



Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union

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Abstract: *Article 18 of the Charter of Fundamental Rights of the European Union enshrines the right to asylum. Nonetheless, despite its ‘constitutionalisation’ within primary law, asylum remains a far too amorphous right, whose axiological potential has gone virtually unnoticed in the ongoing migratory crisis. The paper will argue that this is partly due to the fact that the Court of Justice on a few occasions has declined to clarify the scope of Article 18. The provision at issue therefore remains a pathological element that requires an adequate diagnosis on which accurate prognoses can be based. In an attempt to diagnose the right to asylum enshrined in Article 18 of the Charter of Fundamental Rights of the EU, this paper will compare different hermeneutical approaches and reflect on the contextualisation of the mentioned provision through the lens of domestic and EU case law and in the light of the recent EU–Turkey Statement. The article will ultimately propose to interpret the EU asylum legislation as instrumental to the effective exercise of the right to asylum.*

I Introductory Anamnesis

The adoption of the Charter of Fundamental Rights of the European Union (EU)¹ on 7 December 2000 marked a milestone in the legal landscape of fundamental rights protection in Europe, ‘reinforcing both their visibility in the legal discourse of the Court [of Justice of the EU] and their role as parameters of constitutionality’.² The Charter was, in fact, intended as ‘the detailed and articulated expression of the “principle of fundamental rights protection” affirmed by the Court’.³

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¹ Charter of Fundamental Rights of the European Union, OJ C 364/1, 18.12.2000 [hereinafter ‘The Charter’].

² S. Iglesias Sanchez, ‘The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the CJEU’s Approach to Fundamental Rights’, (2012) 49 *Common Market Law Review*, 1565, 1576. For further references, see S. de Vries, U. Bernitz and S. Weatherill (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford University Press, 2013).

³ A.J. Menéndez, ‘Some Elements of a Theory of European Fundamental Rights’, in A.J. Menéndez and E.O. Eriksen (eds.), *Arguing Fundamental Rights* (Springer, 2006), at 161.

Originally adopted as a solemn inter-institutional Declaration, the Charter was adapted on 12 December 2007 in Strasbourg⁴ in the light of the relevant changes introduced into the EU legal system by the Lisbon Treaty.⁵ Pursuant to Article 6 (1) TEU, the latter treaty provided the Charter with ‘the same legal value as the Treaties’.⁶ Nonetheless, even before obtaining such legally binding force, the Charter played a major role in enhancing fundamental rights protection within the EU, also with reference to third country nationals.

As emphasised by Peers, in fact, ‘all the provisions of the Charter which are not expressly limited in personal scope must apply equally to EU citizens and non-citizens alike’.⁷ More specifically, the last two provisions, namely Articles 18 and 19, of Chapter II, which encompasses the rights interpreting the value of ‘freedom’, concern, the right to asylum and protection in the event of expulsion, removal or extradition respectively.

In particular, the provision on the right to asylum constitutes an ‘*originalité technique*’.⁸ As is known from its Recitals, the Charter reaffirms existing fundamental rights as they result, in particular, from a plurality of external sources, including the constitutional traditions and international obligations common to the Member States, the European Convention on Human Rights (ECHR), the Social Charters adopted by the European Community and by the Council of Europe and the case law of the Court of Justice as well as of the European Court of Human Rights (ECtHR).⁹

Accordingly, the instrument under discussion has not created new rights nor has it conferred further entitlements to European citizens or third country nationals. The reference to the right to asylum is thus rather surprising, given the paucity of sources concerning such right in international law.¹⁰

Yet, despite constituting the sole provision in the European legal landscape recalling the scope of the right to seek and enjoy asylum as enshrined in Article 14 (1) of the Universal Declaration of Human Rights (UDHR),¹¹ the significance and potential of

⁴ Charter of Fundamental Rights of the European Union, OJ C 303/1, 14.12.2007. For a recent commentary, see, in particular, S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2014). For further references, see also G. Di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer, 2011) and W. Mock and G. Demuro, *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press, 2010).

⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, OJ C 306/1, 17.12.2007. Before the entry into force of the Treaty of Lisbon the Charter constituted only a joint Declaration or a mere inter-institutional agreement among the three institutions that solemnly proclaimed it, namely the European Commission, the European Parliament and the Council.

⁶ Consolidated version of the Treaty on European Union, OJ C 326/13, 26.10.2012, Art. 6 (1).

⁷ S. Peers, ‘Immigration, Asylum and the European Union Charter of Fundamental Rights’, (2001) *European Journal of Migration and Law*, 141, 146. For a wider appraisal, see also D. Thym, ‘Citizens and Foreigners in EU Law: Migration Law and Its Cosmopolitan Outlook’, (2016) 22 *European Law Journal*, 296.

⁸ See H. Labayle, ‘Article 18 – Droit d’asile’, in EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, 170, available at http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm (accessed 20 June 2017).

⁹ In this regard, according to P. Craig and G. de Búrca, *EU Law – Text, Cases and Materials* (Oxford University Press, 2015), at 396, ‘could perhaps best be described as a creative distillation of the rights contained in the various European and international agreements and national constitutions on which the ECJ had for some years already been drawing’.

¹⁰ A considerable exception is Art. 22 (7) of the American Convention of Human Rights (ACHR), adopted within the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123.

¹¹ GA Res 217A(III), 10 December 1948, A/810.

such provision have gone virtually unnoticed, especially in the case law of the European Court of Justice (ECJ).

Since the entry into force of the Lisbon Treaty, the Court has played a major role in interpreting and extending the scope of fundamental rights as enshrined in the Charter.¹² Regrettably, by taking a close look at the most relevant cases concerning the right to asylum, this article suggests that, despite the Court not yet settling the issue on how to interpret Article 18, a minimum content of the right under analysis draws from the principle of *non-refoulement* and the claim for the secondary rights linked to international protection. Nonetheless, the provision at issue remains a pathological element that requires an adequate diagnosis on which accurate prognoses can be based.

There are two distinct but correlated questions that this article tries to clarify. First, the paper aims to situate the right to asylum as enshrined in Article 18 in the fundamental rights framework of the Charter by answering whether it constitutes a genuine fundamental right and whether it imposes obligations upon Member States. Next, the article tries to identify some contexts in which the provision under discussion might be relevant and to illustrate what elements are part of the right to asylum. Admittedly, from a pragmatic perspective, the latter question is the crucial one, but its answer depends largely on how the first question is addressed.

These questions are pivotal and need to be answered, especially in light of the ongoing migratory crisis with many asylum seekers applying for international protection in the EU,¹³ and the controversial EU–Turkey Statement,¹⁴ whose legal soundness also depends on how the right to asylum is construed and to what extent it may limit the action of the EU.

In an attempt to unravel all these issues, this article aims to provide first a legal-dogmatic diagnosis of Article 18 of the Charter in the light of different methods of interpretation. Next, the analysis will contextualise the right to asylum through the lens of the domestic and European case law, in order to formulate accurate prognoses, which can be useful to disclose the potential of the mentioned provision within the EU legal system and see how this might translate to real contexts.

II Diagnosis: Interpreting Article 18 of the Charter

Article 18 of the Charter reads as follows:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).

The provision has a constitutional relevance within the Common European Asylum System (CEAS), as proved by the fact that the Preamble to all relevant legislative

¹² See G. de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator’, (2013) 2 *Maastricht Journal of European and Comparative Law*, 168–174.

¹³ As highlighted by Eurostat, in the third quarter of 2016, the number of persons seeking asylum in the EU reached 358,300, marking an increase of 17 per cent compared with the second quarter of 2016. For an overall overview of migration and asylum statistics, see the tables and figures updated by Eurostat at http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_quarterly_report&oldid=305930 (accessed 20 June 2017).

¹⁴ EU–Turkey Statement (18 March 2016), available at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> (accessed 20 June 2017). For a preliminary assessment, see, in particular, S. Peers, ‘The Final EU/Turkey Refugee Deal: a Legal Assessment’, *EU Law Analysis*, 18 March 2016, available at <http://eulawanalysis.blogspot.it/2016/03/the-final-euturkey-refugee-deal-legal.html> (accessed 20 June 2017).

instruments recalls the purpose to give effect to the right to asylum enshrined in Article 18 of the EU Charter.¹⁵

The crucial dilemma beyond the provision under discussion relates to whether asylum is to be interpreted as a State prerogative, according to traditional international law, or as a right of individuals.¹⁶ Asylum can be seen, in fact, as a twofold concept: the prerogative of a State to grant asylum and the right of an individual to seek and be granted asylum, respectively. Still, the literature even distinguishes the right to seek asylum, which is essentially the right of an individual to leave the country of origin or residence in pursuit of asylum, from the right to be granted asylum, the latter entailing ‘at a minimum a right “to benefit from” asylum’, once an individual is admitted to the territory, which might therefore be enforceable vis-à-vis the host state.¹⁷

In EU law a plethora of rules of interpretation have been progressively elaborated by the Court of Justice that has paid greater attention, *inter alia*, to the ‘purpose and general scheme’ of an instrument.¹⁸ In order to refine our understanding of Article 18 of the Charter, the differences between the literal and the supplementary genetic methods of interpretation and a wider systemic approach will subsequently be assessed to illustrate how they can result in different understandings of the right to asylum.

