

X, Y and Z: a glass half full for “rainbow refugees”?

The International Commission of Jurists’ observations on the judgment of the Court of Justice of the European Union in *X, Y and Z v. Minister voor Immigratie en Asiel*

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Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

A. Introduction

1. This commentary analyses the 7 November 2013 judgment of the Court of Justice of the European Union ('the Court' or 'CJEU') in the three joined cases of X, Y and Z v. Minister voor Immigratie en Asiel.¹ The ruling arose from the asylum requests lodged in the Netherlands by three refugee applicants claiming to have a well-founded fear of persecution by reason of their same-sex sexual orientation in their countries of origin where consensual same-sex sexual conduct was and remains criminalized.

2. The International Commission of Jurists (ICJ) decided to publish this commentary for the following reasons.

3. First, the CJEU has an important and unique position in shaping international refugee law jurisprudence. Before asylum became a competence of the European Union (EU),² the interpretation and development of refugee law, at the judicial level, was largely the prerogative of the domestic courts of States parties to the 1951 Convention relating to the Status of Refugees³ and its 1967 Protocol relating to the Status of Refugees.⁴ The United Nations High Commissioner for Refugees⁵ and the views of experts and scholars also played a role in interpreting and developing refugee law.⁶ Now, however, the CJEU plays a pivotal role and, as a result of the Court's supranational status, its case-law is capable of influencing the interpretation and development of refugee law well beyond the EU. The CJEU has indeed already rendered judgment in a number of refugee law cases and is developing a rich jurisprudence in this area.⁷

4. Second, asylum applications based on a well-founded fear of persecution for reason of real or imputed sexual orientation and/or gender identity or expression are unfortunately likely to increase both within the EU and beyond, given the fact that around the world, lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals continue to be singled out for egregious human rights abuses, paradoxically, in part, because they have become more visible by asserting their existence, rights and agency outside the relative safety of "the closet".⁸ With regard to the issue of

¹ Joined Cases C-199/12, C-200/12, C-201/12 X, Y and Z v. Minister voor Immigratie en Asiel,

² See text box on p. 8-10.

³ Convention relating to the Status of Refugees, Geneva (28 July 1951), United Nations, *Treaty Series*, vol. 189, p. 137, hereinafter the 'Refugee Convention'.

⁴ Protocol relating to the Status of Refugees, New York (31 January 1967), United Nations, *Treaty Series*, vol. 606, p. 267.

⁵ See paras. 20 - 21, below.

⁶ See, e.g., Prof. James C. Hathaway, a leading authority on international refugee law, whose work is regularly cited by the most senior courts of the common law world, and also Prof. Deborah E. Anker, another leading refugee law scholar, who is cited frequently by international and domestic courts and tribunals, including the United States Supreme Court.

⁷ See, e.g., joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, Judgment of the Court (Grand Chamber) of 5 September 2012; joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Judgment of the Court (Grand Chamber) of 21 December 2011; case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, Judgment of the Court (Grand Chamber) of 17 June 2010; and case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, Judgment of the Court (Grand Chamber) of 17 February 2009.

⁸ On this point, for example, see Lord Hope's speech in *HJ (Iran) v Secretary of State for the Home Department* (Rev 1) [2010] UKSC 31, 07 July 2010, at paras. 2-3: "... More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically. The ultra-conservative interpretation of Islamic law that prevails in Iran is one example. The rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of Sub-Saharan Africa is another. The death penalty has just been proposed in Uganda for persons who engage in homosexual practices. Two gay men who had celebrated their relationship in a public engagement ceremony were recently sentenced to 14 years' imprisonment in Malawi. They were later pardoned in response to international pressure by President Mutharika, but he made it clear that he would not otherwise have done this as they

criminalization specifically, many African, Caribbean and South East Asian States retain colonial-era laws criminalizing consensual same-sex relationships, and the same behaviour also entails criminal liability throughout much of the Middle East and North African region. Moreover, in nine countries where consensual same-sex sexual conduct is criminalized, conviction could lead to the imposition of capital punishment. Executions following the imposition of the death penalty have also been reported in certain countries.⁹ In Brunei, a recently enacted Penal Code Order not only continues to criminalize adultery, extramarital sexual relations and sodomy, but also to provide capital punishment as a sentence for these "offences" through stoning to death.¹⁰ Further, in a recent backlash that galvanizes opposition against a more visible and outspoken LGBTI community,¹¹ adding to the already existing criminalization of consensual same-sex activity in private, same-sex marriage was made a crime in Nigeria; in Uganda recently introduced penal provisions make it an offence for people to discuss and be open about their sexuality;¹² and both in Uganda and Malawi provisions were introduced explicitly criminalizing consensual same-sex conduct between women. In India, the Supreme Court judgment in *Naz* effectively recriminalized homosexuality, after the Delhi High Court had decriminalized¹³ it in 2009.¹⁴ While in certain regions the trend may show an increase in rights protection for LGBTI individuals, in other regions, importantly those from which refugees are fleeing, the trend has been in precisely the opposite direction.

5. Third, the way the CJEU construes international protection claims based on sexual orientation and/or gender identity or expression is likely to have a bearing on the determination of asylum claims premised on membership of other particular social groups, such as trafficked women, as well as on other Refugee Convention grounds,¹⁵ such as persecution on the basis of political opinion or religious belief.¹⁶

had committed a crime against the country's culture, its religion and its laws. Objections to these developments have been greeted locally with derision and disbelief. 3. The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies on either side of the divide. It is one of the most demanding social issues of our time....the problem ... seems likely to grow and to remain with us for many years. **In the meantime more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries.** It is crucially important that they are provided with the protection that they are entitled to under the Convention...", (**emphasis added**).

⁹ See International Commission of Jurists, Submission to the UN Secretary-General in view of his forthcoming report on the question of the death penalty to the 27th session of the Human Rights Council, March 2014. Available at <http://goo.gl/H2mXrE>. Provisions often also apply to consensual heterosexual extramarital or premarital sexual conduct.

¹⁰ See International Commission of Jurists, 'Brunei: new penal code a blueprint for human rights violations', 27 January 2014. Available at <http://goo.gl/4EEQgk>.

¹¹ See, e.g., footnote 8, above.

¹² See International Commission of Jurists, 'Nigeria and Uganda: new laws herald further persecution based on sexual orientation and gender identity', 27 February 2014. Available at <http://goo.gl/bqV76i>.

¹³ *Naz Foundation v. Government of NCT of Delhi and Others*, The High Court of Delhi at New Delhi, India (2 July 2009), WP(C) No.7455/2001.

¹⁴ See International Commission of Jurists, 'India: appalling judgment recriminalizes same-sex consensual acts between adults in private', 19 December 2013. Available at <http://goo.gl/zUhQCA>.

¹⁵ Refugee Convention, Article 1(A)(2): "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. ...".

¹⁶ See, e.g., the use by the Court in the current case of its earlier jurisprudence in Joined Cases C-71/11 and C-99/11 *Y and Z*, which concerned two asylum claims based on persecution for reasons related to religion.

6. Fourth, the implementation by the EU and its Member States of their recently "recast"¹⁷ Common European Asylum System (CEAS) will likely give rise to several referrals to the CJEU requesting guidance on the interpretation of the new instruments, at least as much as it has thus far been the case with their precursors. While the CJEU's judgment *X, Y and Z v. Minister voor Immigratie en Asiel* concerns an instrument of the first generation,¹⁸ the Court's interpretation of the recast CEAS in the context of future references will also depend on its asylum case law precedents.¹⁹

B. Background

7. Before setting out the legal framework and analysing the Court's judgment in the case, this background section will briefly situate the CJEU's preliminary reference procedure and sketch out the factual circumstances and procedural history of the three references at the heart of this case.

