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The Court of Justice of the European Union as a Fundamental Rights Tribunal

Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice

Sergio Carrera, Marie De Somer and Bilyana Petkova

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Abstract

This paper reflects on the challenges facing the effective implementation of the new EU fundamental rights architecture that emerged from the Lisbon Treaty. Particular attention is paid to the role of the Court of Justice of the European Union (CJEU) and its ability to function as a ‘fundamental rights tribunal’. The paper first analyses the praxis of the European Court of Human Rights in Strasbourg and its long-standing experience in overseeing the practical implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Against this analysis, it then examines the readiness of the CJEU to live up to its consolidated and strengthened mandate on fundamental rights as one of the prime guarantors of the effective implementation of the EU Charter of Fundamental Rights. We specifically review the role of ‘third-party interventions’ by non-governmental organisations, international and regional human rights actors as well as ‘interim relief measures’ when ensuring effective judicial protection of vulnerable individuals in cases of alleged violations of fundamental human rights. To flesh out our arguments, we rely on examples within the scope of the relatively new and complex domain of EU legislation, the Area of Freedom, Security and Justice (AFSJ), and its immigration, external border and asylum policies. In view of the fundamental rights-sensitive nature of these domains, which often encounter shifts of accountability and responsibility in their practical application, and the Lisbon Treaty’s expansion of the jurisdiction of the CJEU to interpret and review EU AFSJ legislation, this area can be seen as an excellent test case for the analyses at hand. The final section puts forth a set of policy suggestions that can assist the CJEU in the process of adjusting itself to the new fundamental rights context in a post-Lisbon Treaty setting.

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Sergio Carrera, Marie De Somer and Bilyana Petkova *

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I believe that not always enough attention is paid to the question of how to really render effective existing law. Too often the discussion focuses on the elaboration of new legal texts. However, the challenge for all of us should be less to produce new standards but rather to ensure the effectiveness of all the existing rights. The question of how to render effective the existing law should be examined thoroughly, as it enables us to connect abstract legal texts with the reality that citizens face on the ground.

Viviane Reding
Vice-President, European Commission,
Commissioner for Justice, Fundamental Rights and Citizenship¹

1. Introduction: The new EU fundamental rights architecture, from design to effective delivery

The Lisbon Treaty consolidated and increased the emphasis on the protection of fundamental rights in the EU's legal system.² Among the changes, the most significant have been the conversion of the Charter of Fundamental Rights of the European Union (hereinafter the 'EU Charter') into a legally binding 'bill of rights' for the Union,³ and the official mandate for the

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¹ Speech delivered at CEPS, Brussels, 16 April 2012.

² Fundamental rights are now formally ranked among the foundational values of the Union in Art. 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." See also Art. 3, para. 3 TEU: "It [the EU] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

³ Art. 6(1) TEU.

EU to accede to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁴ which is currently at an advanced stage of negotiations. These innovations give the Union a strengthened fundamental rights mandate that has provided the basis for the emergence of a novel ‘fundamental rights architecture’.⁵ The rights contained in the EU Charter now have the same legal value as the Treaties, and are to be respected in all EU legislation and national implementing measures by member states, European institutions and agencies.

The challenge, however, as Commissioner Reding rightly put it, consists of turning what is merely an architectural design into an effective institutional, policy and legal apparatus that ensures the practical delivery of fundamental rights to individuals.⁶ The role of the Court of Justice of the European Union (CJEU) will be essential in this regard, especially when it comes to guaranteeing that every person whose fundamental rights have been allegedly violated has access to an effective remedy as envisaged in Art. 47 of the EU Charter.⁷

This paper reflects on the issues affecting the implementation of the new EU mandate on fundamental rights and the readiness of the CJEU to deliver justice when faced with cases of alleged or potential violations of fundamental rights. Our reflection arrives at a very timely moment, as a recast of the CJEU Rules of Procedure and the Court’s Statute are currently under review.⁸ To flesh out our arguments, we rely on examples of European law on asylum, immigration and external border control that fall within the scope of a rather complex and highly dynamic domain of European legislation – the Area of Freedom, Security and Justice (AFSJ). In view of the fundamental rights-sensitive nature of AFSJ policies, and the dilemmas related to accountability and access to justice currently characterising them, we argue that in these particular EU policy areas the effective judicial adjudication of the rights provided by the EU Charter will be a crucial test case for the CJEU to live up to its consolidated role as a fundamental rights tribunal (section 2).

Our analysis continues with an assessment of the CJEU’s role as the prime guardian of the EU Charter (section 3). It moves on to a review of important procedural standards in the procedural practices of the European Court of Human Rights (ECtHR), which for years has sought to

⁴ Art. 6(2) TEU stipulates that “[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”

⁵ In addition to the emphasis given by the Treaties to fundamental rights protection, the EU’s fundamental rights system pre-Lisbon Treaty was further complemented by the establishment of a specific directorate-general in the European Commission dealing with matters related to fundamental rights (DG Justice, Fundamental Rights and Citizenship) and a European Union Agency for Fundamental Rights (FRA). See the European Commission’s website, “Building an area of European justice” (http://ec.europa.eu/justice/index_en.htm) and the FRA’s website (http://fra.europa.eu/fraWebsite/home/home_en.htm), last accessed on 13 August 2012.

⁶ In this regard see also the European Commission’s *2010 Report on the Application of the EU Charter of Fundamental Rights*, COM(2011) 160 final, Brussels, 30 March 2011 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0160:FIN:EN:PDF>) and its *2011 Report on the Application of the EU Charter of Fundamental Rights*, COM(2012) 169 final, Brussels, 16 April 2012 (http://ec.europa.eu/justice/fundamental-rights/files/2011-report-fundamental-rights_en.pdf).

⁷ Art. 47 of the EU Charter provides that “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.

⁸ In March 2011 the CJEU proposed several amendments to its Statute. See respectively, 7338/11 JUR 78 COUR 4 in what concerns the Court of Justice, 7398/11 JUR 79 COUR 5 in relation to amendments to the General Court and 7399/11 JUR 80 COUR 6 on the Civil Service Tribunal.

protect the rights enshrined in the ECHR, first agreed in 1950 (section 4). Building on the experiences or ‘lessons learned’ from the ECtHR, the paper reflects on the challenges arising from the status quo at the CJEU when dealing with the EU Charter and its interface with AFSJ policies (section 5). It then provides a set of policy suggestions geared towards adapting existing EU legal procedures and judicial practices to the demands stemming from the fundamental rights landscape since the Lisbon Treaty (section 6).

2. The Area of Freedom, Security and Justice: Accountability gaps, responsibility shifts

The AFSJ – and perhaps most notably its policies on asylum, immigration and external border control – has been subject to growing attention by academics, international and European regional organisations and civil society groups as a result of increasing difficulties in ensuring effective fundamental rights protection in practical application.⁹ The implementation of EU legislative instruments aimed at harmonising the management of the external borders, asylum and refugee protection have showed multifaceted shortcomings when it comes to guaranteeing that the fundamental rights of persons on the move are accounted for across the multi-level governance of the Union.

Three instances are of particular salience in illustrating the currently outstanding tensions in the effectiveness of the EU Charter within the scope of AFSJ policies: first is the presumption that all EU member states protect and share equal fundamental rights standards; second is the existence of accountability gaps in EU external border and migration management practices; and third is the high degree of vulnerability of the persons subject to EU asylum, immigration and border policies and practices.

The first issue becomes most visible for instance in relation to one of the key pillars of the Common European Asylum System, the so-called ‘Dublin Regulation’,¹⁰ which allocates responsibility among EU member states for asylum applications. The Dublin system has been built on the presumption that all EU member states equally respect fundamental rights, asylum procedures and reception conditions of asylum seekers (i.e. the principle of mutual trust). This presumption has become increasingly contested in light of the failures evidenced in several EU member states to protect the fundamental rights of asylum seekers.

⁹ See S. Carrera, E. Guild, L. den Hertog and J. Parkin, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies – Frontex, Europol and the European Asylum Support Office*, Study prepared for the European Parliament (Policy Department C – Citizens’ Rights and Constitutional Affairs), CEPS, Brussels, August 2011 (<http://ceps.eu/ceps/download/6312>). See also S. Carrera, E. Guild, M. Massimo and J. Parkin, *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*, CEPS Papers in Liberty and Security in Europe, CEPS, Brussels, April 2011 (<http://ceps.eu/ceps/download/5512>); B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff, 2010; European Council on Refugees and Exiles (ECRE) and Amnesty International, *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*, ECRE, Brussels, 2010 (<http://www.ecre.org/topics/areas-of-work/access-to-europe/94-ecre-and-amnesty-international-joint-briefing-on-the-commission-proposal-to-amend-the-frontex-regulation.html>).