A The Literal Method of Interpretation

In international law, the traditional method of interpretation is based on the ordinary meaning of the terms, as posited by the Vienna Convention on the Law of Treaties.¹⁹ From a literal interpretation it thus seems clear that the right to asylum must be delineated within the Refugee Convention and the New York Protocol of 1967,²⁰ which set the general framework, and the relevant EU Treaties, in particular, Article 78 of the Treaty on the

¹⁵ The Common European Asylum System (CEAS) consists of the following binding acts: Council Regulation 604/2013, OJ L 180/31, 29.06.2013, known as “Dublin III Regulation”; Council Regulation 603/2010, OJ L 180/1, 29.06.2013, known as “Eurodac Regulation”; Directive 2011/95/EU, OJ L 337/9, 20.12.2011, known as ‘Qualification Directive’; Directive 2013/33/EU, OJ L 180/96, 29.06.2013, known as ‘Reception Directive’; Directive 2013/32/EU, OJ L 180/249, 29.06.2013, known as ‘Procedures Directive’; Council Directive 2001/55/EC, OJ L212/12, 20.07.2001. For an interpretation of the CEAS as an integrated legal system, see extensively H. Battjes and T. Spijkerboer, ‘The Systematic Nature of the Common European Asylum System’, in F. Julien-Laferrrière, H. Labayle and Ö. Edström (eds.) *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty* (Bruylant, 2005) at 27, who argue that ‘the conception of European asylum legislation as an integrated system is in some quite important respects necessary to interpret its rules, including claims on protection relevant for international law’. For an updated commentary on the CEAS toolbox, see especially D. Thym and K. Hailbronner, *EU Immigration and Asylum Law. Commentary* (Nomos, 2nd edn, 2016).

¹⁶ In this regard, see extensively M-T. Gil-Bazo, ‘The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union’s Law’, (2008) *Refugee Survey Quarterly*, 34–52.

¹⁷ For further references, see A. Edwards, ‘Human Rights, Refugees, and the Right ‘to Enjoy’ Asylum’, (2005) 17 *International Journal of Refugee Law*, 293, 302.

¹⁸ Case 6/74, *Moulijn v. Commission of the European Communities* [1974] ECR 1287, paras. 10–11. For an overall analysis of the ECJ’s methods of interpretations, see K. Lenaerts and J.A. Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretations and the European Court of Justice’, (2014) 20 *Columbia Journal of European Law*, 3–61.

¹⁹ Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entry into force, January 1980, 1155 UNTS 331, Art. 31.

²⁰ Convention relating to the Status of Refugees, adopted on 28 July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened in Geneva, entered into force on 22 April 1954, 189 UNTS 137 (hereinafter ‘Refugee Convention’), and the Protocol relating to the Status of Refugees, adopted on 31 January 1967, entered into force on 4 October 1967, 606 UNTS 267.

Functioning of the European Union (TFEU) (former Article 63 of the Treaty establishing the European Community, TEC), which substantiates the material scope of the provision.

Nonetheless, the priority of literal understanding must not be considered absolute.²¹ Interpretation is a multidimensional and articulated heuristic process which pushes the interpreter to clarify the meaning of a rule by different legal arguments that do not follow a fixed hierarchical order of priority.²²

Article 18 of the Charter undoubtedly illustrates the limits of the literal canon of interpretation, this approach being insufficient to determine whether the provision refers to a right to asylum for individuals or to a mere State prerogative. The reference to the Refugee Convention and Article 78 TFEU seems to suggest that asylum is the protection granted by a State under the conditions and limits enshrined in such instruments.²³

This conclusion may result somehow from an oversimplification of a provision embedded in a document, which is by its nature concerned with rights of individuals rather than of states. As pointed out by the Court of Justice, the literal method of interpretation should therefore prevail 'in the absence of working documents clearly expressing the intention of the draftsmen of a provision'.²⁴ In this respect, it is worth noting that, in fact, a supplementary document, namely the Explanations relating to the Charter of Fundamental Rights, was coupled to the latter, as 'a valuable tool of interpretation intended to clarify the provisions of the Charter'.²⁵ However, as to the scope of Article 18, such interpretative document limits itself to reiterate that '[t]he text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees'.

B The Genetic Canon of Interpretation

As a rule of international law, when it is not possible to determine the obvious meaning of a rule, a supplementary instrument of interpretation is constituted by the *travaux préparatoires*. Reference to the latter instrument underscores the complementary potential of the genetic canon of interpretation, aiming at disclosing the inherent meaning of a rule through the lens of the drafters' reasoning.

Drawing from an extensive analysis of the *travaux préparatoires*, Gil-Bazo confirmed that during the drafting of the Charter debate focused specifically on the categories of individuals entitled to protection under the provision on the right to asylum.²⁶ The first draft in its official text in French made specific reference to a right to asylum for individuals who could not be considered as 'European citizens',²⁷ taking into account the scope of the Protocol on asylum for nationals of Member States of the European

²¹ According to N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) at 121, while the interpreter has a *prima facie* duty to stick to the most obvious, literal meaning of a rule, other reasons can justify the search for less obvious understandings, relying on adequate interpretative arguments.

²² *Ibid.*, 139.

²³ See, in this regard, H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff, 2006) at 112.

²⁴ Case 15/60, *Simon v. Court of Justice of the European Communities* [1961] ECR 225, 220.

²⁵ Explanations relating to the Charter of Fundamental Rights, OJ C 303/1, 14.12.2007, Preamble. Originally drafted by the Praesidium, the Convention's governing body, they have been updated in 2007 in the light of the Lisbon Treaty.

²⁶ Gil-Bazo, above, n. 16, 42–48.

²⁷ Doc. CHARTE 4137/00 CONVENT 8, 24 February 2000, draft Art. 17, reading as follows: 'Persons who are not nationals of the Union shall have a right of asylum in the European Union'.

Union, according to which, given the level of protection of fundamental rights by the EU Member States, an application for asylum made by a national of a Member State may be taken into consideration only exceptionally.²⁸ A similar approach was reiterated in a second draft which made explicit reference to third country nationals (therefore implicitly excluding even stateless people, apart from European citizens),²⁹ until a compromise on the current rather vague wording was reached within the Praesidium.³⁰

Although any reference to the recipients of the right to asylum was ultimately omitted under the auspices of the United Nations High Commissioner on Refugees (UNHCR), which had also opposed the Protocol on asylum for nationals of EU Member States, Gil-Bazo argued that it is clear from the preparatory works that the intention of the drafters was to enshrine the right to asylum as a right of individuals.³¹

However, if one subscribes to this interpretative orientation, the fact that the Charter limits itself to codifying existing rights, would lead one to consider Article 18 as only enshrining a right to seek asylum, since nothing can be assumed as to an alleged individual right to be granted asylum.

Furthermore, as emphasised by Peers, the wording of Article 18 would reiterate the obligation enshrined in Article 78 TFEU, according to which the common policy on asylum, subsidiary protection and temporary protection must be in accordance ('due respect' in the words of Article 18) with the Refugee Convention and other relevant treaties.³² The understanding of the right to asylum in the Charter does not seem therefore autonomous from the relevant asylum acquis.

Within the CEAS, asylum is generally understood as the protection granted to those who can qualify as refugees within the meaning of Article 1 of the Refugee Convention, as interpreted in the Qualification Directive, and is based on the assumption, drawing from the controversial Dublin Regulation, that it is not up to the applicant to choose which EU Member State to apply to for this protection. According to the Dublin Regulation, in fact, a set of specific criteria, including family considerations, recent possession of visa or residence permit in a Member State, or irregular entry to the EU, will determine the State responsible for an asylum application.³³

Accordingly, Article 18 of the Charter cannot be interpreted as ensuring a clear and unconditional right to obtain asylum that Member States should protect.

²⁸ Protocol (No. 24) on asylum for nationals of Member States of the European Union, annexed to the Treaty of Amsterdam [2008] OJ 115/305. As to the practical relevance of the Protocol, see Immigration and Refugee Board of Canada, *European Union: Application of the Protocol on Asylum for Nationals of Member States of the European Union (2013–June 2015)*, 9 July 2015, ZZZ105193.E, available at www.refworld.org/docid/55bf55094.html (accessed 20 June 2017). For a recent critique, see R. Stern, 'At a Crossroads? Reflections on the Right to Asylum for European Union Citizens', (2014) 33 *Refugee Survey Quarterly*, 54–83.

²⁹ Doc. CHARTE 4284/00 CONVENT 28, 5 May 2000, draft Art. 21, reading as follows: 'Nationals of third countries shall have the right to asylum in the European Union in accordance with the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees'.

³⁰ Doc. CHARTE 4333/00 CONVENT 36, 4 June 2000, draft Art. 21. The text was further linguistically reworded, replacing the English expression 'right of asylum' with the current 'right to asylum', cf. Doc. CHARTE 4487/00 CONVENT 50, 28 September 2000. This final version was accepted on a declared consensual basis by the European Commission's President and the President of the EU Council, cf. Doc. CHARTE 4960/00 CONVENT 55, 26 October 2000.

³¹ Gil-Bazo, above, n. 16, 42–48.

³² S. Peers, 'The EU Charter of Fundamental Rights and Immigration and Asylum Law', in S. Peers, V. Moreno-Lax, M. Garlick and E. Guild, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Vol. 3: EU Asylum Law* (Brill/Nijhoff, 2015) at 54.

³³ Dublin III Regulation, above, n. 15, Arts. 7–14. See comments in Thym and Hailbronner, above, n. 15, at 1478.

C The Systemic Method of Interpretation: A Twofold Ontological Test

The literal and genetic canons of interpretation do not seem to leave room for an explicit right to be granted asylum, but might the use of another interpretative argument lead to a divergent conclusion? In order to answer this question, it is proposed to apply a systemic method of interpretation. This approach is necessary for a legal text, such as the Charter, which constitutes a catalogue of rights, whose scope must be considered within the broader architecture of European fundamental right norms.³⁴

In this context, Article 18 is regarded not only in relation to the whole normative apparatus of the Charter but also in the light of the normative references which are relevant to determine the Charter's substantial nub, such as the ECHR and the constitutional traditions common to the Member States.

