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# TRANSNATIONAL JUDICIAL DIALOGUE, HARMONIZATION AND THE COMMON EUROPEAN ASYLUM SYSTEM

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**Abstract** Increased policy harmonization on refugee matters in the European Union (EU), namely the creation of a Common European Asylum System (CEAS), has created the imperative for a transnational judicial comparative dialogue between national courts. This article is based on a structured, focused comparison approach to examining a key element of a transnational European legal dialogue, namely, the use of foreign law by national judges when making their own decisions on asylum. It does so by examining two countries, France and Britain, as representative of the difference in legal tradition and culture within the EU in terms of the civil–common law divide. Both case studies are structured around a common set of empirical and jurisprudential research questions. The empirical findings reveal a surprising lack of transnational use of national jurisprudence on asylum between judges. Nonetheless, a slight but noticeable increase in the use of transnational asylum jurisprudence in the British and French courts must be noted. Two broad accounts—one rational, the other cultural—are applied in each of the case studies to explain this empirical finding. This article concludes on the broader implications of these findings for the establishment of a CEAS by 2012.

## I. INTRODUCTION

Asylum is a policy area that, by its very nature, demands inter-state cooperation and the 1951 Convention Relating to the Status of Refugees (Refugee Convention) is the basic instrument that provides for this.<sup>1</sup> Within the European Union (EU), the imperative for deeper cooperation is present, given the provision for the free movement of persons within the Union. EU Member States have committed themselves to greater harmonization of their national laws on asylum but interpretation and application of these new EC

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<sup>1</sup> 189 UNTS 150, entered into force on 22 April 1954.

laws depend to a large extent on national judiciaries. Thus, the success of the harmonization substantially depends on the development of common judicial understandings, principles and norms concerning refugee matters.

As a general trend, senior judges in the national courts are now commonly and increasingly paying attention to the law of foreign countries as a guide to their own decisions. It has even been suggested that we may be witnessing the emergence of a global jurisprudence, especially in the area of human rights.<sup>2</sup> This affinity with foreign sources of a domestic nature is particularly present in Commonwealth courts, due no doubt to shared legal cultures and a common allegiance to the Privy Council; hence, Lord Bingham suggests that we may be facing ‘a new dawn of internationalism in the English legal world’.<sup>3</sup> In Europe, this debate has traditionally focused on a three-dimensional dialogue: between national judges and European judges (namely, the European Court of Justice or the European Court of Human Rights), between European judges themselves, and between national judges of the different Member States (that is, the transnational dialogue). This article concentrates on the last dimension—namely, the dialogue between national judiciaries—as scholarship to date has focused on the first two.<sup>4</sup> Some work has been done on the dialogue between national judiciaries<sup>5</sup> but not in the area of refugee law.<sup>6</sup> Yet, refugee law offers a particularly interesting case study because it has evolved mostly

<sup>2</sup> A-M Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 *University of Richmond Law Review* 99; ‘Judicial Globalization’ (2000) 40 *VJIL* 1103; ‘A Global Community of Courts’ (2003) 44 *Harv ILJ* 191–219; C McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) *OJLS* 499.

<sup>3</sup> TH Bingham, “‘There is a World Elsewhere’: Changing Perspectives of English Law’ (1992) 41 *ICLQ* 513, 515.

<sup>4</sup> On the dialogue between European courts and national courts, see T Koopmans ‘Comparative Law and the Courts’ (1996) 45 *ICLQ* 3, 545–556; K Lenaerts ‘Interlocking Legal Orders in the European Union and Comparative Law’ (2003) 52 (4) *ICLQ* 873–906; VP Pescatore ‘Le recours dans la jurisprudence de la Cour de Justice des Communautés Européennes à des normes déduites de la comparaison des droits des Etats membres’ (1980) *Revue Trimestrielle de Droit Communautaire* 337; T Franck and G Fox ‘Transnational Judicial Synergy’ in Franck and Fox (eds) *International Law Decisions in National Courts* (Transnational Publishers, New York, 1996). On the dialogue between European courts, see F Lichère, L Potvin-Solis and A Raynourd (eds) *Le Dialogue entre les Juges Européens et Nationaux: Incantation ou Réalité?* (Bruylant, Brussels, 2004); CL Rozakis ‘The European Judge as Comparatist’ (2005) 80 *Tulane Law Review* 257.