The CJEU's preliminary reference procedure

8. The case before the CJEU concerns a reference for preliminary ruling. This procedure is open to all national judges of all Member States. If, in the context of a case over which judges in domestic proceedings are presiding, they consider that the application of a rule of European law raises a question the answer to which they do not know but need clarity on to be able to give judgment, they may stay the domestic case and refer the question to the CJEU, in order to clarify a point of interpretation of European law.²⁰

9. The CJEU's approach to the referral procedure is facilitative: if it considers the questions posed by the domestic judges to be unclear, it may ask the referring court for clarification or it may decide to reformulate the referred questions itself before proceeding to answer them.²¹ In this context, the ICJ notes that in the case at hand, the CJEU chose not to reformulate the referred questions and it did not ask the referring court to clarify them.

10. The referral procedure is not a form of recourse taken against a European or national act, but a mechanism aimed at enabling the domestic courts in the Member States to ensure uniform interpretation and application of EU law. The CJEU's decision on a reference has the force of *res judicata* and is binding on all of the domestic courts of the Member States.²²

¹⁷ See text box on p. 8-10.

¹⁸ The Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereinafter: "the 2004 QD").

¹⁹ Further, Ireland and the United Kingdom will continue to be bound by the 2004 QD.

²⁰ Such questions can concern the interpretation of Treaties, and the interpretation and validity of the acts of the institutions, bodies, offices and agencies of the EU. Judges of courts against whose decision no appeal under national law is open must refer the question to the CJEU if one of the parties requests it, except when the Court has already interpreted the provision and given its interpretation, or when the correct application of EU law is so obvious that there is no scope for any reasonable doubt. (TFEU, Article 267; Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, *Official Journal of the European Union* C 338 (6 November 2012); Joined Cases 28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*; Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*.)

²¹ See e.g., Case C-465/07 *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*; Case C-429/05 *Max Rampion and Marie-Jeanne Godard, née Rampion v. Franfinance SA and K par K SAS*.

²² In the context of a reference for a preliminary ruling concerning validity, if the European instrument is declared invalid, all of the instruments adopted based on it are also invalid. It then falls to the competent European institutions to adopt a new instrument to rectify the situation.

The originating cases

11. The questions put to the Court originate from three asylum applications before the Dutch Raad van State (Council of State). The cases were joined before the CJEU for the purpose of the written and oral procedure and judgment.²³

12. The case of X concerned a male asylum applicant from Sierra Leone, where section 61 of the Offences Against the Person Act 1861 criminalizes homosexual acts and makes them punishable upon conviction by a prison sentence ranging from ten years' to life imprisonment. By decree of 18 March 2010, the Dutch Minister for Immigration and Asylum refused his asylum claim. X appealed the Minister's refusal to the Rechtbank's-Graveshage (District Court of The Hague), which upheld his appeal by judgment of 23 November 2010. The Court held that the Minister could have reasonably considered that X's account was not credible. However, given the criminalization of homosexuality in Sierra Leone, the Minister had nonetheless given insufficient reasons for his view that X's fear of persecution was not well-founded.

13. The case of Y concerned a male asylum applicant from Uganda, where, upon conviction, "carnal knowledge of any person against the order of nature" can lead to a sentence ranging from ten years' to life imprisonment.²⁴ By decree of 10 May 2011, the Minister for Immigration and Asylum refused to grant Y asylum. On 9 June 2011, following Y's appeal against the Minister's refusal, the District Court of The Hague upheld his appeal on the same grounds as those in X's case.

14. The case of Z concerned a male asylum applicant from Senegal, where persons found guilty of "an improper or unnatural act with a person of the same sex" are liable to be sentenced to between one and five years in prison and a fine.²⁵ By decree of 12 January 2011, the Minister for Immigration and Asylum rejected Z's asylum application. By judgment of 15 August 2011, the District Court of The Hague dismissed Z's appeal against the Minister's refusal. It held that the Minister had been entitled to consider that Z's account was not credible and that, moreover, it did not appear from his statements and documentation that homosexuals were "routinely" persecuted in Senegal.

15. The Minister appealed the judgments of the District Court of The Hague to the Council of State in the cases of X and Y. In turn, Z appealed the District Court's decision in his case to the Council of State. In each case, the Council of State took note of the fact that on appeal neither the sexual orientation of the applicants, nor the fact that the Minister could reasonably consider that the accounts in the applications for asylum were not credible, was contested.

The referred questions

16. The Raad van State referred three questions to the Court, phrased in almost identical terms in each case:

"1. Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the 2004 Qualification Directive]?"

"2. If the first question is to be answered in the affirmative: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other

²³ Para. 38 of the judgment. See, the consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012, as amended on 18 June 2013 (*Official Journal* L 173, 26 June 2013), Article 54 of which provides that two or more cases of the same type concerning the same subject-matter may at any time be joined on account of the connection between them.

²⁴ Penal Act 1950 (Chapter 120) (as amended), Section 145(a).

²⁵ Penal Code 1965, Article 319:3.

requirements are met, can that lead to the granting of refugee status? That question encompasses the following subquestions [*sic*]:

(a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?

(b) If the previous answer is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?

(c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?

"3. Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone (Case C-199/12), the Penal Code Act 1950 of Uganda (Case C-200/12) or the Senegalese Penal Code (Case C-201/12) constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?"²⁶

C. Legal framework

17. This section gives a brief overview of the applicable bodies of law with which the CJEU had to apply in determining the references in the *X, Y and Z* proceedings.

18. The cornerstone of any legal regime relating to refugees is the 1951 Convention relating to the Status of Refugees ('Refugee Convention'). In addition to the Refugee Convention, EU asylum law must be compliant with the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR). It must also be implemented in a manner consistent with other EU primary law.

The 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the UNHCR's supervisory mandate

19. The preamble to the Refugee Convention identifies the treaty's object and purpose. The first preambular paragraph refers to the UN Charter and the Universal Declaration of Human Rights which, in turn, affirm the principle that human beings are to enjoy "fundamental rights and freedoms without discrimination",²⁷ while the second preambular paragraph of the Convention mentions UN's "profound concern for refugees" and its efforts to ensure for refugees such fundamental rights and freedoms.²⁸ The preamble as a whole is based on the notion that refugees are entitled, beyond the Convention, to all those fundamental rights and freedoms that have been proclaimed for all human beings.²⁹

20. Further, in this context it is important to mention the role of the United Nations High Commissioner for Refugees (UNHCR) in the supervision of the

²⁶ Para. 37 of the judgment.

²⁷ The first paragraph of the preamble reads: "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination".

²⁸ The second paragraph of the preamble reads: "Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms".

²⁹ See UNHRC, 'The Refugee Convention 1951: The *Travaux Préparatoires* analysed with a commentary by Dr Paul Weis', pp. 12-32, in particular the "Commentary" on p. 32.

application of the Refugee Convention. The UNHCR is mandated by the UN General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees, pursuant to its 1950 Statute.³⁰ Its supervisory responsibility is also reflected in the preamble³¹ to and in Article 35 of the 1951 Refugee Convention,³² and Article II of its 1967 Protocol.³³

21. In the exercise of its supervisory mandate, in 2012 the UNHCR published a set of Guidelines on claims to refugee status based on sexual orientation and/or gender identity,³⁴ replacing its 2008 Guidance Note on the matter.³⁵ The Guidelines provide authoritative guidance on substance and procedure, "with a view to ensuring a proper and harmonized interpretation of the refugee definition in the 1951 Convention".³⁶

The EU Charter of Fundamental Rights and the European Convention on Human Rights

22. Although the founding EU Treaties contain no specific provisions on fundamental rights, these have long been recognized by the CJEU to constitute general principles of EU law;³⁷ further, the ECHR is of "special significance" to the EU legal order.³⁸ Article 6(3) Treaty on EU (TEU), introduced by the Treaty of Amsterdam

³⁰ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Annex, paragraph 8(a) of which states "8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto"; available at: <http://goo.gl/GDyr8r>. While not explicitly elaborated in the Statute, the UNHCR has an implied competence to define and adopt the measures that are reasonably necessary to achieve the purpose of the international legal framework governing the protection of persons of concern to UNHCR; see, Volker Türk (Director of International Protection, UNHCR), Keynote address at the International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967 Protocol and Other International Instruments, York University, Toronto, Canada, 17-20 May 2010, p.5. Further, the need for international cooperation is also recognized in the preamble to the Refugee Convention (recital 4). The 2004 QD refers in its preamble to consultations with the UNHCR, which "may provide valuable guidance for Member States when determining refugee status" (recital 15).

