameworks of influence and information, on account of the prevailing legal landscape at the moment of interpretation.

231 Ibid, para 78.

232 Opinion of AG Mengozzi (n 21) paras 27 and 28. See also *Diakité* (n 22) paras 27–28.

233 *Diakité* (n 22) para 27: '"internal armed conflict" … must … be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part'.

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The terms are not self-evident. They are reminiscent of IHL terminology, without directly referring to it. Some may think that the implicit allusion in Article 17 of the Qualification Directive to 'the international instruments drawn up to make provision in respect of … crimes [against peace, war crimes and crimes against humanity]',[234] for the purposes of exclusion from subsidiary protection,[235] could be extended to Article 15(c) by analogy. However, an extrapolation from Article 17 would not be justified, as it would invert the dynamics between the rule and its exception – broadening the scope of the latter to the detriment of the former, against the principle of effectiveness and narrow interpretation of exceptions in law.[236] The Court has referred instead to '[t]he usual meaning in everyday language',[237] emphasising that IHL notions on the intensity of confrontations, the level of organisation of the parties to the conflict or the length of time of the hostilities are irrelevant.[238] For the purposes of the Qualification Directive, as long as there is a situation in which 'a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other' the definition is met, 'provided that such conflict involves indiscriminate violence'.[239]

As for the context, even if the Court mentions in *Diakité* that it must be considered, it fails to take it into account.[240] The immediate context of Article 15(c) is Article 15(a) and (b), which defines other forms of 'serious harm' using terms extracted from human rights language.[241] The link to human rights is also evident from the definition of 'protection' in Article 7 of the Directive and the connection introduced therein between 'persecution' and 'serious harm'. Indeed, 'protection against persecution and serious harm' is constituted, according to the CJEU in *Abdulla*, by the effective and permanent eradication thereof in the country of origin, taking into account 'the extent to which basic human rights are guaranteed in that country'.[242] A look at the Preamble confirms that subsidiary protection obligations are 'drawn from international

234 Art17(1)(a) QD (also in recast).

235 i.e. as an exception to the general rule.

236 For an illustration, see *Chakroun* (n 179) para 64. See also Case C-127/08 *Metock* [2008] ECR I-6241, para 93.

237 *Diakité* (n 22) para 28.

238 Ibid, paras 32, 34 and 35.

239 Ibid, para 28, 21 and 29.

240 Ibid, para 27.

241 'Death penalty or execution' (Art 15(a)); 'torture, inhuman or degrading treatment or punishment' (Art 15(b)) QD (also in recast).

242 *Abdulla* (n 181) para 71, 72 and 73, on '*effective* protection'. See also Art 9 QD (both versions) defining 'persecution' by reference to 'basic human rights'.

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obligations under human rights instruments …',[243] observing the rights and principles recognised, in particular, by the EU Charter of Fundamental Rights, especially the right to asylum.[244]

The object and purpose of Article 15(c) – on which the Court spends some time in *Diakité* – should be determined by reference to the overall scheme and purpose of the regime of subsidiary protection that the provision helps establish. From the Preamble it emerges that subsidiary protection is intended to complement refugee status, pursuant to the Refugee Convention as transposed in the Directive.[245] Subsidiary protection status together with refugee status constitutes the 'international protection' system at the core of the common asylum policy the EU is mandated to design.[246] In turn, the objective of that system is to progressively establish 'an area of freedom, security and justice *open to those who, forced by the circumstances, legitimately seek protection* in the Union'.[247]

Against this background, the terms used in Article 15(c) must be given an independent (and broad) interpretation, in accordance with the specific object and purpose of that provision and the *finalité* of the system within which it is inscribed. This is precisely the answer of the Court to the first question in *Diakité*, specifying that 'it is not necessary for all the criteria referred to in Common Article 3 of the four Geneva Conventions and Article 1(1) of [Additional] Protocol II … to be satisfied'.[248]

Notwithstanding the lack of a direct mention in the judgment, the reference framework should be the regime of fundamental/human rights embedded in the Directive itself, the Refugee Convention, and the EU Charter of Fundamental Rights to which it refers.[249] Any influence IHL may exert must be in conformity with the overall purpose of subsidiary protection of 'offering appropriate status to any third-country national *requiring* international protection and ensuring compliance with the principle of *non-refoulement*'.[250] The focus should,

243 Recital 25 QD (currently 34 Recast QD).

244 Recital 10 QD (currently 16 Recast QD).

245 Recital 5 QD (currently 6 Recast QD). See also recital 25 QD (currently 34 Recast QD) as well as Arts 1 and 2 QD (both versions). The Court mentions recitals 5, 6 and 24 in *Diakité* (n 22) para 33. See also paras 23 and 24 on the aims pursued by subsidiary protection in contrast to IHL.