<sup>5</sup> McCrudden (n 2) 499; G Canivet, M Andenas and D Fairgrieve (eds) *Comparative Law Before the Courts* (British Institute of International and Comparative Law, London, 2004); P Legrand ‘European Legal Systems are not Converging’ (1996) 45 (1) *ICLQ* 52; R Sefton-Green ‘Compare and Contrast: Monstre a Deux Tetes’ (2002) 1 *Revue Internationale de Droit Comparé* 85; BS Markesinis ‘Judge, Jurist and the Study and Use of Foreign Law’ (1993) *LQR* 622; and ‘A Matter of Style’ (1994) *LQR* 607; BS Markesinis and J Fedtke ‘The Judge as Comparatist’ (2005) 80 *Tulane Law Review* 11, and by the same authors, and very much based on that article, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (University of Texas at Austin & UCL Press, 2006).

<sup>6</sup> With one exception in the form of a report written by G Gyulai ‘Country Information in Asylum Procedures—Quality as a Legal Requirement in the EU’ (Hungarian Helsinki Committee, 2007).

under the influence of judges—so it has ‘become fundamentally judicialized’<sup>7</sup> and this is reflected in the key role occupied by high courts as ‘agents of normative change’.<sup>8</sup> Furthermore, refugee law lacks an international court competent to provide a common interpretation of the Refugee Convention (unlike the area of human rights law for instance),<sup>9</sup> thereby leaving it to each Contracting State ultimately to interpret the Refugee Convention.<sup>10</sup> In sum, refugee law provides tremendous opportunity in terms of seeking a greater transnational judicial role.

There is some evidence of transjudicial activity in refugee law, among senior appellate judges in Commonwealth countries. Hathaway notes that:

Senior appellate courts now routinely engage in an ongoing and quite extraordinary transnational judicial conversation about the scope of the refugee definition and have increasingly committed themselves to find common grounds.<sup>11</sup>

Judges also refer more and more to the work of leading academic authorities.<sup>12</sup> However, this trend is less in evidence outside the Commonwealth. The International Association of Refugee Law Judges’ (IARLJ) own estimate is that there is a problematic lack of cross-referencing between European countries.<sup>13</sup> But there is no study of the precise extent of this problem.

This article adopts a structured, focused comparison approach<sup>14</sup> to examining a key element of a transnational European legal dialogue, namely the use of foreign law by national judges when making their own decisions on asylum. It does so by examining two Member States, France and the United Kingdom, which represent key differences in legal tradition and culture within

<sup>7</sup> JC Hathaway ‘A Forum for the Transnational Development of Refugee Law: The IARLJ’s Advanced Refugee Law Workshop’ (2003) 15(3) *Intl J Refugee L* 418.

<sup>8</sup> V Guiraudon ‘European Court and Foreigners’ Rights: A Comparative Study of Norms Diffusion’ (2000) 34 *Intl Migration Rev* 4 1088–1125, 1107.

<sup>9</sup> A-M Slaughter (n 2) 121 and 127. On the use of comparative law in the UK since the HRA, see D McGoldrick ‘The United Kingdom’s Human Rights Act 1998 in Theory and Practice’ (2001) 50(4) *ICLQ* 901.

<sup>10</sup> AM North and J Chia, ‘Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International judicial Commission for Refugees’ in J McAdam (ed) *Forced Migration, Human Rights and Security* (Hart Publishing, Oxford, 2008) 225–261.