¹⁰ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25.2.2003 (the Dublin II Regulation).

The dysfunctional nature of the Greek asylum system and the consequent humanitarian crisis resulting from inadequate detention practices and facilities have been widely reported.¹¹ The relevance of this situation extends beyond the particular case of Greece towards all EU member states in showing that the respect of fundamental human rights cannot be taken for granted in the Union. The breakdown in Greece, however, did not prevent certain EU member states from continuing to send asylum seekers back to Greece in compliance with a strict application of the Dublin Regulation. This is a practice that, as we further discuss in sections 4 and 5 below, has recently been declared incompatible with states' obligations on human rights by the ECtHR in Strasbourg and subsequently the CJEU in Luxembourg.

A second case concerns activities for EU migration and external border controls, including those carried out by EU home affairs agencies like Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, based in Warsaw).¹² These have been said to raise a number of policy dilemmas from the perspective of legal and judicial accountability in cases of alleged violations of fundamental rights,¹³ which have proved particularly problematic in the Mediterranean context and in the framework of joint operations on border control and surveillance involving member states' authorities under the coordination of Frontex.

Since the adoption of the amended version of the Frontex Regulation,¹⁴ Frontex now has a stronger role in the coordination and organisation of joint operations and in the deployment of European border guard teams at national levels under the supervision of a Frontex coordination officer (FCO). The FCO is entrusted to monitor and report on the adequate implementation of the operational plan (and its compliance with fundamental rights) guiding the border control or surveillance operations (or both) under its coordination. The reinforced role of Frontex has therefore consolidated the grounds for the potential liability (and responsibility) of the Agency before competent national tribunals and (potentially) even directly before the CJEU in cases of fundamental rights violations or other serious incidents.

Furthermore, the border and migration control practices in the Mediterranean show a highly complex picture, with a plethora of multi-level authorities operating together. In this context, responsibility for potentially unlawful actions or serious incidents in external border controls shifts from one actor to another and becomes too fluctuating in nature to provide for effective

¹¹ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Public statement concerning Greece*, CPT/Inf (2011) 10, Strasbourg, 15 March 2011 (<http://www.cpt.coe.int/documents/grc/2011-10-inf-eng.htm>). See also the European Union Agency for Fundamental Rights (FRA), *Coping with a fundamental rights emergency: The situation of persons crossing the Greek land border in an irregular manner*, FRA, Vienna, 2011 (http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub_greek-border-situation_en.htm).

¹² For more information, see the Frontex website (<http://www.frontex.europa.eu/>), last accessed on 13 August 2012.

¹³ See J.J. Rijpma, "Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions: The case of Frontex", in M. Busuioc, M. Groenleer and J. Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making*, Manchester: Manchester University Press, 2012 (forthcoming). See also J. Pollack and P. Slominski, "Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders", *West European Politics*, Vol. 32, No. 5, 2009, pp. 904-924.

¹⁴ Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1, 22.11.2011.

monitoring, accountability and access to justice for the affected individuals.¹⁵ When the actions of such law enforcement agencies open fundamental rights questions, it is often difficult to retrieve information about what happened on the ground. This lack of clarity is of particular concern when it comes to establishing responsibility for migrants and asylum seekers crossing the Mediterranean Sea, often in unseaworthy vessels. As illustrated by a recent scrutiny report carried out by the Parliamentary Assembly of the Council of Europe,¹⁶ the case of the ‘left-to-die boat’ – which led to the deaths of 63 people owing to the lack of rescue by several national and supranational authorities – is exemplary of the challenges for EU policies on migration and border control.¹⁷

A third issue that adds to the fundamental rights sensitivity of the EU’s AFSJ is associated with the high level of vulnerability characterising the individuals affected by these policies. The main concern is not just that certain third-country nationals might be insufficiently informed about the rights they enjoy under EU law. Most importantly it relates to the barriers they encounter when seeking effective remedies before a tribunal in cases of alleged rights violations. These shortcomings are further aggravated in cases of financial vulnerability, when other priorities may confound the pursuit of information regarding legal rights or the wish to bear the costs often associated with pursuing a legal complaint. In affairs connected with extraterritorial border control, which constitutes a new EU practice on border control that is conducted in the territory of African states, access to legal remedies for persons returned or ‘pushed back’ to countries of origin or transit is for obvious reasons aggravated even further.

Taken together, these issues illustrate the way in which the AFSJ constitutes a crucial test case for the effective practical application of the post-Lisbon framework on fundamental rights in general, and the EU Charter in particular. Divergences among EU member states on fundamental rights standards, accountability gaps and responsibility shifts for actions under EU law on migration and external border control, as well as access to justice for holders of fundamental human rights who are at risk of being adversely affected by such measures and actions, make the protection of their rights as provided for by the EU Charter especially challenging in these policy domains. It is the argument of this paper that the challenges described above will test, most directly, the capacity of the Court of Justice of the European Union to provide effective remedies when fundamental rights are at stake.

3. Role of the CJEU as the prime guarantor of the EU Charter

The CJEU has been placed at the heart of the new architecture on fundamental rights, and can be regarded as one of its key guarantors. Art. 47 of the EU Charter confers the right to an effective remedy to everyone whose rights and freedoms guaranteed by the law of the Union might have been violated by executive power.¹⁸ Although all EU institutions have declared their commitments to ensuring respect for the EU Charter throughout the various phases of the EU’s

¹⁵ See also Carrera, Guild, den Hertog and Parkin (2011), op. cit.

¹⁶ T. Strik, *Lives lost in the Mediterranean Sea: Who is responsible?*, Report for the Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, Council of Europe, 29 March 2012.

¹⁷ Ibid.; see also T. Heller, L. Pezzani and S. Studio, *Report on the “Left-To-Die Boat”*, Forensic Oceanography, European Research Council Project “Forensic Architecture”, Centre for Research Architecture, Goldsmiths, University of London, 2012 (http://www.fidh.org/IMG/pdf/rapport_expert_independant.pdf); and also Carrera, Guild, den Hertog and Parkin (2011), op. cit.

¹⁸ Note that in 2011 this right was quoted no fewer than 14 times, making it the most frequently cited article of the EU Charter. See the European Commission’s *2011 Report on the Application of the EU Charter of Fundamental Rights* (2012), op. cit., pp. 85-88.

legislative processes,¹⁹ rights – in order to be rendered substantive – above all require ‘effective remedies’ in case of alleged or possible violations. Hence, the implementation of the EU Charter will depend to a very large extent on the way the CJEU responds to the new context in which it now finds itself after the Lisbon Treaty. The new post-Lisbon Treaty role of the Luxembourg Court can be summarised as follows:

- First, by repealing the constraints under the previous Art. 68 of the Treaty establishing the European Community (TEC),²⁰ the new Treaty of the Functioning of the European Union (TFEU) now grants full judicial review capacities to the CJEU in the particularly fundamental rights-sensitive areas of migration, border control and asylum.²¹ Among others, abolition of the restriction on preliminary questions (the Art. 267 procedure) to those questions raised by national courts of last instance under domestic law (ex Art. 68(1)) is expected to lead to a significant increase in the caseload of the Court in these domains.²²
- A second innovation is provided in Art. 263 TFEU, which foresees the possibility that when acts of EU agencies produce ‘legal effects’, these can fall under the judicial scrutiny of the CJEU. As a result, agencies like Frontex, and in the future the European Asylum Support Office in Malta, could be held accountable before the Court for any actions that may have resulted in alleged breaches of fundamental rights. As we have argued elsewhere,²³ the official discourse according to which EU home affairs agencies are ‘only’ involved in assisting member states and coordinating operational cooperation

¹⁹ In all the legislative proposals it prepares, the Commission has reinforced the aspect of assessing the impact on fundamental rights, and has committed itself to ensuring that the Charter is respected when overseeing the implementation of EU law by member states. Both the Council and the European Parliament as co-legislators have confirmed their respective responsibilities in assessing the impact on fundamental rights of their proposals and amendments. See the European Commission’s *2011 Report on the Application of the EU Charter of Fundamental Rights* (2012), op. cit., pp. 5-7.

²⁰ Whereas Art. 68 of the Treaty of Amsterdam formally established jurisdiction for the CJEU in AFSJ matters, it simultaneously imposed a number of important limitations to this jurisdiction. To begin with, the CJEU’s rulings regarding the interpretation of measures adopted under Title IV would not apply to national judgments that had already become *res judicata* (ex Art. 68(3) EC). The Court was also excluded from ruling on any national measures regarding controls on border crossings adopted with a view to safeguarding internal security and related to the maintenance of law and order (ex Art. 68(2)). The most significant limitation, however, concerned the restriction of requests for preliminary rulings under the Art. 267 procedure to those questions raised by courts of last instance under national law (ex Art. 68 (1)).