³¹ The preamble to the Convention states: "Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner".

³² Article 35(1) reads: "The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

³³ Article II(1) reads: "The States Parties to the present Protocol undertake to cooperate with the office of the United Nations High Commissioner for Refugees, or any other agency which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol."

³⁴ UN High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (23 October 2012).

³⁵ UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (21 November 2008).

³⁶ *Guidelines on International Protection No. 9*, para. 4.

³⁷ *Case 11/70 Internationale Handelsgesellschaft*; *Case 4/73 Nold*.

³⁸ *Case C-260/89 ERT*, para. 41; *Case C-540/03 Parliament v. Council*, para. 35. Also see *Case 222/84 Johnston*. The Treaty of Lisbon cleared the way for the EU's accession to the ECHR and the process is currently well underway. Also see: The AIRE Centre, Amnesty International and the International Commission of Jurists, 'NGO Briefing Note on the Accession Agreement and next steps to the attention of the Council Working Party on Fundamental Rights and Free Movement of Persons (FREMP)' (6 September 2013). Available at: <http://goo.gl/V34W9p>.

in the TEU and codifying the Court's case-law,³⁹ reads: "Fundamental rights, as guaranteed by the [ECHR] and as they result from constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

23. The EU Charter of Fundamental Rights has the same legal force as the EU Treaties.⁴⁰ Its provisions "are addressed to the institutions, bodies, offices and agencies" of the EU "and to Member States only when they are implementing Union law".⁴¹ According to the official Explanations that accompany the Charter, its provisions are binding on the Member States "when they act in the scope of Union law".⁴² As the EU has developed a comprehensive set of asylum instruments, asylum decisions taken by Member States⁴³ come within the scope of EU law.⁴⁴

24. In respect of rights contained in the Charter that correspond to rights guaranteed by the ECHR, "the meaning and the scope of those rights shall be the same as those laid down by the said Convention".⁴⁵ This provision effectively incorporates rights in the ECHR that are coterminous with their Charter equivalent into EU law.⁴⁶ In this context, it is also worth noting that the Charter's preamble reaffirms the significance of the European Court of Human Rights' case law. Article 52(3) of the Charter, especially read together with the preamble's reaffirmation of the significance of the Strasbourg Court's jurisprudence, compels an interpretation of those Charter provisions that are expressed in the same terms as those of the ECHR that takes account of, and complies with, the latter's case-law.

25. The Charter sets a minimum baseline standard and does not preclude EU law granting wider degrees of protection. Article 18 of the Charter guarantees the right to asylum "with due respect for the rules of the Geneva [Refugee] Convention" and the 1967 Protocol and in accordance with the Treaties.⁴⁷ The use of the wording "with due respect for" the Refugee Convention can be explained by the fact that the Refugee

³⁹ See Case C-7/98 *Krombach*, para. 27: "...Article 6(2) embodies that case-law". NB the reference to Article 6(2) was to the Treaty of Amsterdam numbering. However, after the Treaty of Lisbon, the provision was renumbered Article 6(3).

⁴⁰ TEU, Article 6(1).

⁴¹ Charter of Fundamental Rights of the EU, Article 51(1).

⁴² Explanations relating to the Charter of Fundamental Rights, *Official Journal of the European Union* 2007/C 303/32 (14 December 2007). The Explanations set out the sources of the provisions of the Charter, and "shall be given due regard by the courts of the Union and of the Member States"; Charter of Fundamental Rights of the EU, Article 52(7).

⁴³ Case 5/88 *Wachauf*, para. 19: the requirements of the protection of the fundamental rights in the EU legal order are binding on the Member States when they implement EU rules. Also Case C-260/89 *ERT*, para. 42.

⁴⁴ S. Peers, 'Human Rights in the EU Legal Order: Practical Relevance for EC Immigration and Asylum Law', in: S. Peers & N. Rogers (eds.), *EU Immigration and Asylum Law – Text and Commentary* (2006), p. 137, cited at: Laurens Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence', *Goettingen Journal of International Law* 4 (2012) 1, p. 202.

⁴⁵ Charter of Fundamental Rights of the EU, Article 52(3). The 'Explanations relating to the Charter' (see FN 42) list the articles where both the meaning and the scope are the same as the corresponding articles of the ECHR, and those where the meaning is the same but where the scope is wider. As has been pointed out, both meaning and scope for some articles in the second list provided in the Explanations are in fact wider (Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review* 8(3) (2012), p. 395-396).

⁴⁶ From a combined reading of Article 52(3) and Article 53 of the Charter it emerges that if the European Court of Human Rights raises the level of protection or decides to expand the scope of application of a fundamental right so as to overtake the level of protection guaranteed by EU law, the autonomy of EU law may no longer exist. The CJEU will be obliged to reinterpret the Charter. See Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review* 8(3) (2012), p. 394.

⁴⁷ Some have argued that the right to asylum has become a subjective and enforceable right of individuals under the EU's legal order. See Maria-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', *Refugee Survey Quarterly* 27(3) (2008).

Convention does not set out a right to asylum as such. The Charter in this respect goes even beyond the Universal Declaration of Human Rights.⁴⁸

26. A combined reading of the Charter's recognition that "[h]uman dignity is inviolable. It must be respected and protected",⁴⁹ together with the remaining Charter provisions applicable in the context of asylum decisions, as well as those coterminous ECHR rights in combination with the preamble to the Refugee Convention's references to fundamental rights, compels national authorities in charge of asylum determination, the Courts in Member States, as well as the CJEU itself to interpret any EU asylum instrument in a manner that complies strictly with all of the above-mentioned human rights treaties.

The Common European Asylum System

27. The legal basis for the EU's common asylum policy is found in Article 78 of the Treaty on the Functioning of the European Union (TFEU). The provision sets out the obligation for the EU to develop a common policy on asylum, subsidiary protection and temporary protection that "must be in accordance with the Geneva [Refugee] Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."⁵⁰

28. The CJEU's judgment in the *X, Y and Z* case concerns the interpretation of certain provisions of the 2004 QD, itself forming part of the CEAS, which is in turn clearly linked – and, critically, subordinate to – the Refugee Convention, since EU asylum policy as a whole "must be in accordance with the Geneva [Refugee] Convention".⁵¹ The 2004 QD itself makes this clear: its preamble makes several references to the Refugee Convention. Most importantly for present purposes, it states that the "Geneva [Refugee] Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees".⁵²

29. The Geneva Convention does not define persecution. As the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees notes "[t]here is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success";⁵³ and further, that "in certain circumstances [...]"