<sup>11</sup> JC Hathaway *The Rights of Refugees under International Law* (Cambridge, Cambridge University Press, 2005) 1–2, see also 116. Referring in particular to A-M Slaughter (n 2) 99, and to the University of Michigan’s Refugee Caselaw Site and the establishment of the International Association of Refugee Law Judges in 1995. See also, D E Anker ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harv Human Rts J* 133, 136.

<sup>12</sup> H Storey ‘The Advanced Refugee Law Workshop Experience: An IARLJ Perspective’ (2003) 15(3) *Intl J Refugee L* 423.

<sup>13</sup> Author’s discussions with Dr Hugo Storey (Senior Judge at the Asylum and Immigration Tribunal, and member of the IARLJ).

<sup>14</sup> AL George, ‘Case Studies and Theory Development: The Method of Structured, Focused Comparison’ in PG Lauren (ed) *Diplomacy: New Approaches in History, Theory and Policy* (Free Press, New York, 1979) 43–68.

the EU in terms of the civil–common law divide<sup>15</sup>. Both case studies are structured around a common set of empirical and jurisprudential research questions—the normative question of legitimacy is explored in section II.<sup>16</sup> The empirical findings reveal a surprising lack of transnational use of national jurisprudence on asylum between judges. Nonetheless, a slight but noticeable increase in the use of transnational asylum jurisprudence in the British and French courts must be noted. Two broad accounts—one rational, the other cultural—are applied in each of the case studies to explain this empirical finding. This article concludes on the broader implications of these findings for the establishment of a common European asylum system by 2012.

## II. TRANSNATIONAL EUROPEAN LEGAL DIALOGUE AND THE COMMON EUROPEAN ASYLUM SYSTEM

The imperative for dialogue between national judiciaries within the EU comes from the Tampere meeting of the European Council in October 1999, when the then 15 Member States agreed to develop the EU as a common area of freedom, security and justice. In order to do that, the Member States agreed to work towards establishing a Common European Asylum System (CEAS) by making full use of the provisions in the Amsterdam Treaty 1997. The effectiveness of this ‘common’ system will be somehow dependent on commonalities. An obvious way of achieving this is through the adoption of common legislation. In this regard, the adoption of four key Directives and two Regulations on matters of asylum concluded the first phase towards the establishment of a CEAS (a phase which ended in 2005).<sup>17</sup>

<sup>15</sup> For an analysis of a wider range of cases, see GS Goodwin-Gill and H Lambert (eds) *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (forthcoming, Cambridge University Press, Cambridge, 2009).

<sup>16</sup> The distinction between ‘empirical’, ‘jurisprudential’ and ‘normative’ questions is borrowed from C McCrudden (n 2) 499.

<sup>17</sup> Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L326 13/12/2005 13–34; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304, 30/09/2004 12–23; Council Regulation (EC) 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National [2003] OJ L050 06/02/2003 1–10; Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L031, 06/02/2003 18–25; Council Regulation (EC) 407/2002 of 28 February 2002 Laying Down Certain Rules to Implement Regulation (EC) 2725/2000 Concerning the Establishment of ‘Eurodac’ for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2000] OJ L062 05/03/2002 1–5; and Council Directive 2001/55/EC of 20 July 2001 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 [2001] OJ L212, 07/08/2001 12–23. The Commission is planning to amend these pieces of legislation in 2009, see S Peers, ‘Statewatch analysis—the EU’s JHA

The European Commission's Green Paper on the Future Common European Asylum System started the second phase of this process<sup>18</sup> which is due to end in 2012.<sup>19</sup> The European Commission is driving for fuller harmonization of both legislation *and practice* concerning asylum procedures, protection status and asylum decisions.<sup>20</sup> Thus, how this common legislation is interpreted and applied by domestic courts is equally important. A comparative approach by judges therefore appears to be essential for the development of a system that is not only common but is also coherent and built on trust; these are necessary elements for any common system to work, as clearly recognized by the European Commission in its Communication to the Council and the European Parliament on 'Strengthened Practical Cooperation—New Structure, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System'.<sup>21</sup> For this to happen, a transnational judicial dialogue or process of communication, resulting in the use of each others' jurisprudence, must exist between European judges. This article is testing that: to what extent is the ground prepared for a common asylum system, and if not, what are the obstacles that need to be addressed between now and 2012?