This type of analysis will put flesh on the bare bones of Article 18, taking into account the Charter's 'dual function' that, as significantly stated by Advocate General Poiares Maduro in his Opinion in *Elgafaji*

[i]n the first place, it may create the presumption of the existence of a right which will then require confirmation of its existence either in the constitutional traditions common to the Member States or in the provisions of the ECHR. In the second place, where a right is identified as a fundamental right protected by the Community legal order, the EU Charter provides a particularly useful instrument for determining the content, scope and meaning to be given to that right.³⁵

A double test is therefore required to see first whether the right to asylum as enshrined in Article 18 may be ontologically regarded as a fundamental right that can be confirmed by the Charter's main external sources, namely the ECHR and the national constitutions. Second, it must be seen in which contexts Article 18 may better disclose its potential and how its contextualisation through the lens of the domestic and European case law has been substantially contributing to determine or refine its scope. The latter issue will be dealt with in greater detail in the next section, while this section will focus on the bipartite ontological test, referring to the ECHR and the constitutional traditions common to the Member States, in order to determine the EU normative stance vis-à-vis the right to asylum in Article 18 of the Charter.

a) An ECHR-Inferred Ontological Exam

The ontological test first submits Article 18 to be read as coupled with other specific provisions applying to third country nationals, namely Article 19 (2) and, to a certain extent, Article 4 of the Charter. The former provision provides protection from *refoulement*, where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, while Article 4 establishes the general prohibition of torture and inhuman or degrading treatment or punishment. In this regard, it is crucial to stress that the Explanations to the Charter confirm that Article 19 (2) incorporates the relevant case law from the European Court of Human Rights regarding Article 3 ECHR on the prohibition of torture or inhuman treatment.³⁶

A link must therefore be established between the three provisions in order to carve out a more authentic interpretation of the right to asylum under the Charter. Such a connection

³⁴ See, in this regard, N. Jääskinen, 'The Place of the EU Charter within the Tradition of Fundamental and Human Rights', in S. Morano-Foadi and L. Vickers (eds.), *Fundamental Rights in the EU* (Hart Publishing, 2015), at 11.

³⁵ Case 465/07, *Elgafaji* [2009] ECR I-921, Advocate General's Opinion, para. 21.

³⁶ Reference is explicitly made to *Ahmed v. Austria*, Appl. No. 25964/94, 17 December 1996, and *Soering v. UK*, Appl. No. 14048/88, 7 July 1989.

is to be identified in the principle of *non-refoulement*, and in its meaning in the light of the jurisprudential application *par ricochet* of Article 3 ECHR by the ECtHR in asylum cases, which is also relevant for the Charter.

Despite the fact that the majority position in the literature agrees that asylum and *non-refoulement* are two separate institutions,³⁷ it must be stressed that there are also some positions arguing that a right to asylum can be derived from the principle of *non-refoulement*, because the latter cannot be effectively guaranteed without admitting asylum seekers to State territory and conducting a refugee status determination procedure.³⁸ As it has been conceived to protect a person from the risk of persecution, the principle of *non-refoulement* amounts to what Hathaway has defined as ‘a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk’.³⁹ Such duty is based not necessarily upon an explicit individual entitlement, but rather on the complementary nature of the obligation not to violate the prohibition of torture and inhuman treatment and the consequent responsibility to provide for the material wellbeing of individuals. This interpretation is very compelling in the context of social states which emphasise their commitment to honour the right to seek asylum.⁴⁰

The nexus asylum–*non-refoulement* has been explored by the Strasbourg Court since its earlier case law. In *Vilvarajah* and later in *Chahal*, the Court convincingly developed the argument that expulsion of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of the State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.⁴¹ While rewording the principle of *non-refoulement*, the Court in *Salah Sheek* ruled that Article 3 ‘implies an obligation not to expel the individual to that country’⁴² and later in *Gebremedhin*, quoting the French *Conseil d’État*, seemingly carved out a right for asylum seekers to stay in the territory of a Contracting State and have access to an asylum procedure.⁴³

Considering that *non-refoulement* constitutes a relevant component of asylum, the provisions in Articles 18 and 19 (2) are complementary and likely to apply simultaneously, since the former constitutes the material protection for people that cannot be expelled, removed or extradited, and thus it ensures compliance with the principle of *non-refoulement*. The provision under Article 18 would therefore strengthen the scope of Articles 19 and 4 accordingly, and would posit that asylum may constitute a fundamental right of complementary nature vis-à-vis the obligation of *non-refoulement* where there is a risk of torture or ill treatment.

³⁷ See, *inter alia*, G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford University Press, 3rd edn, 2007).

³⁸ See, in particular, Edwards, above, n. 17, at 302.

³⁹ J. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), at 301.

⁴⁰ For further references, see A.J. Menéndez, ‘The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration’, (2016) 22 *European Law Journal*, 388, 389–390.

⁴¹ *Vilvarajah and others v. United Kingdom*, Apps nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991, paras. 109–116; *Chahal v. United Kingdom*, App no. 22414/93, 15 November 1996, paras. 105–106.

⁴² *Salah Sheek v. The Netherlands*, App no. 1948/04, 11 January 2007, para. 131.

⁴³ *Gebremedhin v. France*, App no. 25389/05, 26 April 2007, para. 65. The Court quoted the order issued by the *Conseil d’État*, Order no. 255237, 25 March 2003, stating that the constitutional right to asylum is a fundamental freedom whose corollary is the right to request refugee status.

The conclusion suggested by this first part of the ontological test confirms that an essential component of the fundamental right to asylum is derived from the principle of *non-refoulement*. However, although extremely relevant, this interpretation is not straightforward and may perhaps be too artificial. Further analysis is therefore required in order to see whether the scope of the right to asylum can expand to include any positive obligation as a further relevant component of such right. To this extent, the systemic canon of interpretation is articulated in a second ontological test aimed at seeing Article 18 in the light of the constitutional traditions common to the Member States. This part of the test is likely to disclose noteworthy considerations, particularly on the feasibility of characterising the right to asylum as a subjective fundamental right.

b) *An Ontological Exam Based on Constitutional Traditions*

In her analysis, Gil-Bazo highlighted that asylum must be seen as a subjective right of the individual, justifying this interpretation by the reference in Article 18 to the constitutional traditions of Member States, arguing that in most European Constitutions it seems that the granting of asylum is construed as a subjective right of individuals.⁴⁴ In this regard, Article 52 (3) of the Charter provides that those rights reflecting constitutional traditions of the Member States should be interpreted in line with those traditions, including thus constitutional asylum.

The present national law on asylum was crucially influenced by the post-Cold War scenario, and particularly by the Kosovo experience, which left its imprint in the practice and culture of asylum in Europe, stressing the need to provide a broader framework that, apart from the admission to the territory of the host States, incorporates the human rights legal-political idiom, which was predominant during that time, and specific standards of treatment for recipients of protection.⁴⁵

A fundamental right to asylum is enshrined in the Constitutions of several Member States,⁴⁶ including France, which boasts a long tradition dating back to the constitutional experience of 1793 and echoed on a few occasions by the *Conseil constitutionnel*.⁴⁷ Article 16 (2) of the German Basic Law (*Grundgesetz*) of 23 May 1949 recognises the right to asylum for those persecuted for political reasons.⁴⁸ The Federal Constitutional Court (*Bundesverfassungsgericht*) even clarified that the underlying right to asylum can have a wider scope than the provisions contained in international instruments in force, including the Refugee Convention.⁴⁹ Specific provisions on the right to asylum are characteristic of the new Constitutions of recent Member States from Central and Eastern Europe, which generally emphasise the position of individuals and their rights.

⁴⁴ Gil-Bazo, above, n. 16, 47.

⁴⁵ UNHCR, *A Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia*, 24 July 1992, HCR/IMFY/1992/2, available at <http://www.refworld.org/docid/438ec8aa2.html> (accessed 20 June 2017).

⁴⁶ The Constitutions of several Member States, including Bulgaria, Germany, France, Hungary, Italy, Spain, Poland, Romania, Portugal, Slovakia, Slovenia and Sweden, contain provisions on the right to be granted asylum.

⁴⁷ See, e.g., *Conseil constitutionnel*, 93–325 DC, 12 August 1993, [1993] *Journal officiel* 11722, and 97–389, 22 April 1997, [1997] *Journal officiel* 6271.

⁴⁸ For a comparative analysis, see H. Lambert, F. Messineo and P. Tiedemann, 'Comparative Perspectives of Constitutional Asylum in France, Italy and Germany: *Requiescat in Pace?*', (2008) *Refugee Survey Quarterly*, 16.

⁴⁹ German Constitutional Court, *BVerfGE*, 9, 174 [180], 4 February 1959, BvR 193/57, available at <http://www.servat.unibe.ch/dfr/bv009174.html> (accessed 20 June 2017).