Development of the CEAS

In 1993, upon entry into force of the Treaty of Maastricht, the EU gained competences in the field of asylum as part of the (inter-governmental) Third Pillar of Justice and Home Affairs.ⁱ Policies regarding asylum and migration first became part of EU law properⁱⁱ with the Treaty of Amsterdam,ⁱⁱⁱ which inserted Title IV on 'Visas, Asylum, Immigration and other Policies related to Free Movement of Persons' in the Treaty Establishing the European Community. The objective of this Title was attached to the internal market as the creation of "an area of freedom, security and justice",^{iv} which required, among other things, the adoption of a series of measures on asylum. The Treaty specified an obligation for the Council to adopt "measures on asylum, in accordance with the Geneva [Refugee] Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees".^v In October 1999, the European Council held a special meeting in Tampere, Finland, on the development of the EU as an area of freedom, security and justice, aiming to make full use of the possibilities offered by the Treaty of Amsterdam.^{vi} The European Council reaffirmed the importance that the Union and its Member States attach to "absolute respect of the right to seek asylum" and agreed "to

⁴⁸ UDHR, Article 14(1) reads: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

⁴⁹ Charter of Fundamental Rights of the European Union, Article 1.

⁵⁰ TFEU, Article 78(1).

⁵¹ TFEU, Article 78(1).

⁵² 2004 QD, Preamble recital (3).

⁵³ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, para. 51.

discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities".⁵⁴ Notwithstanding this, and the repeated deference that the 2004 QD purports to pay to the Geneva Convention, in Article 9(1), which is particularly relevant in the context of the *X, Y and Z* case, the Directive qualifies, and thus arguably limits which acts constitute persecution within the meaning of article 1 A of the Geneva Convention.⁵⁵

30. Further, despite the fact that the 2004 QD forms part of a series of instruments of EU secondary legislation that purport to be in accordance with the Refugee Convention, it is inconsistent with that Convention with regard to the definition of membership of a particular social group. The Qualification Directive applies the "protected characteristics" and "social perception" approaches⁵⁶ cumulatively as part of a two-limbed test, where both the former and the latter have to be satisfied.⁵⁷ As UNHCR set out in its Observations⁵⁸ to the CJEU in the current case, its Guidelines on International

work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva [Refugee] Convention".^{vii} This latter commitment was repeated at the follow-up European Councils on the area of freedom, security and justice in The Hague^{viii} and Stockholm^{ix}. Since 1999, the EU has been working to create a Common European Asylum System in its implementation of the Treaties. In the first phase, up to 2005, several legislative measures were adopted with the stated aim of harmonizing common minimum standards for asylum;^x the European Refugee Fund was created;^{xi} and the Temporary Protection Directive was adopted,^{xii} with the stated aim of allowing for a common EU response to "a mass influx" of displaced persons unable to return to their countries of origin. The Dublin II Regulation,^{xiii} determining the Member State^{xiv} responsible for examining an asylum claim in cases where the applicant has entered more than one Dublin II participating state, was adopted in 2003, replacing the existing regime of the

⁵⁴ *Ibid.*, para. 54.

⁵⁵ Article 9(1) of the 2004 QD reads as follows: "1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must: (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

⁵⁶ The "protected characteristics" approach examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. It may be innate or unalterable for other reasons. The "social perception" approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. UNHCR, Guidelines on International Protection No. 2: "Membership of a particular social group", paras. 6-7.

⁵⁷ 2004 QD, Article 10(1)(d): "a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, **and**
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article", (**emphasis added**).

⁵⁸ UNHCR Observations in the cases of *Minister voor Immigratie en Asiel v. X, Y and Z (C-199/12, C-200/2, C-201/12)* regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive, paras. 3.1.3-3.1.4.

Protection No. 2, "Membership of a particular social group"⁵⁹ acknowledge the validity of the two approaches, aiming to accommodate both as alternatives in a standard definition: "a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, **or** [as opposed to and] who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights".⁶⁰ This definition, which acknowledges the two approaches, however, is not premised on both alternatives being applied cumulatively, as the 2004 QD instead prescribes.⁶¹

31. Further, in stating that "**depending on the circumstances** in the country of origin, a particular social group **might** include a group based on a common characteristic of sexual orientation",⁶² the 2004 QD is at odds with UNHCR's Guidelines, which have clarified that "[w]hether applying the 'protected characteristics' or 'social perception' approach, there is a broad acknowledgment that under a correct application of either of these approaches, **lesbians, gay men, bisexuals and transgender persons are members of 'particular social groups'** within the meaning of the refugee definition".⁶³

32. Finally, the 2004 QD must also be interpreted in a manner consistent with the rights guaranteed by the EU Charter of Fundamental Rights and the ECHR, as noted above.⁶⁴

D. Analysis

33. This commentary follows the order in which the Court answered the questions referred to it (i.e., considering question 2 last).

Dublin Convention.^{xv}

A period of reflection and consultations followed the completion of the first phase, after which the European Commission presented its Policy Plan on Asylum in June 2008.^{xvi}

In the introduction to the document, the Commission underlined the fact that the Refugee Convention "plays a fundamental role" in the implementation of the policy plan, both before and after the entry into force of the Treaty of Lisbon.^{xvii} Since then, the Asylum Procedures Directive, Reception Conditions Directive, Qualification Directive, Dublin Regulation and EURODAC Regulation were revised or "recast".^{xviii}

Since the entry into force of the Lisbon Treaty the nature of the EU's obligations in this field has changed. Whereas the EU's competence was limited to adopting "minimum standards" in the past, the EU is now competent to harmonize these measures.^{xix} Accordingly, where before the entry into force of the Lisbon Treaty Member States were generally considered to bear final responsibility for the establishment of a legal framework that protected the fundamental rights of asylum seekers in compliance with the Refugee Convention, this obligation has now at least partially shifted to the EU.^{xx}

⁵⁹ UNHCR, Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its Protocol relating to the Status of Refugees.

⁶⁰ *Ibid.*, para. 11, (**emphasis added**). Also: Guidelines on International Protection No. 9, paras. 44-45.

⁶¹ Alice Edwards, 'Judging gender: Asylum adjudication and issues of gender, gender identity and sexual orientation', Keynote statement at the Intergovernmental consultation on migration, asylum and refugees: Workshop on asylum issues relating to gender, sexual orientation and gender identity (Geneva, 25-26 October 2012). See also Michelle Foster, 'The Ground with the least clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group', August 2012.

⁶² 2004 QD, Article 10(1)(d).

⁶³ UNHCR, Guidelines on International Protection No. 9, para. 46, (**emphasis added**). See also James Hathaway, *The Law of Refugee Status* (1991), pp. 157-161, 163-164.

⁶⁴ See para. 26 above.

The Court's preliminary observations

34. By way of preliminary observation, the CJEU, citing its established case law⁶⁵ and referring to the pertinent preambular recitals⁶⁶ of the 2004 QD, affirmed that indeed the Refugee Convention and its Protocol constitute "the cornerstone of the international legal regime for the protection of refugees". The Court also confirmed that the provisions of the 2004 QD are to guide the authorities of the Member States in the application of the Convention, stating: "The Directive must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva [Refugee] Convention".⁶⁷

35. Further, with reference to the 2004 QD⁶⁸ and its own jurisprudence,⁶⁹ the Court affirmed that the 2004 QD must be interpreted in a manner consistent with the rights recognized in the EU Charter of Fundamental Rights.⁷⁰

Question 1:⁷¹ A particular social group

36. The Court frames its answer to the question as to "whether foreign nationals with a homosexual orientation form a particular social group" with reference to the 2004 QD's cumulative, two-limbed test: do the members of the group share an innate characteristic, or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce? **And** (instead of or), does the group have a distinct identity in the relevant country, because it is perceived as different by the surrounding society?⁷² In ruling on this question, the CJEU adopted the cumulative application of the 'protected characteristics' and the 'social perception' approaches to the definition of membership of a particular social group, despite the fact that the UNHCR's authoritative interpretation of the Refugee Convention does not support such a reading.⁷³

37. Moreover, the CJEU's cumulative approach is arguably inconsistent with the Court's own preliminary observations, where it had correctly identified the place and legal force of the 2004 QD in the normative framework relevant overall: "the Directive must... be interpreted... in a manner consistent with the Geneva [Refugee] Convention"⁷⁴ and with the rights recognized in the EU Charter of Fundamental Rights.⁷⁵

38. The Court states that it is "common ground" that a person's sexual orientation is a characteristic so fundamental to one's identity that one should not be forced to renounce it.⁷⁶ It finds support for this interpretation in the text of the 2004 QD, which provides that "depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation".⁷⁷ While the 2004 QD is equivocal and inconclusive at best, the UNHCR

⁶⁵ Joined Cases C-71/11 and C-99/11 *Y and Z*, para. 47; Case C-31/09 *Bolbol*, para. 37; Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla et al.*, para. 52.