It is worth noting here that the adoption of the new EC legislation on asylum itself has already had some effect on the dialogue between refugee law judges and the use of comparative jurisprudence. Indeed, the adoption of new EC legislation has required the European Commission to consult with different actors (eg academics and senior judges) to learn of the practice and jurisprudence of the Member States. It has also forced the Member States to reform their existing asylum legislation, and in doing so an important process of inspiration by foreign practice and jurisprudence has taken place. Finally, the adoption of new EC legislation requires the national courts to adapt to what other Member States are doing in seeking to match their own approaches with those adopted by other national courts and the European Court of Justice (ECJ) when dealing with similar issues.<sup>22</sup> In this regard, information and best practice are being exchanged through face-to-face meetings and networks, such as the International Association of Refugee Law Judges (IARLJ). The

Agenda for 2009', available at <http://www.statewatch.org/analyses/eu-sw-analysis-2009-jha-agenda.pdf>

<sup>18</sup> Brussels, 06/06/2007, COM (2007) 301, final. See also, the Hague Programme 'Strengthening Freedom, Security and Justice in the European Union' Presidency Conclusions, Brussels, 4–5 November 2004.

<sup>19</sup> Note that the original, formal deadline was 2010 but this has been postponed to 2012. European Pact on Immigration and Asylum, adopted at the Council of European Union Meeting in Brussels, 16 Oct 2008, D/08/14.

<sup>20</sup> Author's interview with Zeta Georgiadou and Doede Ackers (policy officers, European Commission, Directorate General Justice, Freedom and Security, Directorate Immigration, Asylum and Borders) Brussels, 27 June 2007.

<sup>21</sup> Communication of 17 February 2006, COM (2006) 67, 3. See also L Potvin-Solis (n 4) 30.

<sup>22</sup> H Storey 'EU Refugee Qualification Directive: A Brave New World?' (2008) 20 (1) International Journal of Refugee Law 1–49.

IARLJ has its own database, set up by a German judge, Dr Paul Tiedemann, in cooperation with the *Europäische EDV—Akademie des Rechts* in Merzig, Germany, which offers free access to international case law on asylum. At present, the following languages are available: Dutch, English, German, Finnish, French, Polish and Slovenian, and the database currently contains 190 decisions from ten countries. It is entirely dependent on voluntary submissions and the goodwill of contacts (often judges) in different States.<sup>23</sup>

However, the next section shows that in the case of Britain and France, judges rarely *use* each other's decisions within the EU. The extent of this problem is remarkable. Ideally, the ECJ should be able to help in this process but, as things stand, its interpretative role is considerably limited under Article 68 EC Treaty which restricts possibilities of references to the ECJ to 'a court or tribunal against whose decisions there is no judicial remedy under national law'. For instance, since the coming into force of the Qualification Directive (Council Directive 2004/83/EC) on 10 October 2006, only three national courts have made a preliminary ruling reference to the ECJ. In October 2007, the highest administrative court (*Raad van State*) in the Netherlands sent a question to the ECJ concerning the interpretation of article 15(c) (serious harm) of the Directive.<sup>24</sup> In April 2008, the German Federal Administrative Court (*Bundersverwaltungsgericht*) sent a preliminary question concerning the interpretation of Article 11(1)(e) (cessation) of the Directive<sup>25</sup>. And in January 2009, the Hungarian second instance administrative court (*Fővárosi Bíróság*) lodged a reference for preliminary reference to the ECJ concerning the interpretation of Article 12(1)(a) of the Directive. Since the coming into force of the Dublin Regulation (EC) 343/2003, only one question of interpretation has been referred to the ECJ, by the Swedish Administrative Court of Appeal (*Kammarrätten I Stockholm*) in January 2008.<sup>26</sup> The Commission Communication of 28 June 2006 proposes that article 234 EC should also be applicable to the field of asylum, immigration and visas.<sup>27</sup> In the interim, the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice should help towards simplifying the various stages of the proceedings before the ECJ in certain cases, but the existing limitations regarding which court/tribunal can submit a reference remain.<sup>28</sup> It is therefore predicted that the interpretative role of the ECJ will continue to be limited for a number of years. Indeed, even if and when article 68 EC is to be abolished and replaced with article 234 EC (eg with the ratification of the Treaty of Lisbon), it will take the ECJ some time to identify foundational principles in this new area of law.<sup>29</sup> Furthermore, the ECJ is not