²¹ Provisions on criminal law and police and judicial cooperation have also been made subject to the general rules on the jurisdiction of the EU courts, save for two restrictions. See R. Barents, “The Court of Justice after the Treaty of Lisbon”, *Common Market Law Review*, Vol. 47, No. 3, 2010, p. 719.

²² As has been extensively documented elsewhere, higher courts are generally more reluctant to ask for preliminary rulings compared with low or intermediate courts within the same national system. See K. Alter, “Who are the ‘Masters of the Treaty’? European Governments and the European Court of Justice”, *International Organization*, Vol. 25, No. 1, 1998, pp. 125-152; see also W. Mattli and A. Slaughter, “Revisiting the European Court of Justice”, *International Organization*, Vol. 25, No. 1, 1998, pp. 177-209. Moreover, legal proceedings in the area of migration, by their nature, are not often able to come before the highest national courts. With regard to cases in the area of asylum, see M. Garlick, “The Common European Asylum System and the European Court of Justice – New Jurisdiction and New Challenges”, in E. Guild, S. Carrera and A. Eggenschwiler (eds), *The Area of Freedom, Security and Justice ten years on – Successes and future challenges under the Stockholm Programme*, CEPS, Brussels, 2010.

²³ Carrera, Guild, den Hertog and Parkin (2011), op. cit.

among the former does not do away with their potential legal responsibility and liability in cases of fundamental rights violations before supranational tribunals, such as that sitting in Luxembourg.

- Third, the Lisbon Treaty also added a fourth paragraph to Art. 267 TFEU obliging the CJEU to decide with “the minimum of delay” whether a preliminary question raised in a case pending before a national court has regard to a person in custody. In practical terms, this obligation strengthens the application of the accelerated procedure²⁴ and the urgent preliminary ruling procedure (PPU).²⁵ These procedures can prove to be essential to cases arising in the AFSJ, most notably in the area of asylum policies, where the maxim ‘justice delayed is justice denied’ is of particular relevance.²⁶
- Fourth, Art. 52(3) of the EU Charter²⁷ has established a legally binding threshold of protection below which the CJEU cannot fall. This provision requires the Luxembourg Court to interpret the fundamental rights enshrined in the EU legal system corresponding to the rights protected by the ECHR (including the authorised limitations or exceptions to them) in a way that would offer protection no less than that warranted by the Strasbourg Court. This is intended to ensure the necessary consistency between the EU Charter and the ECHR. The second indent of Art. 52(3), modelled on Article 53 ECHR, explicitly allows the Court to afford a more extensive level of protection than that offered by Strasbourg.²⁸

Taken together, these innovations are expected to bring about a large increase in litigation on issues regarding migration, border controls and asylum before the Luxembourg Court. This expectation is further strengthened by the dynamic progression experienced by EU harmonisation processes in AFSJ domains during the last 13 years. The more the member states act ‘within the scope of EU law’, the more the CJEU will be called upon to interpret and review EU policies and their implementation, as well as their compatibility with the EU Charter. Similarly, the above-mentioned continued expansion of the competences of EU home affairs agencies in the areas of oversight and coordination of operational cooperation in border control/surveillance actions will increase their exposure to judicial review.²⁹ All in all, the increase in fundamental rights-sensitive cases that is expected to transpire from the Lisbon Treaty changes outlined above only adds to the enhanced, substantive mandate on fundamental rights entrusted to the CJEU.

The resulting scenario is likely to be one in which, in a number of forthcoming cases, the Court will be facing difficult decisions regarding the interpretation and application of the provisions of the EU Charter, especially where these intersect with AFSJ legislation. The CJEU will bear a very high degree of responsibility for a number of sensitive questions concerning potential

²⁴ Art. 104(a) of the Rules of Procedure.

²⁵ Art. 23(a) of the Statute and Art. 104(b) of the Rules of Procedure.

²⁶ See K. Lenaerts, “The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice”, *International and Comparative Law Quarterly*, Vol. 59, No. 2, 2010, p. 273.

²⁷ Art. 52(3) of the EU Charter states that “[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

²⁸ Refer to Art. 53 of the ECHR – “Safeguard for existing human rights” – according to which “[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”.

²⁹ Carrera, Guild, den Hertog and Parkin (2011), *op. cit.*, pp. 82-87.

breaches of migrants' and asylum seekers' fundamental rights under EU AFSJ policies and practices. This will be no easy task in light of the barriers posed by the accountability, shifting responsibilities and access to justice characterising AFSJ implementation activities as described in section 2 above. The CJEU will need to overcome these barriers if it is to live up to its reinforced role in fundamental rights.

Does the CJEU possess all the necessary instruments and procedural tools to fulfil this task? How could the CJEU further improve or strengthen its current capacities to effectively perform its function as a fully-fledged, fundamental rights tribunal in the AFSJ? To address these questions, it is helpful to look at the work and procedural instruments in the hands of the supranational human rights tribunal *par excellence* in Europe – the ECtHR – and its long-standing efforts and experience in overseeing the implementation of the ECHR.

4. Experience of the European Court of Human Rights: Standards and lessons learned

An assessment of the case record of the ECtHR reveals a pattern of evolution that has gradually allowed the Strasbourg Court to progressively enhance its preeminent role in the adjudication of human rights breaches by states party to the ECHR. For several decades now, the ECtHR has watched over the effective implementation of the rights enshrined in the ECHR, including in such complex and sensitive areas of law and policy as the intersection of human rights and migration, asylum and border controls. In so doing, the ECtHR has given itself a number of procedural tools that have permitted it to ensure that the human rights envisaged by the Convention are rendered justiciable entitlements for individuals. Moreover, the ECtHR has also alleviated the requirement according to which it can only intervene after the exhaustion of all domestic remedies (Art. 35(1) ECHR). The Court has limited the requirement to those cases where the national remedies are deemed to be effective and capable of providing redress to the applicants.³⁰

The procedural mechanisms in the hands of the Strasbourg Court can be considered 'standards' against which to measure the CJEU's practices in the process of fine-tuning its own role as a fundamental rights tribunal for the Union. Two ECtHR tools are of particular relevance: first, the possibility for non-state third parties to intervene and submit observations before the Court (third-party interventions); and second, the possibility for the ECtHR to freeze an action posing an imminent risk of irreparable damage to an applicant's ECHR rights in attendance of a ruling (the Rule 39 procedure).

4.1 Third-party interventions

The ECtHR has gradually transformed its practices to allow for the third-party interventions (also known as *amici curiae* briefs or friends of the Court) of non-governmental organisations (NGOs) and international and regional human rights actors to be submitted to the Court. The facts-based information that is provided through such third-party interventions has often substantively facilitated the effective judicial protection of individuals' human rights, especially when concerning persons with a vulnerable administrative or legal status (e.g. asylum seekers and undocumented immigrants) and who are not able to seek all necessary evidence to argue their case.³¹

³⁰ *Salah Sheekh v. The Netherlands* (Application no. 1948/04, ECHR, 11 January 2007).

³¹ This was formalised by Art. 36(2) of the Convention, which grants the president of the ECtHR the discretionary power to request or allow such parties to intervene "in the interest of the proper administration of justice".

Civil society and multi-level human rights organisations have contributed to the effective monitoring of the ECHR by providing legal expertise as well as on-the-ground information and evidence (contributions on law and facts) that have been instrumental to the Strasbourg Court's evaluations of alleged human rights violations by state parties. Research on the impact of such third-party observations shows that while submissions were filed in a relatively small number of cases in view of the total ECtHR judgments delivered per year, the cases in which organised representatives of civil society and international organisations chose to intervene were usually landmark decisions.³² It must be borne in mind that under no circumstances has the Court (or the parties) been obliged to follow the line of reasoning or opinions given by the interveners involved.