⁶⁶ 2004 QD, preambular recitals 3, 16 and 17.

⁶⁷ Paras. 39-40 of the judgment.

⁶⁸ 2004 QD, preambular recital 10.

⁶⁹ Case C-364/11 *Mostafa Abed El Karem El Kott et al.*, para. 43 (note that the judgment erroneously refers to para. 48); Joined Cases C-71/11 and C-99/11 *Y and Z*, para. 48; Joined Cases C-411/10 and C-493/10 *N.S. et al.* Case C-31/09 *Bolbol*, para. 38; Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla et al.*, para. 54.

⁷⁰ Para. 40 of the judgment. Also see para. 26, above.

⁷¹ Question 1: "Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the 2004 Qualification Directive]?"

⁷² Para. 45 of the judgment.

⁷³ See paras. 20 and 21 above about UNHCR's supervisory responsibility in the application of the Refugee Convention.

⁷⁴ Paras. 39-40 of the judgment.

⁷⁵ Para. 40 of the judgment.

⁷⁶ Para. 46 of the judgment.

⁷⁷ 2004 QD, Article 10(1)(d).

interpretation is clearer.⁷⁸ In this respect the Court has missed the opportunity to interpret the 2004 QD "in a manner consistent with the Geneva [Refugee] Convention".⁷⁹

39. As to the second limb of the test, the Court notes that the existence of criminal laws that specifically target "homosexuals" supports the finding that they belong to a particular social group.

40. In the end, after applying the two-limb test cumulatively, the Court concludes that the existence of criminal laws that prohibit certain sexual acts, specifically targeting homosexuals, supports the finding that those persons must be regarded as forming a particular social group for the purposes of the 2004 QD.⁸⁰ Despite the problems with the Court's reasoning identified above, this finding is ultimately to be welcome.

Question 3:⁸¹ Criminalization of consensual same-sex sexual conduct and the concept of persecution

Court's failure to reformulate Question 3

41. The ICJ considers that question 3, in particular, is poorly formulated and notes that the Court chose not to reformulate it, despite having the competence to do so *proprio motu*.⁸² Had the Court reformulated question 3 meaningfully, it could have overcome the inherent problem to which its current wording gives rise. Namely, it needlessly limits the scope of the enquiry, where in fact the reality of the potential persecutory effects of the criminalization of consensual same-sex sexual conduct necessitates a broad perspective, in light of all relevant circumstances. Question 3, instead, on the one hand restrictively focuses on whether criminalization of homosexual activities and the attendant threat of imprisonment upon conviction constitute an act of persecution exclusively within the meaning of Article 9(1)(a) of the 2004 QD, while, on the other, it omits to ask whether, in the alternative, they constitute persecution within the meaning of Article 9(1)(b).⁸³

42. Question 3 also asks whether criminalization of homosexual activities and the threat of imprisonment in relation thereto constitute an act of persecution within the meaning of Article 9(1)(a), read exclusively in conjunction with Article 9(2)(c) of the 2004 QD. However, subparagraph (c) is only one of six subparagraphs featured in Article 9(2). Moreover, while describing some of the forms that persecution can take, the provision clearly indicates that the enumeration is non-exhaustive and is presented only as example.⁸⁴ Therefore, in choosing not to reformulate question 3,

⁷⁸ See para. 31, above.

⁷⁹ Paras. 39-40 of the judgment.

⁸⁰ Para. 49 of the judgment.

⁸¹ Question 3: "Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone (Case C-199/12), the Penal Code Act 1950 of Uganda (Case C-200/12) or the Senegalese Penal Code (Case C-201/12) constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?"

⁸² See para. 9, above.

⁸³ Article 9(1)(b) of the 2004 QD reads as follows: "1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must: [...] (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)".

⁸⁴ The list in Article 9(2) is preceded by "inter alia". Article 9(2) reads as follows: "Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of: (a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment, which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict,

the Court also failed to address the other subparagraphs in Article 9(2), in addition to subparagraph (c), some of which would have been particularly relevant to its determination of the case

43. The above-mentioned omissions are compounded by the last clause in question 3,⁸⁵ which again inappropriately constrains the scope of the inquiry exclusively within the confines of Article 9(1)(a) read in conjunction with Article 9(2)(c). The opportunity to place the criminalization of homosexual activities and the attendant threat of imprisonment within their broader societal context was thereby once again missed.

The Court's reasoning on Question 3 concerning the mere existence of legislation criminalizing consensual same-sex conduct

44. In its answer to question 3, the Court suggested that the issue turned essentially on "whether Article 9(1)(a) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the mere fact that homosexual acts are criminalised and accompanying that criminalisation with a term of imprisonment is an act of persecution".⁸⁶

45. The Court then pointed to the fact that Article 9(1) of the 2004 QD provides two alternative thresholds to support a finding that the relevant acts constitute persecution, namely, subparagraph (a) and (b).⁸⁷ While the reference to Article 9(1)(b) was outside the scope of enquiry the Court identified in question 3, it clearly would have been appropriate and desirable for the Court to have addressed the question of cumulative measures in framing the question. However, the Court chose not to do so.

46. The Court determined that "not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach" the level of seriousness required to constitute a persecution within the meaning of Article 1(A) of the Refugee Convention.⁸⁸ It noted that "the fundamental rights specifically linked to the sexual orientation concerned in each of the cases in the main proceedings, such as the right to respect for private and family life... is not among the fundamental human rights from which no derogation is possible".⁸⁹ The Court concluded that "[i]n those circumstances, the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution".⁹⁰

47. The ICJ takes issue with the Court's reasoning in three respects.

48. First, the Court speaks of "fundamental rights specifically linked to sexual orientation", without defining the content of those "specifically linked" fundamental rights. By way of example, it identifies only the right to respect for private and family life, as one of them.⁹¹ However, as a facet of anyone's identity, sexual orientation and gender identity are linked with many human rights. These include the right to

where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2); (f) acts of a gender-specific or child-specific nature."

⁸⁵ See para. 16, above. The clause reads "If not, under what circumstances would that be the case?"

⁸⁶ Para. 50 of the judgment.

⁸⁷ See paras. 51-52 of the judgment. The relevant provisions read as follows: "(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the" ECHR; "or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

⁸⁸ Para. 53 of the judgment.

⁸⁹ Para. 54 of the judgment.

⁹⁰ Para. 55 of the judgment.

⁹¹ The Court speaks of rights "such as", see para. 54 of the judgment.

non-discrimination;⁹² the right to human dignity;⁹³ the right to equality before the law;⁹⁴ the right to life;⁹⁵ the right to liberty and security of person;⁹⁶ the right to be free from torture or other ill-treatment;⁹⁷ the rights to freedom of opinion, expression and association;⁹⁸ and the rights to work and to education,⁹⁹ among others.¹⁰⁰ Without defining these rights, the Court nevertheless proceeds on the basis of a narrow compartmentalization of human rights and is quick to conclude that these elusive "fundamental rights specifically linked to sexual orientation" are not among those from which no derogation is possible.