Nevertheless, although these constitutional provisions may establish the existence of a subjective right to asylum, corresponding, as maintained by Moderne, with the right to obtain from the State that has enshrined such right in its own Constitution the necessary protection which is not available in the country of origin,⁵⁰ many of them have never had much practical application. The case of Italy is illustrative in this regard, with the lack of a law implementing Article 10 (3) of the Constitution that has deprived the right to asylum of practical value.⁵¹

In this regard, some concerns can be raised as to the too facile characterisation of the right to asylum as a subjective fundamental right. The lack of implementation of domestic constitutional provisions stresses the fact that the right to asylum, like all fundamental rights, presupposes a specific institutional structure and a set of collective goods to be effective,⁵² including an adequate asylum reception system that will not render this right nugatory. The situation of some Member States, such as Austria and Sweden, which have been facing an exceptional increase in asylum applications,⁵³ clearly shows the limits of an interpretation of the right to asylum as an absolute subjective right. This context, as emphasised by the European Commission itself, has practical consequences on the ability of the national asylum systems to cope with the applications being received and to guarantee the reception conditions required under the CEAS, specifically by the Reception Directive. To this extent, even a temporary suspension of the provisional measures on the relocation of asylum seekers from Greece and Italy⁵⁴ has been proposed for Sweden and Austria.⁵⁵

c) Systematising the Right to Asylum in the Charter's Normative Architecture

The considerations above must be taken into account in order to determine the fundamental rights position of the right to asylum under Article 18 of the Charter. The

⁵⁰ F. Moderne, *Le droit constitutionnel d'asile dans les États de l'Union européenne* (Presses universitaires d'Aix-Marseille, 1997), at 22 ff.

⁵¹ For a more extensive analysis, see M. Benvenuti, *Il diritto di asilo nell'ordinamento costituzionale italiano: Un'introduzione* (Cedam, 2007).

⁵² For a broader analysis, see R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002) 65; see also R. Alexy, 'Individual Rights and Collective Goods', in C.S. Nino (ed.), *Rights* (Dartmouth, 1992), at 163–181.

⁵³ As confirmed by Eurostat figures, from 1 January to 31 October 2014, Sweden received 68,245 applications for international protection, while for the same period in 2015 it received 112,040 applications. The number of monthly applications in August 2015 was 11,735, which more than doubled to 24,261 in September 2015, and increased by a further 61 per cent to 39,055 applications in October 2015. Sweden had the highest number of applicants for international protection per capita in the EU. As regards Austria, the number of applicants for international protection increased by more than 230 per cent from 23,835 applicants for the period from 1 January to 30 November 2014 to 80,880 applicants for the period from 1 January to 30 November 2015, with the monthly number of applicants for international protection reaching a level of more than 10,000 applicants per month since September. Austria had in 2015 the second highest number of applicants for international protection per capita in the EU after Sweden.

⁵⁴ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 248/80. For references, see S. Nicolosi, 'Emerging Challenges of the Temporary Relocation Measures under EU Asylum Law', (2016) 41 *European Law Review*, 338–361.

⁵⁵ See COM(2015) 677 final and COM(2016) 80 final respectively. The Decision regarding Austria was adopted by the Council on 10 March 2016; see Council Implementing Decision (EU) 2016/408 [2016] OJ L 74/36, while the Decision regarding Sweden was adopted by the Council on 9 June 2016, see Council Decision (EU) 2016/94 [2016] OJ L 157/23.

recognition of the latter right in many national Constitutions can confirm, as emphasised by Peers, that the right to asylum is best construed as a general principle of EU law.⁵⁶ From this perspective, the right to asylum presents the two generalities outlined by Semmelmann as regards the general principles of law, and namely an inherent structural generality, as it lacks a precise and well-defined content, and an origin-related generality, as it stems from a common denominator across various national legal orders.⁵⁷

Truthfully, most fundamental rights, with very limited exceptions, are best characterised as principles, although not all fundamental rights have the same abstract constitutional weight, as the latter normally depends, as argued, on context and collective goods.

In addition, taking into consideration its whole normative apparatus, the Charter, as pointed out in the Preamble, sets out rights, freedoms and principles that the Union recognises. The fundamental right to asylum must be systematised and interpreted in the light of this general typology, which is not merely tautological, since, as abundantly explained in the literature,⁵⁸ a distinction is to be made between the rights and principles of the Charter, the latter being more objective guidelines than subjective rights.⁵⁹ Elaborating on Alexy's structural theory of fundamental rights, it is, in fact, possible to distinguish the Charter's provisions that provide rights of the individual, such as citizens' rights under Chapter V, and provisions enshrining rights whose content is left to the legislator, be it European or national.⁶⁰ The horizontal clause in Article 52 (5) of the Charter confirms that the provisions 'which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law'.

In the Explanations to the Charter, examples of principles are drawn from Chapter III (Equality), such as the rights of elderly people in Article 25,⁶¹ and IV (Solidarity), such as environmental protection in Article 37.⁶² As explained by Lord Goldsmith, those rights that are not civil and political freedoms and are recognised and given effect to in different ways in the Member States, would thus constitute principles 'informing policy making by the legislator'.⁶³ To borrow from legal theory, they will constitute 'principles supported by collective goods, which do not necessarily give rise to subjective individual rights'.⁶⁴

To this extent, while the Court of Justice has not yet developed a concrete method of distinguishing individual rights from principles,⁶⁵ in his Opinion in *Association de médiation sociale*, Advocate General Cruz Villalón provided insightful hints on the

⁵⁶ See, in this regard, also S. Peers, *EU Justice and Home Affairs Law* (Oxford University Press, 3rd edn, 2011) at 98. For more references on the general principles of EU law, see, generally, T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2nd edn, 2006).

⁵⁷ C. Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value', (2013) 19 *European Law Journal*, 457, 461.

⁵⁸ See, in particular, Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles', (2001) 38 *Common Market Law Review*, 1201.

⁵⁹ R. Schütze, *An Introduction to European Law* (Cambridge University Press, 2nd edn, 2015), at 105.

⁶⁰ Menéndez, above, n. 3, 163.

⁶¹ Article 25 of the Charter reads as follows: 'The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'.

⁶² Article 37 of the Charter reads as follows: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

⁶³ Goldsmith, above, n. 58, 1212.

⁶⁴ Menéndez, above, n. 3, 165. See also Alexy, 'Individual Rights and Collective Goods', above, n. 52, 167. For a broader discussion, see also M. Borowski (ed.), *On the Nature of Legal Principles* (Nomos, 2010).

⁶⁵ See, in this regard, Case 176/12, *Association de médiation sociale v. Union locale des syndicats CGT and Others*, 15 January 2014.

qualification of a Charter's right. On that occasion, the Advocate General significantly stressed that 'within the structure of the Charter, the general category chosen for the title of the Charter itself, "fundamental rights", must relate to all its contents'.⁶⁶ The Advocate General explained that none of the provisions should be substantially excluded from the category of fundamental rights and, hence, he pointed out that the fact that specific substantive content of the Charter is described as a right 'does not in itself prevent it from potentially belonging to the category of principles'.⁶⁷ Although specifically referring to the category of social rights, the Advocate General conceded that, even when they cannot create legal situations directly enforceable by individuals, the Charter's provisions are rights 'by virtue of their subject-matter' and principles 'by virtue of their operation'.⁶⁸

Despite being suitable for the category of social rights, such hermeneutical paradigm, which Advocate General Cruz Villalón drew from the constitutional experience of Member States,⁶⁹ is likely to apply to Article 18. The rather vague wording of the latter provision, and the fact that, contrary to other rights, there is no predetermined constituency of right holders by reference either to citizenship, residence or physical presence in the territory of the EU, can suggest that the practical constitutional weight of the right to asylum depends on the adoption of secondary legislation in compliance with the Refugee Convention and based upon Article 78 TFEU.⁷⁰ This is also confirmed by the fact that debate on the right to asylum has been focusing on who is entitled to be granted that right and, more specifically, who is the genuine asylum seeker.⁷¹

From this perspective, by virtue of the subject-matter, the fundamental right to asylum can therefore be construed as the right to have the refugee status determined and accordingly as a claim to the secondary rights enshrined in the Refugee Convention and the CEAS.⁷² However, by virtue of its operation, the right to asylum constitutes a principle which calls upon the public authorities and the legislator to promote and transform such principle into a 'judicially cognizable reality'⁷³ while at all times respecting the subject-matter and its purposive nature, namely access to a procedure for determination of the refugee status.

In sum, the ontological tests, through which the systemic interpretative argument has been articulated, confirm the existence of a rudimentary fundamental right to asylum that corresponds to the right to have refugee status determined or more broadly to effective procedures for assessing their need for protection. However, whether and to what extent the force of this right imposes specific obligations on Member States is left vague. A close look at the jurisprudential approach is therefore relevant to refine the scope of the right to asylum and the meaning that must be given to Article 18 in its contextual application.

III Prognosis: Contextualising Article 18 through a Substantive Jurisprudence

The legal-dogmatic reconstruction of Article 18 of the Charter has shed light into the fundamental rights position of the right to asylum within the Charter's framework. A

⁶⁶ *Ibid.*, Opinion of Advocate General, 18 July 2013, para. 44.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, para. 45.

⁶⁹ *Ibid.*, para. 48.

⁷⁰ See, in this regard, Peers, above, n. 32, 54.

⁷¹ See, in this regard, N. El-Emany, 'The EU Asylum, Immigration and Border Control Regimes: Including and Excluding the "Deserving Migrant"', (2013) 15 *European Journal of Social Security*, 171.

⁷² In this regard, see also Battjes, above, n. 23, 112.

⁷³ *Association de médiation sociale*, above, n. 65, Opinion of Advocate General, 18 July 2013, para. 50.

substantive analysis, to be conducted through the lens of the domestic and European case law, will now serve the scope of identifying some contexts in which Article 18 can disclose at best its potential and determine which powers and obligations can be considered part of the right to asylum.

Before delving into the jurisprudential analysis of Article 18, it is worth stressing that, after obtaining jurisdiction over migration and asylum questions in 2005, the role of the Court of Justice has been notably expanded in the area of asylum, with references for preliminary rulings seeking guidance with the interpretation of the EU asylum legislation.⁷⁴ Similarly, over the years the Luxembourg judges have extended fundamental rights protection with reference to the EU Charter in cases relevant to asylum and refugee law.⁷⁵ The incorporation of the Charter into EU primary law, in fact, has been influencing the role of the Court of Justice, giving ‘new opportunities for legal activism’,⁷⁶ that the ECJ, when legitimately feasible, is using to gradually expand the scope of fundamental rights even in favour of third country nationals.