Appendix 1 of this paper provides an overview of landmark cases in the areas of migration, asylum and border control, showing the involvement of NGOs and human rights organisations before the ECtHR. Among other organisations, the most active before Strasbourg have been the UN Refugee Agency (UNHCR), Amnesty International, the AIRE Centre (Centre for Advice on Individual Rights in Europe), Human Rights Watch (HRW), the International Federation for Human Rights (FIDH), Liberty (UK-based National Council for Civil Liberties), Helsinki Monitor and ANAFE (Association for Assisting Aliens at Borders). The ECtHR has also on various occasions invited experts to give opinions in pending cases. Among others, the Venice Commission (the European Commission for Democracy through Law),³³ an expert body of the Council of Europe composed of constitutional law experts, and again the UNHCR, have often been asked, on the Court's own motion, to provide related expertise.³⁴ The office of the Council of Europe Human Rights Commissioner, which performs a decisive role in fostering and monitoring effective observance of human rights in member states, has been another usual intervener before the ECtHR, submitting written observations and participating in the hearings of selected cases.³⁵

It is beyond the scope of this paper to examine the actual impact of the submitted third-party intervention in each of the relevant cases.³⁶ That notwithstanding, a short account of two recent landmark ECtHR cases – *Hirsi and others v. Italy* and *M.S.S. v. Belgium and Greece* – can serve well to illustrate the relevance of third-party interventions to enable a court of fundamental human rights to assure effective judicial protection.

³² See R. Cichowski, "Civil Society and the European Court of Human Rights", in J. Christoffersen and M. Rask Madsen (eds), *The European Court of Human Rights between Law and Politics*, Oxford: Oxford University Press, 2011; see also J. Razzaque, "Changing role of friends of the court in the international courts and tribunals", *Non-State Actors and International Law*, Vol. 1, No. 3, 2002, pp. 169-200.

³³ For more information see the website of the Council of Europe, Venice Commission, "Presentation" (http://www.venice.coe.int/site/main/Presentation_E.asp), last accessed 13 August 2012.

³⁴ Relevant to the discussion on migration, asylum and border controls is the recent case *Sharifi v. Italy and Greece* (Application no. 16643/09, pending), where the Court invited the UNHCR to intervene.

³⁵ For more information, see the website of the Council of Europe, Commissioner for Human Rights, "Third party interventions by the Commissioner for Human Rights" (http://www.coe.int/t/commissioner/Activities/3PIntervention_en.asp), last accessed 13 August 2012.

³⁶ For a broader overview, see S. Carrera and B. Petkova, "The role and potential of civil society and human rights organizations through third party interventions before the European Courts: The case of the EU's Area of Freedom, Security and Justice", in M. Dawson, E. Muir and B. de Witte (eds), *Judicial Activism at the Court of Justice: Causes, Responses and Solutions*, Cheltenham: Edward Elgar, 2012 (forthcoming).

4.1.1 *Hirsi and others v. Italy*

In the seminal *Hirsi* case of February 2012,³⁷ the ECtHR found Italy to be non-compliant with the ECHR because of the extra-territorial ‘push-back’ to Libya of a ship with Eritrean and Somali nationals in May 2009. In its ruling, the Strasbourg Court held that the general situation in Libya was widely documented as being at odds with Convention standards. As such, the Italian ‘push back’ practice of forced return was not in line with the fundamental principle of non-refoulement (which protects refugees from being expelled or returned – *refoulé* – to places where their lives or rights would be threatened) or the prohibition of inhuman and degrading treatment under Art. 3 ECHR or the provision of an effective remedy under Art. 13 of the same Convention.³⁸

The groundbreaking elements of the judgment were that the ECtHR held Convention rights to be applicable ‘extraterritorially’, and – as a result – that the nature of extraterritorial border controls established in a bilateral agreement between Italy and Libya violated the ECHR.³⁹ The ECtHR therefore offered a dynamic interpretation of the jurisdiction concept (foreseen in Art. 1 ECHR) so as to avoid legal vacuums. This judgment is of seminal importance to the EU’s AFSJ as well: the possibility for the EU and/or other member states to sign agreements with third countries modelling the Italian–Libyan one, or to carry out similar border control/surveillance practices becomes highly questionable as their compatibility with the rights of the EU Charter, and the ECHR upon EU accession to it, is doubtful.

With regard to the establishment of the facts in the landmark *Hirsi* ruling, the ECtHR relied extensively on information collected by human rights organisations and NGOs. As illustrated in appendix 1 of this paper, these were Amnesty International, AIRE, HRW, UNHCR and FIDH. The reports, press releases and third-party interventions of these non-state actors were either directly quoted or referred to in the final version of the judgment. They served as substantial grounds for the Court to establish that, given the general critical situation in Libya as regards the human rights of asylum seekers and refugees, and its incompatibility with the ECHR, Italy had breached its obligations under the ECHR by considering Libya a ‘safe country’.⁴⁰ The contributions and evidential input submitted by the third parties also supplied legal arguments to the Court, reinforcing findings on the establishment of extraterritorial jurisdiction, necessary for Italy to be held liable under the Convention.⁴¹

³⁷ *Hirsi and others v. Italy* (Application no. 27765/09, 23 February, 2012).

³⁸ See L. Den Hertog, *Two Boats in the Mediterranean and their Unfortunate Encounters with Europe’s Policies towards People on the Move*, CEPS Papers in Liberty and Security in Europe, CEPS, Brussels, 20 July 2012.

³⁹ For the most relevant parts of the judgment, see *Hirsi and others v. Italy* (Application no. 27765/09, 23 February 2012), paras. 76-82, 122-138, 146-158, 166-186 and 201-207.

⁴⁰ See paras. 118, 123, 125, 126, 128, 133, 139, 149-150, 154, 156 and 203 of the judgment.

⁴¹ More particularly, the intervention of the Columbia Law School Human Rights Clinic, in “drawing on international and regional jurisprudence, the first section [of its submission] describes legal constraints on interdiction practices, including the extraterritorial applicability of the non-refoulement principle and the procedural protections that states owe to interdicted migrants”. The submission was jointly prepared on behalf of the Columbia Law School Human Rights Clinic, African Refugee Development Center, Allard K. Lowenstein International Human Rights Clinic at Yale Law School, Center for Social Justice at Seton Hall University School of Law, Florida Coastal School of Law Immigrant Rights Clinic, Institute for Justice & Democracy in Haiti, Migrant and Refugee Rights Project of the Australian Human Rights Centre at the University of New South Wales School of Law, Physicians for Human Rights and Professors James Gathii, Tally Kritzman-Amir, Stephen H. Legomsky and Margaret L. Satterthwaite. See Columbia Law School Human Rights Clinic, “In the European Court of Human Rights Application no.

4.1.2 *M.S.S. v. Belgium and Greece*

Another seminal case where third-party interventions played a fundamental role was the *M.S.S. v. Belgium and Greece* case of January 2011.⁴² Among others, the ECtHR received contributions from Amnesty International, UNHCR, AIRE, HRW and the Helsinki Monitor. The Council of Europe Human Rights Commissioner also presented a written contribution and intervened orally in the case.⁴³ All in all, the Strasbourg Court relied on no fewer than 22 reports that described the gravity of the asylum situation in Greece, in order to establish that the ‘Dublin transfer’ of an Afghan asylum seeker from Belgium to Greece was in violation of the Convention. Not only Greece, but also Belgium was found to be in breach of the ECHR for sending an asylum seeker back to the state of first entry without assessing whether *in practice* the receiving EU member state complied with its fundamental rights’ obligations.

The information provided by the third-party interveners was especially important for the case as well because it enabled the ECtHR to overturn the precedent it had established in *K.R.S. v. the UK*.⁴⁴ The Court claimed that in the time that had lapsed between the two judgments the situation in Greece had substantially worsened, as evidenced by the many NGO reports and submissions to that effect received by the Court. The significance of the ruling derives from the fact that its remit can be interpreted beyond Greece, to include any EU member state experiencing a systemic failure in its asylum system. The judgment constituted the basis for the ‘non-rebuttable presumption’ of the EU’s Dublin II system being declared untenable and has been mirrored by a subsequent CJEU decision discussed in section 5.1 below.

4.2 Rule 39 procedure

A second powerful procedural instrument developed by the Strasbourg Court is the Rule 39 procedure,⁴⁵ by virtue of which the ECtHR can request the freezing of a state party’s practice while a case is under judicial consideration in exceptional cases. The importance of this *ex ante* mechanism can hardly be underestimated, as stated by the ECtHR’s president: “The application

27765/09 *Hirsi and Others v. Italy: Written Comments*”, New York, NY, 17 April 2010 (<http://ijdh.org/wordpress/wp-content/uploads/2010/06/HirsivItalyFINALbriefColumbiaLaw.pdf>).

⁴² *M.S.S. v. Belgium and Greece* (Application no. 30696/09, 21 January 2011).

⁴³ See Council of Europe, Commissioner for Human Rights, “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 2, of the European Convention on Human Rights □ □ Application no. 30696/09 *M.S.S. v. Belgium and Greece*”, Strasbourg, 31 May 2010 (<https://wcd.coe.int/ViewDoc.jsp?id=1661397>).