49. Second, the Court draws the categorical conclusion that since the right to private and family life is one from which derogation is possible under Article 15(2) ECHR, then its violation cannot be regarded as affecting the victim in a sufficiently significant manner as to constitute persecution within the meaning of the Article 9(1)(a) of the 2004 QD.¹⁰¹ The question of derogations under human rights law is complex and cannot be addressed fully here. However, it should be noted that non-derogability of rights is certainly not coextensive with that of the normative force of the rights at question. The capacity of a State to derogate from a human rights obligation, whether under the ECHR or the ICCPR, depends on the existence of a public emergency threatening the life of the nation. The grounds for designating certain rights non-derogable are not necessarily because they are more important or "fundamental" than other rights, for instance the bar on non-retroactivity of criminal punishment under article 7 ECHR. In addition, when a State derogates from its obligations concerning a certain right, the full scope of applicability of the right may be narrowed, proportionately and only in a manner strictly required by the exigencies of the situation. However, the right is never obliterated. The concept of persecution calls for an analysis of the seriousness/severity of the violation of the rights that it entails. The focus of the Court's enquiry was on whether criminalization of consensual same-sex conduct constituted persecution and not on its lawfulness as a measure derogating from Convention rights, such as the right to private and family life. It should be noted, however, that any such derogation would be unlikely to be lawful under the ECHR.¹⁰²

50. While Article 9 of the 2004 QD refers to non-derogable provisions of the ECHR, the Refugee Convention does not, nor does it at any point specify that only the violation of certain rights can constitute persecution. UNHCR, in its Handbook on procedures and criteria for determining refugee status, has pointed out that "[f]rom Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution. Whether other prejudicial actions

⁹² Charter of Fundamental Rights of the European Union, Article 21.

⁹³ Charter of Fundamental Rights of the European Union, Article 1.

⁹⁴ Charter of Fundamental Rights of the European Union, Article 20.

⁹⁵ Charter of Fundamental Rights of the European Union, Article 2.

⁹⁶ Charter of Fundamental Rights of the European Union, Article 6.

⁹⁷ Charter of Fundamental Rights of the European Union, Article 4.

⁹⁸ Charter of Fundamental Rights of the European Union, Articles 11 and 12.

⁹⁹ Charter of Fundamental Rights of the European Union, Articles 15 and 14.

¹⁰⁰ Also see: The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity; ICJ, Practitioners Guide No. 4: Sexual Orientation, Gender Identity and International Human Rights Law (2009); ICJ, Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook (2011); and Sexual orientation and gender identity in international human rights law: The ICJ UN compilation, 2013 Fifth updated edition. See also, Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law, United Nations, Human Rights, Office of the High Commissioner, HR/PUB/12/06, 2012.

¹⁰¹ Paras. 54-55 of the judgment.

¹⁰² See, among others, *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45, *Norris v. Ireland*, 26 October 1988, Series A no. 142, and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

or threats would amount to persecution will depend on the circumstances of each case".¹⁰³

51. Accordingly, the 2004 QD's reference to the non-derogable rights in Article 15(2) ECHR should not be used, as the Court has done, to warrant a narrow interpretation of the provision and conclude that violations of rights other than non-derogable ones, *ipso facto*, cannot constitute persecution. Rather, by referring to non-derogable rights the 2004 QD simply elucidates those rights the violations of which will always, by definition, be sufficiently serious to constitute persecution. Such an elucidation is not to the exclusion of other serious violations of human rights. The actual text of the provision is entirely consistent with such an interpretation:¹⁰⁴ the use of "in particular" before the reference to the non-derogable rights in Article 15(2) ECHR does not indicate exclusion of violations of other human rights, but at best would suggest application of the *ejusdem generis* rule, according to which any other would have to be in the same general category. Furthermore, this interpretation is also clearly supported by the plain text, with "in particular" in the provision indicating that this criterion is non-exhaustive even under Article 9(1)(a) of the 2004 QD, let alone if one considers the acts that would constitute persecution within the meaning of Article 9(1)(b).

52. As noted, the Court missed the opportunity to reformulate question 3 so as to bring within the scope of its enquiry an analysis of the persecution threshold pursuant to Article 9(1)(b) of the 2004 QD, which provides that an accumulation of various measures can constitute persecution. This additional set of circumstances, which could satisfy the definition of persecution, is thus not addressed in the judgment. The 2004 QD on this point echoes the UNHCR's authoritative interpretation of the Refugee Convention, which has clarified that "an applicant may have been subjected to various measures not in themselves amounting to persecution... the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds'".¹⁰⁵ Ultimately, the Court's inquiry proceeded on the basis of a compartmentalization of the criminal provisions and their effect in the abstract, devoid of any consideration of their proper place and persecutory effects within particular States around the world.

53. Third, the Court's reasoning in its answer to question 3 appears to depart from – and seems at odds with – its own asylum jurisprudence on persecution for reasons of religious belief. In the joined cases of *Germany v. Y and Z*,¹⁰⁶ the Court first identified freedom of religion as one of the foundations of a democratic society and a basic human right, holding that an interference with it may be so serious as to be "treated" in the same way as violations of non-derogable rights. The court did, however, emphasize that this consequence "cannot be taken to mean that **any** interference with the right to religious freedom... constitutes an act of persecution".¹⁰⁷ The Court held that the 2004 QD must be applied "in such a manner as to enable the competent authorities to assess all kinds of acts which interfere with the basic right of freedom of religion in order to determine whether, by their nature or repetition, they

¹⁰³ UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, op. cit., p. 13, paras. 51-52.

¹⁰⁴ 2004 QD, Article 9(1)(a) reads: "1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must: (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, **in particular** the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms;" (**emphasis added**).

¹⁰⁵ UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, op. cit., p. 13, paras. 52-53.

¹⁰⁶ In 2004 and 2003 Y and Z, respectively, entered Germany and applied for asylum. They claimed that their membership of the Muslim Ahmadi community forced them to leave their country of origin, Pakistan. They had both experienced past incidents of persecution and the Pakistani Criminal Code provides that members of the Ahmadi religious community may face imprisonment of up to three years or may be punished by death or life imprisonment or a fine.

¹⁰⁷ Joined Cases C-71/11 and C-99/11 Y and Z, paras. 57-58, (**emphasis added**).

are sufficiently severe to be regarded as amounting to persecution".¹⁰⁸ Such acts must be identified "not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences".¹⁰⁹ Accordingly, the Court continued, "a violation of the right to freedom of religion may constitute persecution within the meaning of... the Directive where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive".¹¹⁰ This latter group includes the State as well as non-State actors, where the State (or parties controlling it or a part of its territory) is unable or unwilling to provide protection.

54. The Court's reading of the 2004 QD in *Y and Z* appears to be on more sound legal footing than its approach in *X, Y and Z*, as it interprets the Directive's provisions consistently with the Refugee Convention and does not improperly limit its focus to the 2004 QD-specific reference to the non-derogable rights in Article 15(2) ECHR. Rather, in *Y and Z*, the Court used that reference as guidance to determine, in a manner consistent with the Refugee Convention, whether the feared human rights violations for reason of religious belief on return to the country of origin would be so serious, by their nature or repetition, as to give rise to a well-founded fear of persecution. In conducting the analysis, the Court took into account the whole spectrum of the experience of freedom of religion, and acts and measures that interfere with it and the way in which they would affect the applicants in turn.