<sup>23</sup> Available at: <http://www.iarlj.nl>

<sup>24</sup> Case C-465/07.

<sup>25</sup> Case C-175-179/08 (pending).

<sup>26</sup> Case C-19/08.

<sup>27</sup> COM (2006) 346 final.

<sup>28</sup> Official Journal 8.3.2008, C-64/1-2.

<sup>29</sup> C Chenevière 'L'article 68 CE—Rapide survol d'un renvoi préjudiciel mal compris' (2004) 40 Cahiers de droit européen 5/6 567–590; and K Lenaerts 'The Unity of European Law

always able or willing to review facts, and yet in refugee cases, facts are often key elements in a decision.<sup>30</sup> Finally, it may be argued that the role of the ECJ in this area of law is seriously compromised by the lack of experts in refugee law at the ECJ and doubts are therefore expressed as to whether or not it will be able to interpret the necessary Directives in accordance with international law, in particular the Refugee Convention. The ECJ accepts the comparative approach as a method of interpretation,<sup>31</sup> but in practice the ECJ generally does not refer in its judgments to national jurisprudence. It is left to the *avocat général* (or the Commission) to undertake any such comparative studies.<sup>32</sup> A notable exception is Case 155/79 *AM & S Europe Ltd v Commission* (relating to confidential treatment of contacts between lawyer and client), where the ECJ itself requested that the parties provide extensive comparative material on the existence and extent of a legal privilege of correspondence.<sup>33</sup> In the new area of EC asylum law, the opinion of Advocate General Poiares Maduro in *Elgafaji*,<sup>34</sup> the first to be delivered on the Qualification Directive, does very little to engage with existing asylum jurisprudence; instead the Advocate General developed autonomous concepts in interpreting the Qualification Directive. And yet, much national jurisprudence exists already in this area of law. Here there is scope for national courts to be more active in providing the ECJ with national and comparative jurisprudence on asylum. In any reference submitted to the ECJ (via articles 68 or 234 EC Treaty) on the interpretation of EU law, the statement of the facts and the legal context set out by the national court is central to the preliminary ruling procedure. It is even recognised that this statement may be more important to the ECJ than the explicit question that has been referred to the court.<sup>35</sup>

In sum, these particularities suggest that when the ECJ is going to enter into a dialogue with national judges in this area of law, its role will not be as effective as in other areas of integration. It has been suggested that EU-wide

and the Overload of the ECJ—The System of Preliminary Rulings Revisited’ in I Pernice, J Kokott and C.Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective*, European Constitutional Law Network-Series Vol 6 (Nomos Verlagsgesellschaft, Baden-Baden, 2006) 211–239, 216.

<sup>30</sup> Lenaerts however points toward the ECJ’s developing tendency to ‘provide more ‘concrete’, as opposed to ‘abstract’, rulings warranting complex analysis of the facts, national legislation and other aspects of the main action’; Lenaerts (n 4) 217.

<sup>31</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* [1996] ECR I-1029, para.27. See generally Lenaerts, (n 4) 99–134.