⁴⁴ See *K.R.S. v. UK* (Application no. 32733/08, 2 December 2008). Similar to *M.S.S.*, in *K.R.S.*, the applicant, an Iranian national, challenged under Art. 3 of the Convention the decision of the British authorities to deport him back to Greece where he feared both the reception conditions and the risk of being sent back to Iran without a real chance of the merits of his application being examined. Although the application was found inadmissible, in *K.R.S.* the ECtHR *de facto* ruled in favour of the UK, considering that since Greece had transposed both the Reception and the Procedures Directives under EU law, there was no reason to believe that it would not comply with its legal obligations.

⁴⁵ Rule 39 (as amended by the Court on 4 July 2005 and 16 January 2012) states that “[t]he Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it”. See the Rules of Court of the ECtHR (http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf), last accessed on 13 August 2012. See also the “Practice Directions” in the same Rules of Court, outlined in pp. 54-55.

of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable.”⁴⁶

The Strasbourg Court interprets emergency interim measures as intended to prevent situations where there is an imminent real risk of serious or irreparable damage to the applicant if the measure is not adopted, which even a favourable judgment could not undo. Such judicial remedies as the right to appeal against a decision refusing, for instance, entry to an asylum seeker, and the possibility to request an interim relief under domestic law were both declared by the Strasbourg Court to be insufficient remedies in the framework of the Convention, especially in light of the potentially serious consequences of an erroneous determination of an asylum application at first instance.⁴⁷ The ECtHR saw their lack of ‘suspensive effect’ to be contrary to the concept of an effective remedy enshrined in Art. 13 ECHR and therefore developed through its jurisprudence the Rule 39 interim measures, which are binding on the state concerned.

The specific grounds on which Rule 39 can be evoked are not expressly set out in the Rules of the Court, but have instead been delineated by the ECtHR’s evolving case law.⁴⁸ In spite of some recent applications of the Rule 39 procedure to novel thematic areas, the main bulk of Rule 39 interim measures have dealt with cases of deportation or extradition where the applicant would be put beyond the reach of the protection of the ECtHR if removed from the jurisdiction of the Council of Europe.⁴⁹ Such cases are predominantly found in the area of asylum, where the sending back of an asylum-seeker to his/her country of origin or transit could irretrievably close the case before the ECtHR and would lead to a violation of Arts. 2 (the right to life) and/or 3 ECHR (the prohibition of torture and inhuman or degrading treatment).⁵⁰

The granting of interim injunctions can hardly be seen as a revolutionary judicial instrument. As a way to safeguard the rights of one of the parties, interim decisions requiring either positive or negative action in a pending dispute have been regularly given by domestic courts and in recent years, are also increasingly used by international tribunals.⁵¹ The proactive manner in which the ECtHR has used the Rule 39 procedure, however, makes this a more distinctive mechanism. Four features of the procedure, as discussed below, are of particular importance.

⁴⁶ European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), *Research on ECHR Rule 39 Interim Measures*, ECRE, Brussels, April 2012, p. 20 (<http://www.ecre.org/component/content/article/56-ecre-actions/272-ecre-research-on-rule-39-interim-measures.html>).

⁴⁷ This has also been supported by the UNHCR, which has held that given the potentially serious consequences of an erroneous determination of an asylum application at first instance, the suspensive effect of asylum appeals is a crucial safeguard for ensuring the right to effective remedy. See M. Reneman, “An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?”, *European Journal of Migration and Law*, Vol. 12, No. 4, 2010, pp. 407-434.

⁴⁸ See C. Harby, “The Changing Nature of Interim Measures before the European Court of Human Rights”, *European Human Rights Law Review*, Vol. 201, No. 1, 2010, pp. 73-84.

⁴⁹ *Ibid.*; see also ECRE and ELENA (2012), *op. cit.*, p. 14.

⁵⁰ The Strasbourg Court understands interim measures in a broad way too, with the Court giving specific indications to the national authorities beyond prevention of deportation or extradition of the applicant. Thus, among others, interim measures have encompassed guarantees for access to a lawyer, the provision of accommodation or shelter and access to medical treatment – see Harby (2010), *op. cit.*, pp. 73-84.

⁵¹ See G. Letsas, “International Human Rights and the Binding Force of Interim Measures”, *European Human Rights Law Review*, Vol. 5, 2003, pp. 527-538.

First, the ECtHR has interpreted as implicit to the right of individual petition under Art. 34 ECHR the existence of an obligation on the state party to enforce interim measures, thereby conceding binding force to the suspension procedure on the state party.

Second, the Court has decided, on its own motion, that pending the adoption of a judgment and especially after handing such judgment, Rule 39 measures are to be applied in all similar cases. For instance, Rule 39 procedure requests have frequently been made on the application of the Dublin Regulation to prevent transfers of asylum seekers to certain EU member states, most notably Greece.⁵² Furthermore, to deal with the pressure that the large inflow of Rule 39 requests poses on the Court's workload⁵³ and to ensure consistency in its approach, the ECtHR has on several occasions communicated specific requests to member states for specific categories of applicants.⁵⁴ By way of illustration, in attendance of the previously mentioned judgment in *M.S.S. v. Belgium and Greece*, the Strasbourg Court indicated that it would apply the Rule 39 procedure in any case where an asylum-seeker in another contracting state party challenged his/her return to Greece, thereby requesting states to refrain from any action to remove such applicants.⁵⁵

Third, the threshold that has been set by the ECtHR for granting interim measures in its case law is not particularly high so as not to render the issuance of Rule 39 measures excessively difficult in practice. The applicants, or their representatives, need to establish a *prima facie* risk of serious and irreversible harm to their human rights. In addition, given the level of urgency of such applications, the Court does not apply the same level of judicial scrutiny as it usually carries out in the substantive dimension of the application. The applicants or their representatives only need to present an arguable claim that they run a risk of ill treatment if a suspensive interim measure is not granted.⁵⁶

Fourth, either the applicant or his/her representative can send the Rule 39 request for interim measures. Importantly, at this stage of the procedure, the representative can be a family

⁵² See ECRE and ELENA (2012), op. cit., p. 65.

⁵³ Ibid., pp. 15-16, p. 38; see also B.M. Zupančič, "Asylum Requests at the ECHR and its Rule 39 Emergency Procedures", Contribution to the Bled Conference, 8 to 9 September 2011 (http://www.iarj.org/general/images/stories/BLLED_conference/papers/B_Zupancic_paper_Bled_2011.pdf); and also European Court of Human Rights (2012), *Annual Report 2011*, Registry of the European Court of Human Rights, Strasbourg, pp. 39-40 (http://www.echr.coe.int/NR/rdonlyres/219E9A92-716A-4337-99DE-053358F536B3/0/2011_Rapport_Annuel_EN.pdf).

⁵⁴ See ECRE and ELENA (2012), op. cit., pp. 39-45.

⁵⁵ Ibid. Similarly, pending the *N.A. v. the United Kingdom* judgment, the ECtHR requested the British government to stop issuing removals to Sri Lanka, as it would grant interim measures to all cases concerning persons of Tamil origin. In the period October–November 2010, in response to an increasing amount of Rule 39 requests by applicants seeking to prevent their return to Baghdad, the Strasbourg Court communicated to a number of authorities that it would grant interim measures in all such cases. Referring explicitly to concerns voiced by the UNHCR, the ECtHR stated that in view of the reported deterioration in the security situation in Iraq, it needed time to examine the potential risk upon return to that country and therefore requested that governments cease to enforce deportations to Iraq for the time being. See *N.A. v. the United Kingdom* (Application no. 25904/07, 17 July 2008).

⁵⁶ This was clarified by the Grand Chamber of the Court in the case *Paladi v. Moldova*, where it held that [t]he full facts of the case will often remain undetermined until the Court's judgment on the merits of the complaint to which the measure is related. It is precisely for the purpose of preserving the Court's ability to render such a judgment after an effective examination of the complaint that such [interim] measures are indicated. Until that time, it may be unavoidable for the Court to indicate interim measures on the basis of facts which, despite making a *prima facie* case in favour of such measures, are subsequently added to or challenged to the point of calling into question the measures' justification. (Para. 89)

member, friend, lawyer, an NGO (if entitled by the applicant) or anyone in possession of a ‘written authority’ signed by the applicant. In exceptional circumstances where the representatives are not able to obtain the signature of the applicant due to lack of access (for instance, if the applicant is being held in detention), the ECtHR can still consider granting interim relief.