In *Cimade*, for instance, the Court ruled that minimum reception conditions that ensure full respect for human dignity as enshrined in Article 1 of the Charter, must be granted not only to asylum seekers present in the territory of the responsible Member State, but also to those who remain pending the determination of the responsible Member State, a procedure which can last for a number of months.⁷⁷ Later, in *MA, BT, DA*, the Court referred to the best interests of the child as enshrined in Article 24 of the Charter as a guideline for Member States when examining a minor’s asylum application.⁷⁸ The same yardstick was applied by the Court in other cases involving family reunifications.⁷⁹

This case law underscores that, since the entry into force of the Lisbon Treaty, the Charter has become a ‘more consolidated, preferential, or even exclusive tool’ to interpret the EU asylum legislation.⁸⁰ This partly mitigates the idea that the Charter would constitute an attempt by the Member States to tame the Court of Justice which was perceived too progressive.⁸¹ Nonetheless, the fact the Charter includes provisions stemming from a plurality of sources can distract the ECJ from investigating the rationale behind a specific provision. This could be the case for Article 18. In fact, despite the fact that the Court of Justice has expanded the scope of many provisions of the Charter, even those under Chapter V (Citizenship) in favour of third country nationals, the Luxembourg

⁷⁴ See, e.g., *Elgafaji*, above, n. 35. For references, see M. Garlick, ‘International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR’, (2015) 34 *Refugee Survey Quarterly*, 1; S. Boutruche Zarevac, ‘The Court of Justice of the EU and the Common European Asylum System: Entering the Third Phase of Harmonisation?’, (2010) 12 *Cambridge Yearbook of European Legal Studies*, 53; see also A. Collin, ‘Recent Developments in Asylum and Immigration Law before the Court of Justice’, (2009) 9 *ERA Forum*, 581–590.

⁷⁵ See, e.g., Case 31/09, *Bolbol* [2010] ECR I-5539; Case 175/08, *Salahadin Abdulla and Others* [2010] ECR I-1493.

⁷⁶ C. Engel, ‘The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and its Normative Consequences’, (2001) 7 *European Law Journal*, 151, 153.

⁷⁷ Case 179/11, *Cimade, Groupe d’information et de soutien des immigrés (GISTI)*, 27 September 2012, para. 56. For further references, see L. Tsourdi, ‘Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity’, (2015) 29 *Journal of Immigration, Asylum and Nationality Law*, 9–24.

⁷⁸ Case 648/11, *MA, BT, DA v. Secretary of State of the Home Department*, 6 June 2013.

⁷⁹ Joined Cases 356/11 and 357/11, *O, S v. Maahanmuuttovirasto, L v. Maahanmuuttovirasto*, 6 December 2012, paras. 76–82. See also Case 40/11, *Yoshikazu Iida v. Stadt Ulm*, 8 November 2012, paras. 79–80.

⁸⁰ F. Ippolito, ‘Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?’, (2015) 17 *European Journal of Migration and Law*, 1, 20.

⁸¹ This position was elaborated most convincingly by A. Knook, ‘The Court, the Charter, and the Vertical Division of Powers in the European Union’, (2005) 42 *Common Market Law Review*, 367–398.

judges have been hesitant in providing further clarifications on the exact scope of the right to asylum under Article 18.⁸²

The latter provision has been mentioned by some cases before the Court of Justice and at the national level in domestic proceedings. This twofold jurisprudential interpretation will be analysed below.

A Article 18 in Relevant Domestic Proceedings

The provision on the right to asylum has recently represented a significant reference in relevant cases at the domestic level. In a number of legal proceedings, Article 18 has been interpreted as aiming at assuring that refugee protection, as established under the Refugee Convention and interpreted in EU asylum law, namely the Qualification Directive, is guaranteed for eligible applicants.⁸³

More recently, the Supreme Court of Ireland in *T.D. v Minister for Justice Equality and Law Reform* provided a more detailed reasoning on Article 18.⁸⁴ Interestingly, on that occasion the Court, after reiterating the Member States' duty to grant refugee status to those who qualify as refugees in accordance with the criteria set out in the Qualification Directive, did not merely equate the right to asylum with refugee status. The Court stressed the relevance of EU law, and in particular of the Charter of Fundamental Rights, as to the asylum rights claimed by the applicants, emphasising that the State cannot 'deny or limit the rights conferred by the Charter and the relevant Directives given the primacy which is accorded by the Constitution to the law of the European Union'.⁸⁵

More specifically, the judgement under discussion provided a meaningful interpretation of the right enshrined in Article 18 of the Charter as 'an autonomous fundamental right',⁸⁶ drawing from a broader understanding of the Qualification Directive, which in its Preamble expressly states that the Directive 'seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members'.⁸⁷ Furthermore, the Irish Supreme Court underscored that the Directive confirms that the recognition of refugee status is a declaratory act of a pre-existing right.⁸⁸

The Court therefore maintained that asylum is to be understood as 'an autonomous right to a status, refugee status, which is a fundamental right'.⁸⁹ The judgement issued by the Irish Supreme Court is a valuable contribution to understand asylum as the fundamental right to have the refugee status determined. This conclusion is not different from the findings of the European Court of Human Rights, which over the years, as discussed above, in most cases concerning the concomitant application of Article 3 and Article 13 ECHR has implicitly assumed an emerging right to *de facto* asylum under the ECHR regime. As posited by Einarsen, in fact, the provision offers a temporary basis

⁸² See S. Velluti, *Reforming the Common European Asylum System—Legislative Developments and Judicial Activism of the European Courts* (Springer, 2014), at 29.

⁸³ See, e.g., Constitutional Court (Belgium), 1/2014, 16 January 2014; Conseil d'État (France), 371316, 23 August 2013; Asylgerichtshof (Austria), C8 407012–1/2009, 12 September 2012; Supreme Administrative Court (Finland), KHO:2012:18, 7 March 2012.

⁸⁴ Supreme Court of Ireland (Ireland), *T.D. v. Minister for Justice Equality and Law Reform* [2014] IESC 29, 10 April 2014.

⁸⁵ *Ibid.*, para. 57.

⁸⁶ *Ibid.*, para. 133.

⁸⁷ See Qualification Directive, above, n. 15, at Recital 16 (former Recital 10).

⁸⁸ This point was formerly emphasised also by the British Supreme Court in *F.A. (Iraq) v. Secretary of State for the Home Department* [2011] UKSC 22, para. 32.

⁸⁹ Supreme Court of Ireland (Ireland), above, n. 84, para. 143.

for *de facto* asylum in two steps: ‘the first step endures from the moment at which a claim is raised under article 3..., until it has been decided whether a *prima facie* case exists... [t]he second step endures until the claim has been turned down on the merits, by the appropriate national authority in accordance with article 13’.⁹⁰ This argument has even been buttressed by the recent acknowledgment by the ECJ that in most asylum cases the case law of the ECtHR confirmed that Article 3 ECHR reads in conjunction with Article 13 on effective remedy in relation to the applicants’ complaints under Article 3.⁹¹

Nevertheless, since domestic Courts confirm that asylum, as enshrined in the Charter, is an autonomous concept under EU law, it follows that its scope needs to be determined, as stressed by Gil-Bazo, by application of the Union’s own rules.⁹² From this perspective, the dialogic interaction between national judges and the Court of Justice of the EU through the instrument of the reference for preliminary rulings⁹³ is indeed a precious tool to refine the scope of Article 18 of the Charter and determine which powers and obligations can be considered part of the right to asylum.

B Article 18 in Light of the EU Court of Justice’s Reasoning and the most Recent Practice

The Court of Justice, as a ‘constitutional’ judicial institution of the EU, has the potential to foster genuine interpretations of concepts of EU law and thus provide national authorities with useful guidance in the implementation of norms and rights stemming from the EU legal order.

In this regard, the preliminary ruling procedure has proved to be an effective hermeneutical instrument with reference to unclear provisions of EU law, including those in the field of asylum. Nonetheless, it is worth noting that the judges of Luxembourg in the latter area very seldom reflected on the scope of Article 18 of the Charter, although some interesting guidelines, as will be explained in the following sections, can be drawn from the Advocates General Opinions.

Prior to the entry into force of the Lisbon Treaty, a first valuable opportunity for the Court of Justice to reflect on the scope of Article 18 was offered by the *Elgafaji* case. On that occasion, Advocate General Poiares Maduro, although indirectly, contributed to interpret the scope of Article 18 of the Charter by emphasising that the Qualification Directive ‘pursues the objective of developing a fundamental right to asylum which follows from the general principles of Community law’.⁹⁴ The Advocate General situated the right to asylum under Article 18 among the general principles of EU law, which, as emphasised, are ‘the result of constitutional traditions common to the Member States and the ECHR, as reproduced, moreover, in the Charter of Fundamental Rights of the European Union’.⁹⁵ This noteworthy reasoning corroborates the systemic interpretative argument based on the ECHR and its relevant case law, which must be considered ‘a starting point for determining the content and scope of those rights within the European Union’.⁹⁶

⁹⁰ T. Einarsen, ‘The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum’ (1990) 2–3 *International Journal of Refugee Law*, 361, at 380.

⁹¹ Case 239/14, *Amadou Tall v. Centre public d’action sociale de Huy*, judgement of 17 December 2015, para. 54.

⁹² Gil-Bazo, above, n. 16, 52.

⁹³ Article 267 TFEU. For a general reference, see C.O. Lenz, ‘The Role and Mechanism of the Preliminary Ruling Procedure’, (1994) 18 *Fordham International Law Journal*, 388–409.