<sup>32</sup> *Avocat généraux* have often referred to foreign jurisprudence and academic writings (eg US) for inspiration in competition cases. See F Jacobs ‘Judicial Dialogue and the Cross-Fertilisation of Legal Systems: the European Court of Justice’ (2003) 38 *Texas International Law Journal*, 553. The Commission too has on occasion provided comparative materials upon request by the ECJ, see Case 43/75 *Defrenne v Société anonyme belge de navigation aérienne Sabena*.

<sup>33</sup> T Koopmans ‘The Birth of European Law at the Crossroads of Legal Traditions’ (1991) 39 *American Journal of Comparative Law* 493–507.

<sup>34</sup> Case C-465/07, opinion delivered on 9 September 2008.

<sup>35</sup> D Chalmers and A Tomkins *European Union Public Law* (Cambridge University Press, Cambridge, 2007) 278.



guidelines based on national case law,<sup>36</sup> which the ECJ can then rely on, may be necessary to address the problem of divergent interpretation.<sup>37</sup> This idea is advocated by the UNHCR<sup>38</sup> and is currently being discussed by members of the IARLJ, European Chapter. The European Commission has recently adopted a proposal for a Regulation to establish a European Asylum Support Office, in the form of an independent agency, in 2009, and aiming at providing adequate support for practical cooperation activities between Member States.<sup>39</sup> It is felt that such support would serve ‘to improve the quality and convergence of Member States’ decision-making, through, inter alia, exchange of good practice, joint training activities and the sharing of information on countries from which asylum seekers originate’.<sup>40</sup> This article argues that national judges are key players in the establishment of a ‘common’ European asylum system, and activities based on trust and reciprocity between national courts (such as using each others’ jurisprudence on asylum) must occur for this system to work effectively.

### III. TRANSNATIONAL ASYLUM JURISPRUDENCE IN THE BRITISH AND FRENCH COURTS: EMPIRICAL FOCUS

This section takes an empirical focus on Britain and France and answers three questions: (1) What is the precise extent of the use of transnational asylum jurisprudence by British and French judges in the EU? (2) When does it happen? (3) Where does it happen?

Whilst not a primary focus, this section also considers questions of how and why transnational asylum jurisprudence is used. Is it used because it is interesting or persuasive?<sup>41</sup> Is it used to prove or disprove factual propositions or to seek normative guidance? Is it used to fill a gap in the law or to confirm that a

<sup>36</sup> The terms ‘case law’ and ‘jurisprudence’ are used interchangeably throughout this article.

<sup>37</sup> This ‘shared responsibility’ between the national courts and the ECJ is clearly recognized by the ECJ itself in the area of human rights, eg Case C-117/01 *KB v National Health Service Pensions Agency (Judgment)* [7 January 2004] and Case C-101/01 *Lindqvist (Judgment)* [6 November 2003].

<sup>38</sup> UN High Commissioner for Refugees, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007.

<sup>39</sup> Press Release, ‘Setting up of European Asylum Support Office proposed by the Commission’ IP/09/275, Brussels, 18 February 2009. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/275&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 28 February 2009).

<sup>40</sup> Press Release ‘The EU moves toward the creation of a Support Office in the field of asylum management’, IP/08/607, Brussels, 18 April 2008. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/607&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 22 April 2008). See also COM (2008) 360 final, Commission’s ‘Policy Plan on Asylum’.

<sup>41</sup> The search for ‘persuasive authority’ has been described as an attempt ‘to learn something from a judge in a different country dealing with a similar problem’; Comments in the *Harvard Law Review* (2005) 103, 167, 149. Also, J Bell *French Legal Cultures* (Butterworths, London, 2001) 8.

proposed solution has worked elsewhere? Is it used to interpret a statute that has its origins in the Refugee Convention or EC law (eg the Qualification Directive)? In cases where no jurisprudence exists from the International Court of Justice or the ECJ, the national court will naturally aim towards reaching a common meaning of the international treaty or the EC Directive. Some of these purposes fall within rules of relevance others within judicial discretion. In our context, refugee law, it is safe to say that judges have more discretion when interpreting international treaties (EC Article 31(3) of the Vienna Convention on the Law of Treaties) than when interpreting EU laws (direct effect and indirect effect, and the evident role of the ECJ). This may explain partly why we can see a slow increase in the pattern of transnational references between certain EU countries since the adoption of EC legislation on asylum.