5. Back to the CJEU: Current procedural instruments and challenges to effective judicial protection

As evidenced in the previous section, third-party interventions and the Rule 39 procedure have played a decisive role in the ECtHR’s efforts to effectively monitor the practical application of human rights standards as granted by the ECHR. This section returns to the CJEU, to evaluate the readiness of the Luxembourg Court to provide for the effectual implementation of the EU Charter. In particular, we build upon the experience gained and the lessons learned from the ECtHR to critically review the current mechanisms at the disposal of the CJEU as regards non-state third-party interventions and interim relief measures. For both categories, we reflect upon the main challenges that emerge as a result of their limited scope or effectiveness.

5.1 Access for (non-state) third parties

In contrast with the situation described above regarding the ECtHR’s practice, the CJEU does not possess a similarly open and formalised procedure for non-state third-party interventions.⁵⁷ This is the case for both direct and indirect actions.

First, interventions in ‘direct actions’ by interested parties other than member states or EU institutions (including agencies of the Union) in pending cases before the CJEU – and especially in the so-called ‘actions for annulment’ envisaged in Art. 263 TFEU – cannot be initiated by the interested party per se. They are realised through a procedure whereby only a party that can show a ‘direct and individual interest’ in the outcome of the case (privileged applicants) may present its views before the Luxembourg Court.⁵⁸ The limited *locus standi* (standing) to bring an action for annulment of acts adopted by EU institutions and agencies has been one of the most contentious elements of Art. 263 TFEU. The intervener is limited to supporting the conclusions of one of the parties and cannot raise entirely new grounds upon which neither party has relied.

Second, access for third-party interventions in indirect actions before the Court, such as in the preliminary ruling procedure, is even more restricted. Interested representatives of civil society and human rights organisations cannot address the CJEU directly. Their files and contributions are only passed on to the Luxembourg Court *if* they have been parties in the national judicial proceedings. The recently decided landmark case, *N.S. and M.E.*,⁵⁹ is an exceptional example illustrating this situation, as it constitutes the only preliminary reference so far in the field of asylum where non-state actors actually managed to reach the CJEU as a result of their participation in domestic proceedings.

In the *N.S. and M.E.* case, the Court was asked to rule on ‘Dublin transfers’ from the UK and Ireland to Greece, where the applicants’ fundamental rights were at risk of being violated. In accordance with the non-state interveners, the CJEU established that member states could rely

⁵⁷ For a broader overview, see Carrera and Petkova (2012), op. cit.

⁵⁸ Art. 40 of the Statute of the Court defines the right to intervene in direct actions, whereas Arts. 23 and 23(a) of the Statute specify the respective rules governing the preliminary reference procedure.

⁵⁹ Joined Cases C-411/10 and C-493/10, *N.S. (C-411/10) v. Secretary of State for the Home Department and M. E. and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] OJ C 274/21 and OJ C 13/18.

on a ‘rebuttable’ and not a conclusive presumption that all minimum standards provided for in EU secondary law are duly observed in the receiving member state. The ‘indirect’ third-party interveners included Amnesty International, AIRE, the Equality and Human Rights Commission and the UNHCR, which took part in the UK and Irish national proceedings respectively, and were thus entitled to intervene before the CJEU. Although the Luxembourg Court found the Dublin II system compatible with international human rights law from a legal point of view, it asserted that if a de facto overload of a member state’s asylum system were to mean that rights protected under the EU Charter⁶⁰ would be adversely affected, then the other member state should be obliged not to deport asylum seekers to that state in order to apply the Dublin Regulation in accordance with EU primary law.

The *N.S. and M.E.* case is illustrative of a number of challenges that emerge from the limited role and accessibility by civil society and multi-level human rights organisations before the CJEU:

- 1) The EU is now committed, in accordance with Art. 52(3) EU Charter, to ensuring that the level of protection guaranteed by the EU Charter in those areas overlapping with the provisions of the ECHR is “no less than the protection granted by the ECHR”. This provides the CJEU with an additional incentive to take the Strasbourg Court case law into account when developing its own fundamental rights jurisprudence. If the Luxembourg Court seeks to guarantee “no less than” the protection granted by the ECtHR and if it wants to avoid overriding the *Bosphorus* doctrine⁶¹ (by virtue of which the Strasbourg Court does not review EU legislation, as the latter is considered equally protective of human rights), it will need to align with previous decisions of the ECtHR that treat the same subject matter. In AFSJ-related cases, this has already happened in the *N.S. and M.E.* case, which ‘mirrors’ the rationale of the *M.S.S.* judgment of the Strasbourg Court.

Since non-state third-party interventions can be highly important for the establishment of a lead case in Strasbourg (section 4.1 above), their input also has an impact on the Luxembourg Court’s jurisprudence, albeit indirectly. The merit of such an indirect route, however, is questionable. The question remains vivid with regard to the way in which the CJEU would have decided a case like *N.S. and M.E.* ahead of the ECtHR. The role of non-state submissions in revealing factual circumstances and providing expertise could be of tremendous relevance in such instances. Moreover, the closer interlinking of the Luxembourg and Strasbourg jurisdictions in view of accession of the EU to the Convention, as well as the expected increase in AFSJ cases before the CJEU, are putting questions of procedural discrepancies into relief.

- 2) The restricted standing of non-state third parties before the CJEU⁶² is a matter of concern and an issue that the various human rights organisations more frequently taking part as

⁶⁰ See *N.S. and M.E.*, paras. 114, 122, 131 and 135-6. The AG Trstenjak mentions the right to human dignity (Art. 1) and the right to be free from torture or other ill treatment (Art. 4), as well as the right to asylum (Art. 18) and the right to non-extradition (Art. 19) of the EU Charter.

⁶¹ In the *Bosphorus* judgment (*Bosphorus* (2006) 42 E.H.R.R.) the ECtHR held that, as long as the EU’s legal order protected fundamental rights in an equivalent manner to the Convention, it will be presumed that a member state has acted in compliance with the Convention where it had no discretion in implementing EU secondary law. The ECtHR thus clearly privileges the EU’s legal order and only exercises its jurisdiction where, exceptionally, protection was manifestly deficient. See T. Lock, “EU Accession to the ECHR: Implications for Judicial Review in Strasbourg”, *European Law Review*, Vol. 35, No. 6, 2010, pp. 777-798.

⁶² In preliminary references, the rationale behind restricting access to third parties has so far been that the proceedings before the CJEU are not contentions or ‘fact-based’, so the CJEU is bound to offer interpretation of EU law without going into the facts of the case at the national level. Still, as the *N.S. and*

third-party interveners before Strasbourg have already raised with European Commission officials since the entry into force of the EU Charter.⁶³ The shortage of factual data, evidence and expertise can hamper the Luxembourg Court's ability to deliver solid, evidence-based judgments in complex cases on fundamental rights. What is more, since non-state interveners are active in presenting contextual information across various domains of relevance to the EU Charter (see appendix 2 of this paper), such a procedure could strengthen the Court's institutional capacity to deal effectively with fundamental rights dilemmas also beyond the remit of asylum. Yet interestingly, under its current rules of procedure, the CJEU is able to invite expert opinions.⁶⁴ That notwithstanding, and unlike the ECtHR, the Luxembourg Court has never used the procedure on its own motion in cases of fundamental rights.

The accessibility challenges have even led to the development of informal, secondary routes to reach the Court designed to pass over the restrictive rules concerning formal access. The UNHCR, for instance, has been issuing written public statements in the majority of preliminary references on asylum that have been dealt with by the Luxembourg Court so far.⁶⁵ These observations have then made it through to the Court, as usually one of the appellants has annexed the UNHCR file to their own materials. Although submissions have not explicitly been cited in any judgment so far, in some instances the advocate-general's or the Court's reasoning bear similarities to the third-party arguments (the *N.S. and M.E.* case) or the UNHCR's statement,⁶⁶ showing the broader potential that the submissions of non-state parties can have.

- 3) The current divergences in the domestic rules across the EU member states regarding access for third parties can also lead to concerns about procedural fairness and equal treatment. As procedural rules on third-party interventions are more open in some EU member states than in others, a high degree of differential treatment among non-state actors and organisations exists on access to the CJEU. There is, furthermore, no guarantee that cases in national proceedings will be subject to a reference for a preliminary ruling, a decision that is entirely left to the discretion of the national court involved. This raises further restrictions, because the matter can become time-consuming and resource-draining, especially for certain civil society actors. Issues of differential treatment are

M.E. case demonstrates, the monitoring of the Dublin II system shows that a strict division of facts and merits is not possible in cases of fundamental rights violations. Also, an argument against reforming the present procedure could be the impression that third parties, when made part of the proceedings, may unnecessarily prolong the completion of cases. Yet, if the contextual information presented by such parties helps the delivery of solid and unambiguous judgments that give sufficient guidance to the national courts in interpreting EU law in future cases, then on the contrary, accepting extra input can prove timesaving.