⁹⁴ Case 465/07, *Elgafaji*, above, n. 35, para. 21.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, para. 23.

Advocates General have been playing a major role in shedding light on some contexts in which Article 18 can play a crucial role, confirming in the first place that, by building on the protection from *non-refoulement*, Article 18 can limit the strict logic of responsibility allocation in transfers of asylum seekers pursuant to the Dublin Regulation. In addition, the recent EU–Turkey Statement offers another relevant context in which Article 18 can disclose its potential, as the provision may be understood as entailing the responsibility for the EU and its Member States to examine an application for international protection and assure due compliance with the Refugee Convention, as also required by Article 78 TFEU.

In this regard, it is interesting that the recent reference from the Czech Supreme Administrative Court, which asked the ECJ to answer whether the revocation/end/refusal clause under Article 14 of the Qualification Directive is in line with Article 18 of the Charter, Article 78 TFEU and the general principles of EU law under Article 6 (3) TEU.⁹⁷ While waiting for a more authoritative interpretation of Article 18 by the Court of Justice, it is worth noting how the Czech Supreme Administrative Court seems to recall Poiares Maduro's reasoning in *Elgafaji*, in that it links asylum as part of the fundamental rights which constitute general principles of EU law.

Moreover, this reference for preliminary ruling offers a valuable occasion to reflect on how Article 18 and more broadly the CEAS can be balanced with the Refugee Convention. In fact, from the question which was referred to the ECJ, it seems clear that the goal pursued by the Qualification Directive is to guide the competent authorities of the Member States in the correct application of the Refugee Convention. The fact that, instead of limiting itself to invoke Article 78 TFEU, as the treaty provision aimed at ensuring the compliance of EU law with the Refugee Convention, the Czech Supreme Administrative Court mentioned Article 18 of the Charter and fundamental rights as general principles of EU law, seems to suggest that the fundamental right to asylum might have a wider content, which is not limited to *non-refoulement* and access to effective procedures for assessing the need for international protection, but it may include the claim and usability of all secondary rights enshrined in the Convention. In this context, Article 18 would serve the scope of incorporating into EU law the protection regime of the Refugee Convention, to which the EU secondary legislation, including the Qualification Directive, must conform.

By and large, the main context in which Article 18 has been invoked so far refers to Dublin cases, whose analysis will be dealt with in the following section.

a) Article 18 in the Context of 'Dublin Cases'

Despite the fact that the Court has so far missed the opportunity to elaborate on the specific obligations stemming from the alleged 'constitutionalisation' of the fundamental right to asylum, a few benchmarks can be drawn from Advocates General's Opinions in the most relevant case law concerning the relevance of Article 18 in the context of transfers of asylum seekers pursuant to the Dublin Regulation.

In this context, an opportunity was offered by the Court of Appeal of England and Wales in a reference for preliminary ruling in the case of *N.S. and Others*.⁹⁸ On that occasion, the Court of Justice was asked, among other issues, to illustrate whether the scope of the protection conferred upon a person by some Charter provisions, including Articles 1, 18 and 47, is wider than the protection conferred by Article 3 of the ECHR. The Court did not issue a detailed answer as to the scope of the right to asylum in the

⁹⁷ Case 391/16, *M v. Ministerstvo vnitra*, request lodged on 14 July 2016.

⁹⁸ Joined Cases 411/10 and 493/10, *N.S. and Others* [2011] ECR I-13905.

Charter and in that sense it missed an opportunity to refine the reasoning of Advocate General Trstenjak.

The latter interpreted the right to asylum as intertwined with the principle of *non-refoulement* as enshrined in Article 33 of the Refugee Convention and, by applying its reasoning to the case at issue, namely the systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in Greece, the Advocate General argued that if the overloading of a Member State's asylum system were to mean that the refugees in that Member State were at risk of direct or indirect return to a persecuting State, Article 18 of the Charter 'therefore prohibits the other Member States from transferring refugees to that Member State'.⁹⁹ The Advocate General emphasised that Article 18 must be regarded as a benchmark of protection against transfers which are incompatible with the Refugee Convention.¹⁰⁰ Accordingly, the transfer of an asylum seeker to the Member State primarily responsible, under the Dublin Regulation, for the asylum application is not compatible with the Charter of Fundamental Rights where there is a serious risk in that Member State of direct or indirect expulsion to a persecuting State, which is incompatible with the Refugee Convention.

Neither the Advocate General nor the Court addressed the specific question whether the protection under Article 18 of the Charter may be wider than the one envisaged under Article 3 ECHR. The Court limited itself to interpreting the issue in the light of the prohibition of torture, thus preventing transfers of asylum seekers to the 'Member State responsible' under the Dublin Regulation if there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter corresponding to Article 3 ECHR.¹⁰¹ In sum, the Court found that Member States exercising a discretionary power under the Dublin Regulation were applying EU law and therefore must interpret national law and exercise their powers in line with EU law and fundamental rights, including Article 18.

The judgement under discussion is the mirror image of the 2011 ECtHR Grand Chamber's ruling in *M.S.S.* On that occasion, the Strasbourg judges, on the one hand, ruled that Belgium was in violation of Article 3 ECHR for exposing the applicant to risks arising from the deficiencies of the asylum procedure in Greece, as well as exposing the applicant to the detention and degrading living conditions there. On the other hand, with regard to the national appeal procedure in Belgium, the Court held that Belgium was in violation of Article 13 ECHR in conjunction with Article 3 ECHR because of the lack of an effective remedy against the decision, based on the Dublin Regulation.¹⁰²

Similar concerns have been raised by the ECtHR in *Tarakhel*, as to the removal of an Afghan couple with six children from Switzerland to Italy. In the latter case, the applicants claimed the risk to be received in facilities not adapted to the children's age in Italy.¹⁰³ The Court reiterated that 'to fall within the scope of Article 3 the ill-treatment must attain a

⁹⁹ Joined Cases 411/10 and 493/10, *N.S. and Others*, Opinion of Advocate General, 22 September 2011, para. 115.

¹⁰⁰ *Ibid.*, para. 154.

¹⁰¹ Joined Cases 411/10 and 493/10, above, n. 98.

¹⁰² *M.S.S. v. Belgium and Greece*, 21 January 2011, App No. 30696/09. Reference was to the structural shortcomings in the asylum procedure and of the systematic problems in the detention and reception of asylum seekers in Greece. These problems were well documented in reports of international instances such as the UNHCR.

¹⁰³ *Tarakhel v. Switzerland*, App No. 29217/12, 4 November 2014.

minimum level of severity'.¹⁰⁴ The Court pointed out that the assessment of this minimum threshold is relative and depends on all the circumstances of the case, 'such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim'.¹⁰⁵

In the light of such case law issued by the Strasbourg counterpart, the Luxembourg Court could have elaborated a more comprehensive obligation under Article 18 of the Charter, going beyond the mere principle of *non-refoulement*, by taking into account, for instance, the Strasbourg Court's findings that asylum seekers constitute a 'particularly underprivileged and vulnerable' population group that requires 'special protection' under Article 3 ECHR.¹⁰⁶ Apart from the negative obligation not to transfer, expel or extradite individuals at risk of being exposed to torture or inhuman treatment, the Court could have stressed, for instance, whether a positive obligation corresponding to a duty to assure that an application for international protection is duly examined in compliance with Article 18 of the Charter, is required.

This conclusion, which is better mirrored in the case of *T.D.* before the Supreme Court of Ireland, is also supported by the fact that, as mentioned before, in most asylum cases Article 3 ECHR reads in conjunction with Article 13 on effective remedy in relation to the applicants' complaints under Article 3 ECHR. To this extent, it is worth reiterating that in *Cimade*, by reading Article 18 in conjunction with Articles 1 and 47 of the Charter, the ECJ stressed the importance for asylum seekers to enjoy minimum reception conditions in line with dignified standards of life,¹⁰⁷ which may indeed represent another component of the right to asylum.¹⁰⁸ Such conclusion is relevant in the light of the recent reform of the Asylum Act and the Act on State Border in Hungary, entered into force in July 2016, which allows the police to automatically push back asylum seekers.¹⁰⁹ This practice would infringe Article 18 of the Charter, in that it denies asylum seekers the right to seek international protection and the right to stay in the EU Member State's territory pending a decision by the competent asylum authority, which is an essential element of the right to asylum.

Still, the ECJ missed the opportunity to further reflect on this comprehensive meaning of the right to asylum in the case of *Halaf*.¹¹⁰ On the latter occasion, the Administrative Court of Sofia (Bulgaria) in a request for preliminary ruling concerning the Dublin Regulation, asked the ECJ the specific question: 'What is the content of the right to asylum under Article 18 of the Charter...?'.¹¹¹

This question, which clearly had the potential to unravel the meaning of the obligations under Article 18, went unnoticed, since the Court partly diverted the answer, pointing out that if the humanitarian clause, foreseen to protect family unity,¹¹¹ is not applicable, a Member State which is not responsible under the Dublin Regulation may examine an

¹⁰⁴ *Ibid.*, para. 118.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*; *M.S.S.*, above, n. 102, para. 251.

¹⁰⁷ *Cimade*, above, n. 77, paras. 51–61.

¹⁰⁸ In this regard, see Ippolito, above, n. 80, 22.

¹⁰⁹ See Amended Section 71/A (1) of Act LXXX of 2007 on Asylum and newly added Section 5 (1a) of Act LXXXIX of 2007 on State Borders.

¹¹⁰ Case 528/11, *Halaf*, 30 May 2013.