55. In *Y and Z*, the Court stated that for the purpose of determining whether interference constitutes persecution, the "authorities must ascertain, in light of the personal circumstances of the person concerned, whether that person... runs a genuine risk of, inter alia, being prosecuted". Hence mere criminalization (i.e., the "genuine risk of... being prosecuted"),¹¹¹ in the context of religious freedom, appears to be sufficient to be able to give rise to a well-founded fear of persecution.¹¹²

56. Thus, if in *X, Y and Z* the Court had approached question 3 in light of its ratio in *Y and Z*, it would have seen fit to reformulate question 3 as actually asking whether, in light of "the criminalization of homosexuality" and the potential for imprisonment upon conviction, the applicant would run a genuine risk of persecution.

57. While the assessment needs to be made in each individual case, it is obvious that the application of the *Y and Z* reasoning to the current case would have been capable of yielding a very different outcome. Indeed, civil society organizations have extensively documented the ways in which laws and regulations that directly or indirectly criminalize consensual same-sex sexual orientation or conduct provide State actors with the means to perpetrate human rights violations, and enable non-State actors to persecute individuals on account of their real or imputed sexual orientation or gender identity or expression with impunity.¹¹³ Hence, the fact that consensual

¹⁰⁸ Joined Cases C-71/11 and C-99/11 *Y and Z*, para. 64.

¹⁰⁹ Joined Cases C-71/11 and C-99/11 *Y and Z*, para. 65.

¹¹⁰ Joined Cases C-71/11 and C-99/11 *Y and Z*, para. 67.

¹¹¹ On this point, e.g. see Austria, Unabhängiger Bundesasylsenat, 203.430/0-IX/26/98 (28 September 1998): "Although UNHCR reportedly does not know of any examples in which a person has been prosecuted based on his homosexuality, this does not provide for a conclusion considering the reasons why no prosecutions have occurred. There might not have been any trials based on homosexuality, homosexual people might have fled Iran and have been granted asylum in another country, or the appropriate evidence might not have been submitted. Therefore, from this information cannot be concluded that the provisions criminalising homosexual acts, which do exist in Iran, are not being enforced in practice." Cited by Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum claims related to sexual orientation and gender identity in Europe* (September 2011), p. 24.

¹¹² Joined Cases C-71/11 and C-99/11 *Y and Z*, para. 72.

¹¹³ For an extensive discussion on this point, see "Observations by Amnesty International and the International Commission of Jurists on the case *X, Y and Z v Minister voor Immigratie*,

same-sex sexual orientation and/or acts are criminalized require a thorough, individualized and holistic assessment – rather than a false and compartmentalized one – of whether these laws affect the lived experience of asylum applicants in their country of origin in such a way as to give rise to a well-founded fear of persecution.

58. The Court's inconsistent approach in the case of persecution for reason of membership of a particular social group based on sexual orientation, as compared to persecution for reason of religious belief, is not warranted in light of the Refugee Convention, which lists the five grounds on an equal basis.¹¹⁴ The Court offers no reasons to justify departing from its approach in asylum claims based on religious belief. There appears to be no reasonable basis to distinguish the cases, not just on the basis of the Refugee Convention, but also following the Court's own reasoning in the current case, particularly since in *X, Y and Z* the Court noted as "common ground" that sexual orientation is a "characteristic so fundamental to his identity that he should not be forced to renounce it".¹¹⁵ This implies that the experience and expression of one's sexual orientation is as much core to human dignity as one's religious beliefs.

Court's reasoning on Question 3 concerning the application of sanctions

59. Having dismissed the possibility that the mere criminalization of consensual same-sex sexual orientation or conduct can constitute persecution, as *per se* entailing sufficiently serious or severe violations of human rights, the Court points out that a term of imprisonment that accompanies criminalization is capable of constituting an act of persecution if it is actually applied, as such a sanction infringes upon Article 8 ECHR and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the 2004 QD.¹¹⁶

60. The Court here restricts itself to a partial interpretation: Article 9(2)(c) refers to "prosecution or punishment, which is disproportionate or discriminatory". This provision indeed requires actual enforcement of the criminal law giving rise to punishment or at least to charges and liability to prosecution and a real risk of imprisonment in order to justify a finding of persecution.

61. The Court's conclusion that laws criminalizing same-sex sexual conduct that are actively enforced and may lead to imprisonment will constitute persecution, in practice entails a significant step forward for applicants in those European countries where hitherto this was not considered a decisive element.¹¹⁷

62. But had the Court reformulated the question to look beyond Article 9(2)(c), it could have addressed persecution stemming from the existence of laws criminalizing consensual sexual conduct or same-sex sexual orientation by reference to Article 9(2)(b): "legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner" whether or not there is a recent record of enforcement in the sense of imprisonment resulting from the application of the relevant provisions. This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or of non-State actors against whom the State does not offer protection.¹¹⁸ By requiring active enforcement of the criminal

Integratie en Asiel (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013", op. cit. at footnote 1.

¹¹⁴ UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, op. cit., pp. 15-18. At para. 66: "In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above."

¹¹⁵ Para. 46 of the judgment.

¹¹⁶ Paras. 56-61 of the judgment.

¹¹⁷ See Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia*, op. cit., p. 24.

¹¹⁸ For regional and international jurisprudence that recognizes the persecutory nature or potential thereof of unenforced laws that criminalize consensual same-sex sexual orientation or

law in practice in order to find an act of persecution and interpreting this as the conduct of a trial leading to the imposition of a prison sentence, the Court discounts the possibility "rogue enforcement", whereby the existence of these laws can give rise to acts of persecution, without necessarily leading to court cases and convictions that are recorded, and which, incidentally, may only then become part of the country of origin information adduced in asylum proceedings.

63. The decision also disregards the fact that the existence of laws criminalizing consensual same-sex sexual orientation or conduct, including in countries where they have not been recently enforced, gives rise to a real risk that they may be enforced in the future. Recent country examples demonstrate that a lack of implementation of domestic criminal law does not guarantee that enforcement of the relevant criminal provisions will not resume in future. As long as statutes are not repealed, there continues to be a real risk of their enforcement and therefore a real risk that individuals would face criminal investigations, charges, trials, convictions and penalties such as imprisonment, because of their real or perceived sexual orientation or gender identity.¹¹⁹ Accordingly, the fear of the individuals potentially affected, is well-founded and hence, if the other elements of the Refugee Convention are also satisfied, is capable of leading to the recognition of refugee status.

64. It is worth mentioning that in some EU Member States the Courts have already considered this question and come to a contrary conclusion to that of the CJEU.¹²⁰ In Italy, for instance, the Supreme Court of Cassation considered whether the existence of laws criminalizing homosexuality in Senegal was a valid reason for granting international protection. In its judgment, the Court reasoned that the fact that the Senegalese Penal Code criminalizes homosexual acts with penalties of up to five years of imprisonment constituted *per se* a deprivation of the fundamental right to live freely one's sexual and emotional life. Consequently, homosexuals were forced to violate the Senegalese criminal law, exposing themselves to severe penalties if they wanted to live their emotional and sexual life freely. The Court held that this was a violation of the right to private life, embedded in the Italian Constitution, the ECHR and the EU Charter on Fundamental Rights. The criminal law placed homosexuals in a situation of objective persecution, and this justified the granting of protection. The criminalization of consensual same-sex sexual conduct in Senegal was *per se* considered to be a serious and unlawful interference with private life and deemed to severely compromise individual freedom. It placed the homosexual asylum seeker in an objective situation of persecution, which justified granting protection.¹²¹

conduct see, among others, European Court of Human Rights (ECtHR), *Dudgeon v. United Kingdom*, Application No. 7525/76 (22 October 1981); ECtHR, *Norris v. Ireland*, Application No. 10581/83 (26 October 1988); ECtHR, *Modinos v. Cyprus*, Application No. 15070/89 (22 April 1993); Human Rights Committee, *Nicholas Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 (4 April 1994); UN Committee Against Torture, *Uttam Mondal v. Sweden*, UN Doc. CAT/C/46/D7338/2008 (23 May 2011).