246 Art 1 and 2(a) QD, and recital 1 QD (currently 2 Recast QD).

247 Recital 1 QD (currently 2 Recast QD) (emphasis added). The language of legitimacy is used by the CJEU in *Diakité* (n 22) para 34, speaking of a '*genuine* need for international protection' (emphasis added).

248 Ibid, para 21–27 and 35.

249 In this sense, see Opinion of AG Mengozzi (n 21) paras 73–77.

250 Art 78(1) TFEU (emphasis added).

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hence, be the *need* of protection of the individual, rather than the legal qualification under IHL of the circumstances in which that need arises. The determination of whether an 'internal armed conflict' under IHL exists – which seems to be the main preoccupation of the referring court in *Diakité* – should not distract the decision-maker from the main task.

A careful reading of the provision itself reveals that the main point is to discern whether there is a 'serious and individual threat to a civilian's life or person' linked to (or 'by reason of') 'indiscriminate violence' that justifies a grant of subsidiary protection. The '*situations of* international or internal armed conflict' the wording mentions constitute the contextual reality within which the 'indiscriminate violence' occurs. As recognised by the CJEU, there is no necessity to characterise those situations under IHL or any other legal framework.[251] The contribution by IHL (if any at all) should be limited to informing the characterisation of the contextual reality prevailing in the country of origin at the moment of interpretation, helping establish the degree of the need of protection in relation to the degree and intensity of the feared threat.

This is how the Court proceeded in *Elgafaji* in the pre-Lisbon context. Asked about the precise meaning of 'serious and individual threat' and 'by reason of indiscriminate violence' in Article 15(c), it took distance from external sources, declaring that the interpretation had to be carried out 'independently'.[252] And in relation to the definition of 'indiscriminate violence', the Court did not rely on IHL. It established, instead, an autonomous meaning inspired by 'the broad logic' of the provision,[253] taking account of 'the wording and purpose of the Directive in order to achieve the result pursued'.[254] 'Indiscriminate violence' was, hence, described as the sort of violence that 'may extend to people irrespective of their personal circumstances',[255] without any singular targeting being necessary,[256] and creating a 'general risk of harm' that is 'inherent in a … situation of international or internal armed conflict'[257] – regardless of, and without referring to, the legal qualification of the situation under IHL. The Court concluded that the assessment must rather centre on whether 'a general risk of harm' exists to such a degree that it prevents return to the country of

251 *Diakité* (n 22) paras 21, 26–27, 34.
252 *Elgafaji* (n 5) para 28.
253 Ibid, para 38.
254 Ibid, para 42.
255 Ibid, para 34.
256 Ibid, para 43.
257 Ibid, paras 33 and 34.

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origin and justifies the grant of subsidiary protection. The same has been reiterated in *Diakité*.[258]

In this connection, the Court pointed out in *Elgafaji* that there may be *exceptional* situations where (armed and) indiscriminate violence reaches such a high level that substantial grounds are shown for believing that a civilian – in its plain meaning – would face a real risk of serious harm if returned to the country of origin, 'solely on account of his presence' there.[259] *A contrario*, the Court appeared to ascertain that, in the absence of such a high level of violence, proof of individualisation would be required, showing 'factors particular to [the] personal circumstances [of the applicant]' for Article 15(c) to be activated. Intermediary situations could also exist within this 'sliding scale' scheme,[260] so that 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.[261] However, the Court did not provide indications as to how to measure the different levels of violence. *Diakité* adopts an identical position, using the language of exceptionality and leaving the relevant factors unspecified.[262]