¹¹¹ Pursuant to Art. 15 of the former Dublin Regulation 343/2003, the humanitarian clause reads as follows: 'Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent'.

application for asylum ‘only if it is shown that the right granted to asylum seekers by Article 18 of the Charter is not respected by the Member State responsible under the criteria set out in the Regulation’.¹¹² Yet, by using the right to asylum under Article 18 of the Charter as an option to derogate from the strict criteria of responsibility allocation under the Dublin Regulation, implicitly the Court opened up to include both the negative obligation not to transfer an asylum seeker and the positive obligation to examine his or her application for international protection.

In this regard, an insightful contribution was provided by the UNHCR in a statement issued in the context of the reference for a preliminary ruling from the Administrative Court of Sofia in *Halaf*.¹¹³ The UNHCR confirmed that ‘the institution of asylum is not ... limited only to the prohibition on *refoulement*’, and carved out a number of elements that contribute to refine the powers and obligations beyond such institution.¹¹⁴ In particular, the right to asylum entails, *inter alia*: (i) access of asylum-seekers to fair and effective processes for determining status and protection needs; (ii) the need to admit refugees to the territories of States; (iii) the need for rapid, unimpeded and safe UNHCR access to persons of concern; (iv) the need to apply scrupulously the exclusion clauses; (v) the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards; (vi) the responsibility of host States to safeguard the civilian and peaceful nature of asylum; and (vii) the duty of refugees and asylum-seekers to respect and abide by the laws of host States.¹¹⁵

In sum, the UNHCR stressed that construing asylum under Article 18 of the Charter narrowly and limited only to *non-refoulement* means ‘to fail to secure the effectiveness of this Article’.¹¹⁶ The doctrine of *effet utile* suggests that, among several possible interpretations, the one that will prevail is the one that best guarantees the practical effect of existing law.¹¹⁷

Interestingly, a similar approach was upheld, to a certain extent, by Advocate General Cruz Villalón in his Opinion in *Abdullahi*.¹¹⁸ On that occasion, the Austrian *Asylgerichtshof* in a reference for a preliminary ruling asked the ECJ, *inter alia*, whether or not the acceptance by a Member State of its responsibility for taking charge of the examination of an asylum application rules out the possibility of determining if, in accordance with the criteria laid down in the Dublin Regulation, responsibility actually lies with another Member State.

In a few passages, the Advocate General emphasised how the EU asylum legislation, and in particular the Dublin Regulation, is instrumental ‘to ensure the effective exercise of the right to asylum’,¹¹⁹ and that the Regulation, ‘like all the other provisions which together with it make up the system guaranteeing the fundamental right to asylum, must

¹¹² *Halaf*, above, n. 110, paras. 40–42.

¹¹³ UNHCR, *Statement on the right to asylum*, August 2012, available at <http://www.refworld.org/pdfid/5017fc202.pdf> (accessed 20 June 2017).

¹¹⁴ *Ibid.*, para. 2.1.3.

¹¹⁵ *Ibid.* See also UNHCR, Executive Committee, No. 82 (XLVIII), *Safeguarding Asylum*, 17 October 1997, available at <http://www.unhcr.org/3ae68c958.html> (accessed 20 June 2017).

¹¹⁶ *Ibid.*

¹¹⁷ P. Pescatore, ‘The Doctrine of “Direct Effect”: An Infant Disease of Community Law’, (1983) 8 *European Law Review*, 135, emphasised that ‘any legal rule is devised so as to operate effectively’.

¹¹⁸ Case 394/12, *Abdullahi*, Opinion of Advocate General, 11 July 2013.

¹¹⁹ *Ibid.*, para. 40. The Advocate General stressed that the Dublin Regulation ‘is a fundamental component of the normative system devised by the European Union to enable that fundamental right to be exercised’.

therefore be understood ultimately as an instrument operating in the service of that guarantee'.¹²⁰

More specifically, and in order to answer the preliminary question, the Advocate General called on the EU as a whole and each of the Member States to offer 'sufficient assurances' as to the proper exercise of the fundamental right to asylum guaranteed by Article 18, which must be ensured 'upon [the applicant's] entry into the European Union, inasmuch as the holder of that right may not be adversely affected by the fact that his application is examined by one Member State rather than another'.¹²¹ According to the Advocate General, the exercise of the fundamental right to asylum cannot be limited by the application of the criteria established in the Dublin Regulation, stressing nonetheless that the fundamental right to asylum does not amount to 'a subjective right such as to substantiate the claim that the application for asylum should be examined by a particular Member State'.¹²²

This is a relevant finding that the Court missed to refine in its judgement of 10 December 2013 in which once again the issue of delving into the scope of Article 18 was not specifically addressed.¹²³ Despite not delving into the exact scope of the right to asylum, indeed the Advocate General's Opinion discloses the potential of Article 18 as a provision aimed at ensuring asylum seekers' rights above the strict logic of the Dublin system. Significantly, this conclusion has been recently echoed by Advocate General Sharpston, who, in *A.S. and Jafari*, also stressed that insisting on rigorous application of the mentioned criteria runs counter to one of the aims of the Dublin Regulation, namely ensuring that Member States do not keep applicants for international protection 'in orbit'.¹²⁴

b) Article 18 in Light of the Recent EU–Turkey Statement

The analysis of Dublin cases has confirmed that Article 18 would incorporate the obligation of *non-refoulement* as well as the affirmative right to an appropriate status for any person in need of international protection. This comprehensive set of obligations is relevant also in the context of the recent EU–Turkey Statement whose lawfulness also depends on how the right to asylum is interpreted and to what extent it may limit the action of the EU. These are crucial questions in view of the fact that the cooperation established by the EU–Turkey Statement is seen as a model for future agreements with third countries.

Moreover, the EU–Turkey deal offers the opportunity to reflect on the changing socio-economic, cultural and political context of the right to asylum in Europe. The humanitarian necessity characteristic of the European experience in the 1990s, which contributed to steer the process of integration towards the development of a common European asylum and migration policy seems in fact to be diluted into the appalling rejection of the responsibility to effectively implement such policy, thereby sending the message that providing protection is a fungible task and that the obligation to protect becomes secondary.¹²⁵

¹²⁰ *Ibid.*, para. 41.

¹²¹ *Ibid.*, para. 42.

¹²² *Ibid.*, para. 39.

¹²³ *Ibid.*, Judgement, 10 December 2013.

¹²⁴ Case C-490/16, *A.S. and Case C-646/16, Jafari*, ECLI:EU:C:2017:443.

¹²⁵ E. Collett, 'The Paradox of the EU-Turkey Refugee Deal', March 2016, available at <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal> (accessed 20 June 2017).

In this context, whether one of the essential components of the right to asylum is the protection against return to a country where a person has reason to fear persecution and danger, it requires Member States to accept responsibility for examining an application for international protection, where it is evident that fundamental rights will be violated otherwise, as recently stressed by Advocate General Mengozzi in *X, X v. État belge*, another unfortunate case for Article 18. On that occasion, the Advocate General even insisted on the need to offer legal access route to international protection by issuing visas on humanitarian grounds ‘to prevent persons seeking such protection, including in particular women and children, being snatched and exploited by criminal networks smuggling and trafficking migrants.’ This would be another important context in which Article 18 can disclose its potential, although in its judgment, the Court regrettably did not follow the Opinion of the Advocate General.¹²⁶

Arguably, by ‘farming out’ to Turkey the right to asylum, the EU does not seem to comply with the obligation to examine an application for international protection, since, as has been noted, the right to asylum in Turkey cannot be considered as ‘fully established’, owing to the largely dysfunctional system and the existing inequalities in access to protection and content of protection.¹²⁷ While Turkey signed the 1951 Refugee Convention and the 1967 Protocol, it entered a reservation according to which the Convention only applies to persons who have become refugees as a result of events occurring in Europe. Moreover, despite the fact that in 2013 under Turkish legislation a system of international protection was established providing a temporary protection regime for Syrians, the Council of Ministers retains full discretion to terminate such status at any time, with the consequent risk of *refoulement*.¹²⁸

Taking into consideration that under EU asylum law, and pursuant to Article 38 of the Asylum Procedures Directive, the ‘safety’ of a country depends on a number of criteria, including the possibility to receive protection in accordance with the Geneva Convention, it comes as no surprise that the conclusive assumption that Turkey is a safe third country was challenged by the Greek Appeals Committees. Significantly, a decision of the Greek Appeals Committee, which upheld the appeal of a Syrian asylum seeker that had been listed for deportation under the Statement at issue, confirmed that Turkey would not give Syrian refugees the rights they are entitled to under international law.¹²⁹ As reported by

¹²⁶ Case C-638/16 *PPU, X, X, v. État belge*, ECLI:EU:C:2017:173, 7 February 2017, para. 173. The judgment was issued by the Grand Chamber last 7 March 2017, stating that ‘an application for a visa with limited territorial validity made on humanitarian grounds with a view to lodging, immediately upon arrival in the EU Member States, an asylum application, does not fall within the scope of EU law, namely the EU Visa Code’ (Regulation 810/2009).

¹²⁷ See Human Rights Watch, ‘EU: Don’t Send Syrians Back to Turkey’, 20 June 2016, available at <https://www.hrw.org/news/2016/06/20/eu-dont-send-syrians-back-turkey> (accessed 20 June 2017); see also S. Peers and E. Roman, ‘The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?’, *EU Law Analysis*, 5 February 2016, available at <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html> (accessed 20 June 2017).

¹²⁸ See Law on Foreigners and International Protection, Law No. 6458, 4 April 2013, *Official Gazette*, No. 28615, 11 April 2013, Art. 91. For references, see N. Ekşi, *The New Turkish Law on Foreigners and International Protection: An Overall Assessment* (Nomos, 2014); see also Ö. Gürakar Skribeland, *Seeking Asylum in Turkey: A Critical Review of Turkey’s Asylum Laws and Practices* (Norwegian Organisation for Asylum Seekers, 2016) at 21, available at <http://www.noas.no/wp-content/uploads/2016/04/NOAS-rapport-Tyrkia-april-2016.pdf> (accessed 20 June 2017).