⁶³ Telephone interview with a legal representative from the UK Equality and Human Rights Commission (14 February 2012).

⁶⁴ See "Section 2 – The summoning and examination of witnesses and experts", and in particular Art. 49 on the role of 'experts' in the Rules of Procedure of the Court of Justice of the European Union (OJ C 177/1, 2.7.2010).

⁶⁵ All UNHCR public statements are available on the UNHCR's website (at <http://www.unhcr.org/eu> or at <http://www.refworld.org>).

⁶⁶ Both the AG and the Court agreed to no small part of the arguments presented by the third parties in the *N.S. and M.E.* case. In the *Germany v. B and D* case (Joined Cases C-57/09 and C-101/09, *Germany v. B and D* [2010] OJ C 13/4), the AG explicitly referred to and sided with the position expressed in the annexed submission of the UNHCR (paras. 68-69). The approach suggested by the UNHCR was finally also adopted by the CJEU, since the Court followed the AG on that point.

thus exasperating, because organisations have different chances of reaching the Court depending on the financial and personnel resources they are able to invest.

5.2 Interim relief measures

Whereas several interim relief measures in judicial proceedings are already provided for at the EU level, in comparison with the ECtHR Rule 39 procedure these are far less developed and adapted to the specificities characterising fundamental rights cases. In short, they can be summarised as follows:

- First, once a case appears before the CJEU as a result of a direct action, the Luxembourg Court has at its disposal the instrument laid down in Arts. 278 and 279 TFEU, which allows it to grant interim relief “if it considers that circumstances so require”. By virtue of Arts. 83-89 of the Rules of Procedure, the CJEU has the power to temporarily suspend the operation of any measure or actions adopted by an institution until a judicial decision on the substance of a petition is taken.⁶⁷ To our knowledge, the Court has until the present not availed itself of this possibility in infringement actions in AFSJ policy domains related to asylum and border controls.
- Second, in references for preliminary rulings the Court can make use of the so-called ‘expedited procedures’, and in particular of the urgent preliminary ruling procedure (PPU) (see section 3 above). So far, however, the CJEU has applied such expedited procedures in the area of migration, border controls and asylum in few cases. Among them was *Metock* C-127/08 (the accelerated procedure), which dealt with the conditions and limits applicable to the right of residence of third-country nationals who are spouses of EU citizens,⁶⁸ and *Kadzoev* C-357/09 (the PPU), in which the CJEU specified the conditions for the detention of irregularly staying third-country nationals in the scope of the EU Returns Directive (2008/115/EC).⁶⁹

It should be noted here that in relation to injunctions in preliminary references, the CJEU is bound to respect the principle of national procedural autonomy. Since there is a variation of national procedures on interim measures, this implies that suspensive effect is not necessarily attached to appeals in asylum cases. In other areas of European law, however, the Court has limited national procedural autonomy as the Court has ruled that it may not render practically impossible or excessively difficult the exercise of rights

⁶⁷ According to Art. 83 of the Rules of Procedure,

1. An application to suspend the operation of any measure adopted by an institution, made pursuant to Article 242 of the EC Treaty or Article 157 of the EAEC Treaty, shall be admissible only if the applicant is challenging that measure in proceedings before the Court.

An application for the adoption of any other interim measure referred to in Article 243 of the EC Treaty or Article 158 of the EAEC Treaty shall be admissible only if it is made by a party to a case before the Court and relates to that case.

2. An application of a kind referred to in paragraph 1 of this Article shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for.

⁶⁸ Case C-127/08, *Metock and Others v. Minister for Justice, Equality and Law Reform* [2008] ECR I-06241.

⁶⁹ See Case C-357/09, *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189; see also Council Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008.

conferred by EU law (the principle of effectiveness).⁷⁰ On the basis of this general principle, the Court has ruled that the national court can sometimes be under an obligation to provide interim relief even if such does not exist for the situation in question under national law.⁷¹ Moreover, the principle of effective judicial protection can be read to the same effect.⁷²

A key challenge characterising interim relief is that the threshold conditions for granting it under EU law in both direct and indirect actions before the Luxembourg Court are higher than those established by the ECtHR under the Rule 39 procedure. The CJEU uses the same criteria as the ECtHR in that there must be a *prima facie* case and the case must be urgent (the interim measure must be necessary to avoid serious and irreparable harm). Next to these criteria, however, the CJEU takes account of the relevant (Union) interests.⁷³ In addition, in preliminary references, the national court should also entertain serious doubts about the validity of the EU measure, refer the question to the CJEU and take due account of the Union's interests.⁷⁴

An additional constraint consists of the need for the application for suspension of the operation of an act (or a part thereof) before the CJEU to be made only by the party who is challenging that measure in the main proceedings before the Court. In other words, unlike the ECtHR, which vests a broad understanding in the concept of 'representative' for requests of interim measures at this stage of the procedure, it is solely the legal representatives of either of the parties who are authorised to request interim relief at the CJEU. The extent to which a third party intervening in the main proceedings, such as an NGO or a human rights organisation, is entitled to do so remains uncertain.

The CJEU has no role in the context of the Art. 7 TEU procedure, which constitutes a key instrument in the hands of EU institutions to secure EU member states' respect for the conditions of Union membership, in particular the 'common values' stipulated in Art. 2 TEU, which include consolidated, legal general principles (such as the rule of law and respect for fundamental rights) as foreseen by the EU Charter.⁷⁵ The Nice Treaty (1 February 2003) revised

⁷⁰ Case 33/76, *Rewe* [1976] ECR 1989.

⁷¹ Case C-213/89, *Factortame I* [1990] ECR I-2433.

⁷² The principle of effective judicial protection is reflected in Art. 47 of the EU Charter and Art. 39(3) of the Procedures Directive (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13.12.2005).

⁷³ J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law*, Groningen: Europa Law Publishing, 2007, p. 248.

⁷⁴ *Ibid.*

⁷⁵ Art. 7 TEU reads as follows:

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account

Art. 7 TEU, giving it a ‘preventive’ focus, that is, the capacity to act preventively in the event of a clear threat of a serious breach of the common values.⁷⁶ The European Commission published a Communication in 2003 examining the conditions for activating the procedures of Art. 7 and identifying the operational measures that could make for respect and promotion of ‘the common values’.⁷⁷ Yet, the actual ways in which Art. 7 TEU works in practice make this instrument a purely political tool, regarded by some high-level EU officials as an ‘atomic bomb’ of last resort. The CJEU has not been granted any power of judicial review of the decision determining that there is a serious and persistent breach of fundamental rights or a clear risk of such a breach in the context of Art. 2 TEU.⁷⁸ Should the CJEU be granted such responsibilities, however, this would increase the (de)politicisation and judicial accountability surrounding use of the Art. 7 TEU procedure.⁷⁹

Overall, the CJEU has made very little use of its powers either to accelerate proceedings or to issue emergency relief measures in infringement actions with fundamental rights implications. Moreover, the Court should read the principle of national procedural autonomy without prejudice to the principles of effectiveness and the right of effective judicial protection enshrined in the EU Charter. If the CJEU is to provide for the effective delivery of fundamental rights, these concerns will have to be addressed. To strengthen the CJEU’s capacity to issue interim relief measures *ex ante*, which are often indispensable for certain fundamental rights-sensitive cases in the area of migration and asylum, a more proactive stance on behalf of the Court itself will be necessary.

6. Conclusions and policy suggestions

This paper has examined the challenges faced by the CJEU as a fundamental rights tribunal in the new fundamental rights architecture that has emerged since the entry into force of the Lisbon Treaty. As one of the prime guarantors of the EU Charter through Art. 47 (the right to an effective remedy), the Luxembourg Court now has a consolidated role and reinforced legal mandate in fundamental rights protection. It is the argument of this paper that – in the process of establishing its position as fundamental rights adjudicator in the Union – the CJEU should give due consideration to the procedural law tools and standards that have been developed by the ECtHR in Strasbourg. Improving the accessibility of third-party interventions and ensuring a proactive use of interim relief measures accommodated to fundamental rights cases would tremendously ease the difficulties inherent to the conversion of the EU Charter from ‘law on the

the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

⁷⁶ This differs from the previous version in the Treaty of Amsterdam, which only provided remedial action after the fundamental rights breach had occurred.

⁷⁷ European Commission, Communication from the Commission to the Council and the European Parliament on Art. 7 of the Treaty of the European Union: Respect and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15 October 2003.