Following the approach of the Strasbourg Court in *Sufi and Elmi*,[263] it may be here, in the determination of the different levels of violence 'creating a genuine need for international protection',[264] that IHL indicators could play a role. The fact that there is an 'armed conflict' according to IHL thresholds or that IHL norms are violated, may be an important indicator of the existence of a relevant risk. The European Court of Human Rights used in that case the IHL-inspired criteria of computing civilian casualties, considering the methods and tactics of warfare employed, and the amount of population displacement provoked to adjudicate whether return to Mogadishu would *by itself* amount to a violation of Article 3 ECHR.[265] However, the Court also warned that 'these criteria are not to be seen as an exhaustive list', implying that a case-by-case assessment of all relevant circumstances is always necessary and that IHL-like

258 *Diakité* (n 22) para 30.

259 *Elgafaji* (n 5) paras 35 and 37.

260 Opinion of AG Poiares Maduro, Case C-465/07 *Elgafaji*, delivered on 9 September 2008, para 42.

261 *Elgafaji* (n 5) para 39.

262 *Diakité* (n 22) paras 30–31.

263 *Sufi and Elmi* (n 94).

264 *Diakité* (n 22) para 34.

265 Ibid, para 241 ff.

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indicators cannot be used to exclude situations of violence that do not meet IHL standards, if the existence of a risk of ill-treatment can be determined otherwise.[266]

This is, in conclusion, the approach that should be adopted in relation to Article 15(c), introducing indicators that help measure intermediate levels of violence at the basis of the 'serious and individual threat' feared by the applicant. The fact that the Court fails to provide any guidance in this respect constitutes a missed opportunity in *Diakité*. Inspiration from IHL-like concepts, if constructively engaged with, may be of support in this examination. But, in any event, the key factor is to carry out a meticulous and comprehensive assessment of all facts and circumstances[267] that may determine the *need* for subsidiary protection. That need is, in the words of Advocate General Mengozzi, the 'main criterion'.[268]

The necessity of a broad construction of the terms of Article 15(c) (whether informed by IHL categorisations or not) is also determined by systemic constraints. Considering the presumption against redundancy under PIL[269] and the equivalent doctrine of *effet utile* within the EU legal order,[270] Article 15(c) cannot be devoid of content. The opposite would contravene the basic duty of the interpreter to 'read all applicable provisions of a [legal instrument] in a way that gives meaning to *all* of them, harmoniously'. According to the maxim *ut res magis valeat quam pereat*, the interpreter 'is not free to adopt a reading that would result in reducing whole clauses … to redundancy or inutility'.[271] Article 15(c) should, therefore, be supposed to cover situations *in addition to* those already covered by Article 15(a) and (b) of the Directive,[272] which is a matter the Court leaves unaddressed in *Diakité*.

Several factors support this interpretation: First, the fact that the CJEU established that 'the fundamental right guaranteed under Article 3 of the ECHR

266 Ibid. In this line, see Opinion of AG Mengozzi (n 21) para 92.

267 Art 4 QD on the 'assessment of facts and circumstances' (both versions). See, in this connection, Case C-277/11 *MM*, Judgment 22 November 2012 (nyr).

268 Opinion of AG Mengozzi (n 21) paras 85 ff.

269 A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 422 and references therein.

270 See, generally, M. Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?' (2006) 31 EL Rev 476.

271 WTO Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8,WT/DS98/AB/R, 24, paras 81 and 80 (footnotes omitted). See further, R. Gardiner (n 35) 159 ff.

272 In this line, see R. Errera, 'The CJEU and Subsidiary Protection: Reflections on *Elgafaji* – and After' (2010) 23 IJRL 93, at 99.

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forms part of the general principles of [EU] law' and that it must be taken into account specially in relation to Article 15(b), which is the provision of the Qualification Directive 'which corresponds … to Article 3 of the ECHR'.[273] Second, the way in which the Strasbourg Court has subsequently interpreted Article 3 ECHR in *Sufi and Elmi*, considering that both provisions (Article 15 of the Directive and Article 3 ECHR) 'offer comparable protection',[274] thereby producing an indirect enlargement of the scope of application of Article 15(b) – and potentially nullifying the effectiveness of Article 15(c) as interpreted in *Elgafaji*. Indeed, as noted by Tiedemann, 'Article 15(b) provides a dynamic referral to the constituent parts of Article 3 of the ECHR' so that, after *Sufi and Elmi*, 'persons at risk of torture or inhuman or degrading treatment as a result of indiscriminate violence in situations of armed conflict should … be granted subsidiary protection on the basis of Article 15(b)'.[275] Finally, in both *Sufi and Elmi* and *Elgafaji*, protection has been reserved to 'exceptional circumstances'[276] or 'an exceptional situation'[277] in which the level of violence is of such intensity that a risk for *any* applicant exists on return to the country of origin simply on account of her presence.