#### A. Methodology

These questions were applied to a rigorous empirical analysis of the use of foreign law in asylum cases in France and Britain. In the case of France, a comprehensive survey was conducted by the Refugee Appeals Board's Legal Information Department on behalf of the author.<sup>42</sup> This involved analysis of all the decisions and preparatory documents (*feuilles vertes*) of the plenary sessions of the Refugee Appeals Board (now the National Asylum Court) since its first hearing in 1993 until August 2006. The *feuilles vertes* are working documents that contain a summary analysis of the legal instruments and case law relevant to the case at hand. They are prepared by the Legal Information Department of the Appeals Board (now the new Court), directly under the supervision of its President (currently Mr Bernard) who decides which questions to be considered and which appendices to include. Thus, it is he who can require (and has required) foreign jurisprudence to be considered and added. The *feuilles vertes* are intended to be used by judges; on occasion they may be communicated to the parties (and their representatives). The empirical survey also involved analysis of all the relevant decisions of the Council of State (*Conseil d'Etat*) including the conclusions of the *Commissaire du Gouvernement* which were available to the Refugee Appeals Board but excluding those applications that were found to be manifestly unfounded. In addition, a selection of decisions by the Refugee Appeals Board sitting in ordinary session was also examined.<sup>43</sup> In the case of Britain, a team

<sup>42</sup> Note that the Refugee Appeals Board (*Commission de recours des réfugiés*) became the National Asylum Court (*Cour nationale du droit d'asile*) following amendment of the CESEDA (*Code de l'entrée et du séjour des étrangers et du droit d'asile*) on 20 November 2007. See new article L.733-1 f of the CESEDA.

<sup>43</sup> Until 2001–2002, the annual collection of decisions of the Refugee Appeals Board (created by the Legal Information Department) was based on all the decisions of the Board (ie 6,000–12,000 per year). Since 2003, the Board (and now the new Court) has made over

of researchers conducted a complete survey of the published decisions of *all* the relevant courts in England and Scotland until January 2008. The decisions of the Asylum and Immigration Tribunal, the Administrative Court, the High Court, the Court of Appeal, the Court of Session (Scotland) and the House of Lords that made reference to foreign asylum jurisprudence were selected and analysed.

### *B. Empirical Findings: France*

Empirical research shows that it is very rare for French senior asylum judges to refer to foreign jurisprudence in the text of their decisions. With the exception of one case requiring the application of principles laid down in the Dublin II Regulation and Schengen Convention,<sup>44</sup> none of the decisions of the National Asylum Court/Board or of the Council of State have made explicit reference to foreign jurisprudence in the actual text of courts' decisions. Rather, if and when foreign material is being used, this takes place through the use of supporting documents (*feuilles vertes*) for the plenary sessions of the National Asylum Court/Board which, on occasion, include an analysis of foreign jurisprudence,<sup>45</sup> or through the conclusions of the *Commissaire du Gouvernement* who, as a member of the Council of State, gives her or his opinion on the interpretation of important legal issues, an opinion which very occasionally refers to foreign case law.<sup>46</sup> On these rare occasions, foreign jurisprudence has been used when it comes to interpreting certain controversial provisions of the Refugee Convention, such as the meaning of social group or the exclusion clause. The general assessment is that judges in France base their arguments and reasoning mostly on French sources of law, including international and European law which is binding on the French courts. However, a recent trend is starting to show towards an increase in transnational references, particularly in the context of new legal concepts that spring from the new EU Directives. For instance, the Refugee Appeal Board gave serious consideration to foreign jurisprudence when, in 2003, it drafted an internal document aimed at implementing Council Directive 2004/83/EC (namely, the Qualification Directive). This document, largely inspired by

40,000 decisions per year, of which around 2,000 decisions are selected each year for the collection.