⁷⁸ This is so despite “the repeated suggestions made by the Commission in the run-up to the Amsterdam and Nice Treaties” (ibid., p. 6). Moreover, the Court might review the mere procedural stipulations in Art. 7, which aims at allowing the relevant state’s defence rights to be respected.

⁷⁹ On this point, see M. Dawson and E. Muir, “Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma”, *Common Market Law Review*, Vol. 48, No. 3, 2011, pp. 751-775; see also S. Carrera and A. Faure Atger, *L’affaire des Roms: A Challenge to the EU’s Area of Freedom, Security and Justice*, CEPS Papers on Liberty and Security in Europe, CEPS, Brussels, 29 September 2010 (<http://www.ceps.eu/book/l'affaire-des-roms-challenge-eu's-area-freedom-security-and-justice>).

books’ into a justiciable document having tangible effects for vulnerable individuals, i.e. into ‘law in practice’.

We have used the EU’s AFSJ and in particular its migration and external borders management and asylum components as our main case study, as they will increasingly represent a crucial test case for the CJEU’s capacity to live up to its role as a fundamental rights tribunal. The CJEU will need to further reinforce its current capacities and procedural tools in order to ensure the effective judicial implementation of the EU Charter. Maintaining the status quo would be problematic, as this would jeopardise the legitimacy of the EU Charter and potentially the entire AFSJ. It would also put the Luxembourg Court in a difficult position within the wider constellation of European judicial actors on fundamental human rights, which includes the national constitutional courts and the ECtHR, and *vis-à-vis* other international and regional actors engaged in the monitoring and supervision of EU and member states’ compliance with human rights standards. In light of the findings highlighted in this paper, and for the CJEU to address the challenges in the delivery of fundamental rights in the EU legal system, we put forward the following policy suggestions, which deal respectively with the role of non-state third-party interventions, and interim measures and accelerated judicial review.

6.1 Non-state third-party interventions

The CJEU should develop a procedure for third-party intervention that is similar to the one existing before the ECtHR. This would be particularly useful in those cases presenting a strong fundamental rights dimension, and especially for those where the AFSJ and the EU Charter intersect.⁸⁰ Following the experiences gained in the context of the ECtHR’s work, the contributions and expertise of civil society and human rights organisations would address the ‘knowledge and accountability gaps’ affecting cases on alleged violations of fundamental rights in AFSJ law, policies and practices. Given the transversal nature of fundamental rights issues, third party interveners could also be helpful in other areas of EU Law.

A procedure for third-party interventions at the CJEU would address the existing incoherencies across the judicial systems of member states regarding rules and practices on third-party interventions before national tribunals. Concerns have been voiced that the adoption of such a procedure could prolong the proceedings, leading to a backlog of cases. Yet time considerations cannot be an excuse when the issuance of well-informed judgments is at stake, especially in domains that are fundamental rights-sensitive.

The concrete steps below could be followed for the practical implementation of this suggestion:

- a) First, the Luxembourg Court could start by making a more active and decisive use of the rules foreseen in the current Rules of Procedure on “summoning and examination...of experts”.⁸¹ It should better profit from the external expertise, practical experience and evidence brought by major civil-society actors and human rights organisations.
- b) As a second step, the European Commission could conduct a study covering a cross-comparative assessment of EU member states’ systems on third-party interventions

⁸⁰ Since due to time considerations, under the urgent preliminary procedure only the main parties in the national proceedings, the government of the referring court and the Commission, the Council and Parliament (when their legislative act is challenged) are entitled to submit written observations, interested non-state third parties can be allowed to make their observations during the oral phase of the procedure, which is open to other member states as well.

⁸¹ See “Section 2 – The summoning and examination of witnesses and experts” and in particular Art. 49 on the role of ‘experts’ in the Rules of Procedure of the Court of Justice of the European Union (OJ C 177/1, 2.7.2010).

(examining existing rules and practices). This could be combined with a report by the European Ombudsman on the main obstacles at the domestic level on the accessibility of the EU Charter, done in the light of the experience and expertise of the network of national ombudsmen.⁸²

- c) A next step could be to include a fully-fledged third-party procedure as a supplementary amendment in the ongoing⁸³ or any future recast of the Rules of Procedure and amendments of the Court's Statute.
- d) Guidelines for non-state third-party interveners could be issued by the CJEU, modelling the existing guidelines on the preliminary reference procedure directed at national courts.

6.2 Interim measures and accelerated judicial review

- a) The Luxembourg Court could start developing through its case law the use of Art. 279 TFEU as a legal basis for affording interim relief in the context of the AFSJ. Although the Court has yet to take this approach in infringement actions falling within the scope of application of asylum and border control law, under Art. 83 of the current Rules of Procedure it can already temporarily 'freeze' action against victims of fundamental rights violations until a full judicial decision is taken.⁸⁴ The Court should be more proactive in this respect, ordering interim measures on its own motion.
- b) Modifications of Arts. 83-89 of the current CJEU's Rules of Procedure to reflect the Rule 39 procedure of the Strasbourg Court could also prove crucially important to vulnerable applicants. In the interest of the proper administration of justice, the Court should consider allowing non-state third parties to act as representatives of affected individuals in requests for interim relief in the AFSJ. For instance, giving a broader understanding of 'representatives' entitled to apply for interim relief on behalf of the applicants could help tackle problems connected with, among others, the vulnerable status of migrants at sea.
- c) Recourse to the urgent preliminary ruling procedure (PPU) in immigration and asylum cases has been extremely scarce. Although the use of the procedure depends to a certain extent on the national courts submitting well-reasoned references, its effectiveness could also be enhanced by the way the CJEU construes the level of emergency able to trigger the PPU. The Court could be more 'rights-assertive' in this respect, as the president of the Court can propose on his/her own motion that the procedure is applied.
- d) Inserting a new rule into the Rules of Procedure of the Court on the basis of Art. 7 TEU could serve this purpose. Such a preventive mechanism and accelerated judicial review could be coupled with an amendment of Art. 7 TEU. As pointed out in this paper, Art. 7 TEU does not foresee any express role for the CJEU and remains mainly 'political' in nature. A revision of the high threshold needed for its activation in combination with ensuring judicial accountability in the various stages that form part of its application could ensure that fundamental rights violations are prevented in a timely fashion. The European Commission could jump-start the process by an express reference to such

⁸² See the website of the European Ombudsman, "European Network of Ombudsmen" (<http://www.ombudsman.europa.eu/activities/network.faces>), last accessed 13 August 2012.

⁸³ See CJEU 7338/11 JUR 78 COUR 4; see also 7398/11 JUR 79 COUR 5 in relation to amendments to the General Court, 7399/11 JUR 80 COUR 6 on the Civil Service Tribunal and the European Commission Opinion of 30.9.2011 on the requests for amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM(2011) 596, Brussels, 30 September 2011.

⁸⁴ Dawson and Muir (2011), op. cit., pp. 751-775.

reforms in new Commission guidelines interpreting Art. 7 (as a follow-up to the 2003 Commission Communication).

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Appendix 1. Third-party interveners in landmark ECtHR cases on asylum and border control

Table A1. Third-party interveners in landmark ECtHR cases

	Non-state actors	Amnesty Int.	AIRE	HRW	UNHCR	FIDH	ANAFE	Helsinki Monitor	Liberty
C a s e s	Soering v. UK	X							
	Chahal v. UK	X	X						X
	Saadi v. UK		X		X				X
	Gebre-Medhin v. FR						X		
	Ramzy v. NL	X	X	X					X
E C t H R	A v. NL	X	X	X					X
	M.S.S. v. BE & GR	X	X	R*	X			X	
	Hirsi v. GR & IT, pending	X	X	X	X	X			
	Sharifi v. GR & IT, pending	X	X		X				

* The different reports of NGOs and human rights organisations quoted in the *M.S.S.* judgement amount to 22.

Notes: 'X' refers to (joint) submission as a third party and 'R' to a report or a written statement referred to by the Court.

Source: Authors' compilation.

Appendix 2. Areas of human rights activity by national and transnational multi-specific NGOs

Table A2. Areas of human rights activity

Non-state actor/activity	Amnesty Int.	AIRE Centre	HRW	FIDH
Freedom of expression	X		X	
Anti-discrimination	X	X	X	X
Corporate accountability	X			
Domestic violence		X		
Cross-border criminal justice		X		
Fight against death penalty/torture	X	X	X	X
Migrants' rights		X	X	X
Children's rights				
International justice	X		X	
Counterterrorism			X	X
Environment			X	
Economic & social rights			X	X

Source: Authors' compilation.



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