Preserving the exceptionality approach post *Sufi and Elmi* deprives Article 15(c) of its 'independent substance',[278] conflating it with that of Article 15(b). From a systemic perspective, this is unsustainable. As noted by Errera, 'serious' in Article 15(c) does not relate to the level of violence, but to the threat of harm feared by the applicant. There is no reason why Article 15(c) protection should be reserved to exceptional situations of extremely high levels of violence difficult to quantify – even with the help of IHL. Recital 26 in the Preamble (currently 35) – which has hitherto been considered to promote a narrow construction of Article 15 – simply speaks of '[r]isks to which a population of a country … is generally exposed', excluding that '*general* risks' may create '*in themselves*' the kind of 'serious (and individual)' threat referred to in Article 15(c). But in the presence of a '*serious* risk' (even if 'general'), determined by a combination of factors, 'by reason of indiscriminate violence', in the context of 'armed conflict', there is no reason to exclude the action of Article 15(c). And in relation to the *individual* nature of the threat, both

273 *Elgafaji* (n 5) para 28.

274 *Sufi and Elmi* (n 94) para 226.

275 P. Tiedemann, 'Subsidiary Protection and the Function of Article 15(c) of the Qualification Directive' (2012) 31 RSQ 123, at 128.

276 *Sufi and Elmi* (n 94) para 226.

277 *Elgafaji* (n 5) para 37.

278 Ibid, para 28.

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European courts have evolved in their perception and clarified that individual concern (not 'targeting') is enough for the requisite to be met, so that if a risk is likely to affect the applicant at personal level, there is no obligation to demonstrate any specific 'singling out' in her regard of the measures or circumstances concerned.[279] In addition, there is nothing in Article 15(c) that would justify a reduction of the terms 'civilian's life or person' to protection against ill-treatment alone;[280] other interests connected to the 'basic human rights' that must be guaranteed in the country of origin to assert the existence of protection[281] and the viability of life there[282] – or *the absence of* 'substantial grounds for believing that the person concerned, if returned, … would face a real risk of suffering serious harm'[283] – should also warrant a grant of subsidiary protection.

In the post-Lisbon context, taking account of the new role played by the Charter of Fundamental Rights and the now binding character of the right to asylum, a broad interpretation of Article 15(c) is not only possible, but also well founded. Advocate General Mengozzi has posited that the provision must be interpreted taking account of the humanitarian considerations underpinning the subsidiary protection regime, as an expression of the respect owed to the principle of human dignity and as a manifestation of the founding values of the EU.[284] *Diakité* thereby offered the opportunity – that the CJEU failed to seize – to meet one of the objectives the recast process of the Qualification Directive sought to achieve, which is, precisely, 'to complete the establishment of a Common European Asylum System … to offer *a higher* degree of protection'.[285]

279 ECtHR, *MSS v Belgium and Greece* (2011) 53 EHRR 2; and *NS and ME* (n 205). On the questions of individualization, standard of proof and burden of proof, refer to the contribution by Tsourdi to this volume.

280 *Cf.* Tiedemann (n 275) at 133 ff, concluding to the obsolesce of Art 15(c).

281 See above discussion on 'effective protection' in (n 242) and main text.

282 See Art 8 QD (recast version) on the necessity of ensuring 'access to protection … safely and legally', at least in a 'part of the country [where the applicant] can reasonably be expected to settle', for recourse to the internal protection alternative (IPA) doctrine to be used in conformity with the Directive.

283 Art 2(e) QD (Art 2(f) in recast version).

284 Opinion of AG Mengozzi (n 21) para 96: '… ces notions doivent être interprétées en tenant compte des considérations humanitaires qui sont à l'origine de ce régime, expression des valeurs de respect de la dignité humaine et de respect des droits de l'homme sure lesquels, aux termes de l'article 2 TUE, l'Union est fondée'.