¹¹⁹ For more on this, see "Observations by Amnesty International and the International Commission of Jurists on the case *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013", op. cit. at footnote 1.

¹²⁰ See the case law cited in Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia*, op. cit., p. 21-26, and in particular on p. 23.

¹²¹ Order 15981/12, Supreme Court of Cassation, Italy (20 September 2012), full text of the judgment, available in Italian, at <http://goo.gl/7HrIh8>.

Question 2:¹²² "Discretion or concealment"

65. In addressing Question 2, the Court first clarified the question: if a homosexual applicant is a member of a particular social group, should a distinction be made between acts that fall within the scope of the 2004 QD, and acts that do not? The Court noted that the question refers to applicants that have not shown that they have already been persecuted or subjected to direct threats.¹²³

66. The Court's reading of Article 10(1) of the 2004 QD is welcomed. The concept of sexual orientation must not be understood as only applying to the private life of the person, but can include acts in his or her public life. Affirming that a requirement of "concealment or discretion" is incompatible with the recognition of a characteristic so fundamental to a person's identity that one cannot be required to renounce it, the Court correctly concludes that, "an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin to avoid persecution".¹²⁴ Moreover, the applicant is not expected to exercise greater restraint than a heterosexual in expressing his sexual orientation, even if that would allow him to avoid the risk of persecution.¹²⁵

67. In answering Question 2 the Court uses heterosexuality as the comparator, and, on that basis, concludes that there should be no distinction. Homosexuals should expect and be treated in the same manner as heterosexual, no more, but certainly no less, to use a famous adage.

68. In light of the Court's answer to the first sub-questions in Question 2, there was no need for it to answer part (c). The Court did however make the following observation: "Nevertheless, it must be recalled that, for the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive, it is unnecessary to distinguish acts that interfere with the core areas of the expression of sexual orientation, even assuming it were possible to identify them, from acts which do not affect those purported core areas (see, by analogy, *Y and Z*, paragraph 62)."¹²⁶

69. In light of the Court's reasoning in its answer to Question 3 mentioned above, one cannot fail to note that the Court's closing paragraph in answering Question 2, recalling by analogy its own judgment in *Y and Z*, is remarkably inconsistent. Inviting analogy with its holistic approach to the concept of persecution espoused in *Y and Z*, the Court confirms that for the purpose of determining which acts may constitute persecution there is no need to distinguish between acts that interfere with the "core areas" of sexual expression and those that do not. Almost by way of parenthesis, the Court also confirms that it is a far-fetched assumption that one could identify those "core areas".

¹²² Question 2: "If the first question is to be answered in the affirmative: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following subquestions [*sic*):

(a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?

(b) If the previous answer is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?

(c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?"

¹²³ Paras. 62-63 of the judgment.

¹²⁴ Paras. 69-71 of the judgment.

¹²⁵ Paras. 72-75 of the judgment.

¹²⁶ Para. 78 of the judgment.

E. Conclusions

70. The Court's finding that asylum applicants that have a same-sex sexual orientation from countries of origin where consensual homosexual conduct is criminalized form a particular social group for the purposes of the 2004 QD, in line with the UNHCR's interpretation of the Convention, is welcome. Likewise, it is positive that the Court recognized that sexual orientation is a characteristic so fundamental to identity that one cannot be expected to renounce or conceal it, or to exercise greater restraint in its expression than heterosexuals.

71. Further, the conclusion that "a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution"¹²⁷ is a step forward for applicants in those European countries where hitherto this was not considered a decisive element.

72. However, in some important respects this judgment represents a missed opportunity.

73. First, the Court failed to clarify that the cumulative application of the 2004 QD's two-limbed test to define membership of a particular social group is not consistent with the UNHCR's authoritative interpretation of the Geneva Convention, and indeed with some States' practice.

74. Second, the Court chose to maintain the narrow scope of the questions referred by the Council of State and ended up with an unwarrantedly restrictive reading of the 2004 QD, addressing only one definition of persecution and only one type of persecutory acts.

75. Thus, the Court ignored the numerous persecutory effects of criminalizing consensual same-sex sexual orientation or gender identity, including the issue of rogue enforcement, and the lack of protection against persecution by non-State actors. The Court missed a chance to state that laws criminalizing consensual same-sex sexual conduct, even when they are not enforced in the sense that there exists a recent record of enforcement through actual imposition of terms of imprisonment, have a persecutory effect, as they criminalize an essential characteristic of one's identity.

76. The fact that the Court took a different approach from its own reasoning and holistic methodology on the analogous issue in relation to religious persecution is highly problematic from a rule of law perspective, since one would expect, in the absence of good reasons, that like cases are treated alike, especially as the Court acknowledged in this judgment that sexual orientation is a characteristic fundamental to one's identity.

¹²⁷ Para. 61 of the judgment.

ENDNOTES TO THE TEXT BOX ON PAGES 8-10

- ⁱ Treaty on European Union, Article K.1 (Treaty of Maastricht numbering). The Article provided that the Member States shall regard the area of asylum policy as a matter of common interest. Article K.2 provided that "The matters referred to in Article K.1 shall be dealt with in compliance with the ECHR and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds".
- ⁱⁱ For an overview of the measures taken at the inter-governmental level prior to the Treaty of Amsterdam, see Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy', 18 *International Journal of Refugee Law* (2006), p. 631-640.
- ⁱⁱⁱ Official Journal of the European Communities 97/C 340/03 (10 November 1997).
- ^{iv} TEC, Article 61 (Treaty of Amsterdam numbering).
- ^v TEC, Article 63(1) (Treaty of Amsterdam numbering).
- ^{vi} Presidency Conclusions, Tampere European Council (15-16 October 1999), Introduction.
- ^{vii} *Ibid.*, para. 13.
- ^{viii} Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, *Official Journal of the European Union* 2005/C 53/01 (3 March 2005), III.1.3.
- ^{ix} European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, *Official Journal of the European Union* 2010/C 115/01 (4 May 2010), 6.2.1.
- ^x Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers (27 January 2003); the 2004 QD; Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (1 December 2005).
- ^{xi} Council Decision of 28 September 2000 establishing a European Refugee Fund, *Official Journal of the European Communities* 2000/L 252/12 (6 October 2000).
- ^{xii} Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (20 July 2001), *Official Journal of the European Communities* 2001/L 212/12 (7 August 2001).
- ^{xiii} Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *Official Journal* L 050 (25 February 2003).
- ^{xiv} On 1 April 2006, the Regulation became applicable to Denmark, which has opted out of the Common European Asylum System; the Dublin II Regulation also applies to Norway, Iceland and Switzerland.
- ^{xv} Dublin II Regulation, Article 24(1).
- ^{xvi} European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Policy Plan on Asylum: An Integrated Approach to Protection Across the EU, COM(2008)360final (17 June 2008).
- ^{xvii} *Ibid.*, p. 2 ('Background').
- ^{xviii} See ICJ's comments on the new recast directives in "Public consultation 'Debate on the future of Home Affairs policies: An open and safe Europe – what next?' Contribution to the public consultation of the International Commission of Jurists", January 2014, in particular section 4 entitled Asylum, pp. 4-5; available at <http://goo.gl/OIHF8>. NB: however, the current case arises from the interpretation of the first incarnation of the Qualification Directive, i.e. the 2004 instrument, not its recast.
- ^{xix} Compare TEC, Article 63 and TFEU, Article 78. With the exception of TEC, Article 63(1)(a) (i.e., the legal basis for the Dublin system), where the EU always had the competence to harmonize.
- ^{xx} Laurens Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence', *Goettingen Journal of International Law* 4 (2012) 1, p. 210-211.