¹²⁹ See Greek Council for Refugees, Press release, 22 May 2016, available in Greek at: <http://www.gcr.gr/index.php/en/news/press-releases-announcements/item/560-22052016> (accessed 20 June 2017). For further comments, see Menéndez, above, n. 40, 409 ff.

the European Commission itself, several other Appeals Committees' decisions rebutted the safe third country presumption regarding Turkey.¹³⁰

Such situation at the domestic level resulted in the composition of Appeal panels being changed through a legal amendment, whose constitutionality was questioned by the National Commission of Human Rights, which also questioned the constitutionality of the new composition of the Appeals Committees and the compliance of the new law with the right to an effective remedy.¹³¹ More interestingly, at the European level, another opportunity has been given to the judges of Luxembourg to reflect on the meaning of the right to asylum under the EU Charter. This time the opportunity arose from three applications for annulment, which have been lodged under Article 263 TFEU with the General Court of the EU on behalf of individuals staying in refugee camps in Lesbos and Athens, and seeking the annulment of the EU–Turkey Statement for its incompatibility with EU fundamental rights, notably with Articles 1, 18 and 19 of the EU Charter.¹³²

The applicants considered that the EU–Turkey Statement constitutes an agreement entered into by the European Council with Turkey and claim that it is an act that produces legal effects adversely affecting the applicants' rights and interests, including the right to asylum. The political deal of March 2016 thus officially entered the courtroom and its legal soundness was to be assessed in the light of Article 18 of the Charter.

Unfortunately, the General Court disappointed some expectations, as its Orders dismissed the actions, owing to the lack of jurisdiction on a measure that the General Court declared as not adopted by one of the institutions of the EU. In the aftermath of the General Courts' Orders some considerations can be raised. First, given that the EU–Turkey Statement does not constitute an international agreement in the meaning of the Treaty (Article 218 TFEU), but rather a political statement, its execution is legally untenable in that it undermines the functioning of the CEAS. As stressed by Menéndez, for instance, in contrast to the Dublin Regulation, the Statement does not envisage any mechanism to follow up on each individual transfer to Turkey.¹³³ Second, the cooperation set by the EU–Turkey Statement risks systematically denying the exercise of the right to asylum, as enshrined in Article 18 of the EU Charter, in that it aims to serve as a paradigm for future agreements with third countries. Third, while bearing in mind that, in an action brought under Article 263 TFEU, the Court does not have jurisdiction to rule on the lawfulness of a possible international agreement, it is crucial to stress that any international agreement in the field of asylum concluded by the Member States must be

¹³⁰ See European Commission, Second Report on the progress made in the implementation of the EU–Turkey Statement, COM(2016) 349 final, according to which as many as 70 rulings of the Appeals Committees have rebutted this presumption and overturned the related first instance decisions of the Greek Asylum Service.

¹³¹ See National Commission of Human Rights, Public Statement on the amendment modifying the composition of the Independent Appeals Committees, 17 June 2016, available in Greek at http://nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf (accessed 20 June 2017), and reported by ECRE on 24 June 2016, at <http://www.ecre.org/greece-amends-its-asylum-law-after-multiple-appeals-board-decisions-overturn-the-presumption-of-turkey-as-a-safe-third-country/> (accessed 20 June 2017). For the text of the amendment, see Greek Parliament, Amendment No. 496/25 to the draft law on 'Legal framework for the establishment of regimes for Strengthening Private Investments for the regional and economic development of the country— Establishment of Development Council and other provisions', 15 June 2016, available in Greek at <http://www.hellenicparliament.gr/UserFiles/bbb19498-1ec8-431f-82e6-023bb91713a9/9623744.pdf> (accessed 20 June 2017).

¹³² Cases T-192, *NF v. European Council*, 22 April 2016, T-193, *NG v. European Council*, and Case T-257/16, *NM v. European Council*, 28 February 2017. The actions were lodged on 19 May 2016.

¹³³ Menéndez, above, n. 40, 410.

compatible with those international obligations which are part of EU law, including the need to respect the Refugee Convention and guarantee the exercise of the right to asylum.

Although it has not to be regarded as an agreement, the EU–Turkey Statement reveals at least two problematic issues vis-à-vis Article 18 of the Charter. On the one hand, it hampers the legitimate claim to the secondary rights enshrined in the Refugee Convention; on the other hand, even accepting that Turkey is a safe third country, one may wonder to what extent the EU–Turkey deal preserves the practical effect of Article 18 and more broadly of the whole international protection policy of the EU, which Advocate General Mengozzi in *X, X v. État belge*, directly linked with the ‘humanitarian values and respect for human rights on which European construction is founded’.¹³⁴

IV Final Prescriptions

In an attempt to diagnose the right to asylum enshrined in Article 18 of the Charter of Fundamental Rights of the EU, this analysis has compared different hermeneutical approaches and reflected on the contextualisation of the provision at issue through the lens of the judicial interpretation at the domestic and EU level in order to carve out accurate prognoses.

Despite the rather obscure wording, Article 18 constitutes an overriding axiological principle, as for the first time since the 1948 Universal Declaration, it enshrines within the European context a provision recalling the right ‘to seek and enjoy asylum’. Unfortunately, as stressed by Gil-Bazo, ‘the lack of clarity of this provision is an example of unsatisfactory legal drafting and it raises issues under the principle of legal certainty’,¹³⁵ which the Court of Justice is called to ensure.

The research underscores that despite its ‘constitutionalisation’ within primary law in the terms of Article 18, asylum remains a far too amorphous right under EU law and it is a pathological element of the Charter. As emphasised, this is partly due to the fact that the provision has gone virtually unnoticed in the case law of the Court of Justice that on a few occasions has declined to clarify the scope of Article 18. Nonetheless, in a context such as the EU, which is increasingly affected by ongoing applications for international protection, Article 18 remains a paramount provision, whose potential is still ‘partially dormant’.¹³⁶ For this not to remain dead letter, it is thus crucial to provide some final prescriptions.

The hermeneutical diagnosis suggests that, despite being regarded as a fundamental right by its subject-matter, including the guarantee for a third country national to have access to international protection within the EU, the right to asylum would constitute a principle by virtue of its operation, thereby calling upon the public authorities and the legislator at the domestic and the EU levels to promote its exercise.

From this perspective, national judges are therefore required to (re)consider the potential of Article 18 while applying the EU asylum legislation and to engage in a dialogue with the ECJ through the instrument of the reference for preliminary rulings. Significantly, in a recent Grand Chamber’s ruling, the Court of Justice stressed the importance of this special instrument by precluding any provision of national law or jurisprudential practice from preventing a chamber of a court of final instance faced with

¹³⁴ See, Case C-638/16, PPU, *X, X, v. État belge*, Opinion of Advocate General, above, n. 126, para. 6.

¹³⁵ Gil-Bazo, above, n. 16, 44–45.

¹³⁶ Ippolito, above, n. 80, 5.

a question concerning the interpretation of EU law from referring the matter to the Court of Justice for a preliminary ruling.¹³⁷

In addition, awaiting a more authoritative interpretation by the Luxembourg Court, it is worth reiterating that in its case law on Dublin transfers, the ECJ, and in particular Advocates General, have provided some significant findings. In this context, it must be remembered that the Advocates General's task is not only to provide a wider argumentation that the Luxembourg judges can follow in the final judgement, but their opinion is important also for national courts, as well as for the parties to the dispute in question who can use those arguments.¹³⁸

In particular, it is suggested that the whole CEAS be instrumental to ensure the effective exercise of the fundamental right to asylum, including the right to have access to international protection and to claim the secondary rights enshrined in the Refugee Convention and the Qualification Directive. This would imply, *inter alia*, that in case of Dublin transfers, arguments, as suggested by the Court in *Halaf*, can be based on Article 18 in order not to proceed to a removal that will result in the denial of the right to access to effective asylum procedures.¹³⁹ It follows that the scope of Article 18 cannot be limited exclusively to compliance with *non-refoulement*, since, as also emphasised by the Irish Supreme Court,¹⁴⁰ it would entail the fundamental right to have access to effective procedures for assessing asylum seekers' needs for protection. More specifically, as stressed by the UNHCR,¹⁴¹ it encompasses a set of rights that an applicant can claim from the moment he or she enters the State jurisdiction until an adequate protection status is granted.

Ultimately and more broadly, even though the exact scope of the right to asylum in the EU Charter is far from being settled, in the light of the recent controversial EU–Turkey Statement and at a very critical time for the future sustainability of the CEAS, Article 18 calls on the EU as a whole and each Member State to take on the responsibility to confirm that this normative system is 'devised by the European Union to enable that fundamental right [to asylum] to be exercised'.¹⁴²

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¹³⁷ Case 689/13, *Puligienica Facility Esco SpA (PFE)*, 5 April 2016, para. 35.

¹³⁸ For general references, see N. Burrows and R. Greaves, *The Advocate General and EC Law* (Oxford University Press, 2007); see also T. Tridimas, 'The Role of the Advocate General in the Development of Community Law: Some Reflections', (1997) 34 *Common Market Law Review*, 1349–1387.

¹³⁹ *Halaf*, above, n. 110, paras. 40–42.

¹⁴⁰ *T.D. v. Minister for Justice Equality and Law Reform*, above, n. 84.

¹⁴¹ UNHCR, above, n. 113, para. 2.2.8.

¹⁴² Case 394/12, *Abdullahi*, Opinion of Advocate General, above, n. 118, para. 40.