285 New recital 8 Recast QD.

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5 Conclusions: Towards Coherence (Not Uniformity)

The previous sections have elucidated that the starting point in the interpretation of a legal text is constituted by its wording, placed in its context and in light of its precise object and purpose, taking account of the state of the wider legal scene prevailing at the time of interpretation. This is true both at PIL and EU law levels – respectively under Article 31 VCLT and its re-elaboration by the European Court of Justice. In relation to the determination of the legal context, in particular, it has become clear that external sources, *if relevant*, may be taken into account, but that they cannot supersede the object and purpose of the instrument under consideration or neutralise its *effet utile*.

In the realm of the EU, as Sections 3 and 4 have shown, there are rules structuring the way and intensity of this exercise, determining whether and to which extent external sources may indeed be considered relevant and to which effect. As a 'constitutionalising' supranational regime, EU law regulates the terms in which the reception of PIL takes place within its internal legal order and establishes, in addition, constitutional requirements and autonomous constraints to be considered as well.

From the (relevant) external sources so identified, human rights, as recognised by the Charter of Fundamental Rights and interiorised through Articles 2 and 6 TEU as essential to the system, constitute the primary reference and aid to interpretation in the EU domain. The elucidation of terms and the filling of any *lacunae* in EU law instruments must, therefore, be effected in compliance with fundamental rights.

The implication for Article 15(c) of the Qualification Directive, as Section 5 has explained, is that the interpreter must start her enquiry from the text of the provision and 'make sense' of its terms by placing them in their context, having regard to their object and purpose. However, these are not unitary concepts. The 'context' is disposed in concentric circles, going from other paragraphs in the same clause, to other clauses in the same instrument, to the instrument itself, and to the broader framework of the EU legal order. 'Object and purpose' are not unitary entities either. The specific object and purpose of the provision must be considered, as underpinned by the object and purpose of the instrument of which it is part and by those of the wider system of rules in which it is inscribed. This disaggregated *effet utile* paradigm, building on Maduro's work, refers to a particular 'systemic understanding' of the EU legal order that permeates the construction of all its rules, with a view to preserving not only the essence of single norms, but also contribute to the advancement of the 'constitutional *telos*' of the system as a whole. The methodology proposed is, thus, both teleological and 'meta-teleological', considering the objectives of the

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specific provision at hand together with the overarching goals of the entire regime of reference.[286]

Under this prism, IHL should be integrated within the subsidiary protection analysis without pre-empting a reading in conformity with fundamental rights. The final outcome would then conform to the ultimate humanitarian purposes of IHL, while *simultaneously* taking account of the specificities of EU asylum law, in light of developments in the area of human/fundamental rights and refugee protection. This technique of 'mutual supportiveness' would lead to a sound articulation between the different standards, fostering coherence between the different branches of PIL concerned, without thereby dispossessing any one of them of its specific rationale.[287]

The truth is that there is no real conflict for the interpreter to resolve in the current case – and she should not see one where there is none.[288] A human-rights oriented reading of EU asylum law is not inconsistent with IHL, it rather builds upon it and takes it beyond. There is, therefore, no real fragmentation to avoid. The human/fundamental rights framework offers the necessary tools to overcome the interpretative impasse with which this contribution began, through a constructive – rather than reductive – operation of cross-fertilisation.

The absence of uniformity between EU asylum law and IHL should emerge as an opportunity for constructive heteronomy – which is a different class of (positive) fragmentation. The nuance is important and should contribute to dispelling the myth according to which the diversification and expansion of PIL irremediably leads to autarky and disintegration. The findings herein should help show that integration does not require complete uniformity and substantive assimilation, but instead coherence and coordination between complementary branches of PIL working towards common goals. This diversity, if constructively managed and engaged with, should be celebrated as a way to promote and consolidate ever-higher standards.

286 See Poiares Maduro (n 23).

287 On mutual supportiveness, see ILC, *Fragmentation of International Law* (n 25) para 412.

288 Ibid, paras 19 and 89, on unreal conflicts; and paras 37–42, on the presumption against normative conflict.

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