<sup>44</sup> CRR (*Commission de recours des réfugiés*), SR (*sections réunies*), 23 February 2001, application no. 351244, *Keklicekpinari*.

<sup>45</sup> Eleven such cases were found: CRR, SR, 7 November 2001, applications 361050 and 373077, *Sissoko*; CRR, SR, 7 December 2001, appl 368138, *Soumah*; CRR, SR, 9 January 2003, appl 362645, *Altun*; CRR, SR, 28 February 2003, appls 404302 and 404411, *Miles Wang*; CRR, SR, 17 October 2003, appl 423904, *Mlle M*; CRR, SR, 25 June 2004, appl 403498, *Mme Koffi Amani*; CRR, SR, 15 October 2004, appl 444000, *Nazia*; CRR, SR, 4 March 2005, appl 489014, *Mlle Tas*; CRR, SR, 29 July 2005, appl 519803, *Mlle Tabe*.

<sup>46</sup> See, Conclusions by Martine Denis-Linton in *Mme Agyepong* (*Conseil d'Etat*, 2 December 1994, application 112842) and Conclusions by Jean-Denis Combexelle in *Ourbih* (*Conseil d'Etat*, 23 June 1997, application 171858).

foreign jurisprudence, is important in providing new directions in the interpretation of new concepts in the Directive, such as lack of protection by the State of origin, internal relocation, and subsidiary protection. It also confirms that the new EC Directives on asylum require judges to learn more about their neighbouring countries' jurisprudence.

### C. Empirical Findings: Britain

In Britain, the search for an authority (or subsequent State practice)<sup>47</sup> is an important component of a court's decision. To this end, the British courts (including the Scottish Court of Session) have often explicitly referred to common law jurisprudence in asylum cases, in particular to decisions from Canada, New Zealand, Australia and the USA when interpreting certain provisions of the Refugee Convention.<sup>48</sup> They have also increasingly relied upon the jurisprudence of the International Court of Justice, the International Tribunal for the Former Yugoslavia, and the European Court of Human Rights,<sup>49</sup> as well as drawn on distinguished academic writing.<sup>50</sup> However, judges only rarely refer to jurisprudence from other EU Member States.<sup>51</sup> When such transnational reference happens, it takes place mostly in the context of the application of the Dublin II Regulation (that is, when considering the likely conduct of a court in a third country), or when interpreting certain controversial provisions of the Refugee Convention (such as, persecution by non-state agents, protection of the country of nationality or article 1D-refugees receiving United Nations protection and assistance). Other foreign material, such as foreign statutes or practice, is also occasionally being referred to in the context of the application of the Dublin Regulation.<sup>52</sup> In such cases, the use of foreign law is made quite openly by judges themselves in the

<sup>47</sup> Article 31(3)(b), Vienna Convention on the Law of Treaties 1969.

<sup>48</sup> eg Lord Bingham's opinion in *Sepet v SSHD* [2003] 1 WLR 856 (HL) and in *Januzi and Hamid v SSHD* [2006] UKHL 5 (HL) and Lord Steyn's opinion in *Islam v SSHD* and *R v IAT and another, ex parte Shah* [1999] 2 AC 629 (HL) (25 March 1999).

<sup>49</sup> eg *R (Razgar) v SSHD* [2004] UKHL 27 (HL), *R (Limbuella) v SSHD, R (Tesema) v same, R (Adam) v same* [2005] (HL) (3 November 2005) *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] 26 (HL) and *A et al Abu Rideh and Ajouaou v SSHD* [2004] CA 71 (HL).

<sup>50</sup> In particular the work of Professors G S Goodwin-Gill and J C Hathaway, eg *SSHD v K (FC) and Fornah (FC) v SSHD* [2006] 46 (HL); *Horvath v SSHD* [2000] INLR 15 (HL); and *Islam v SSHD* [1999] 2 WLR 1015 and *R v Immigration Appeal Tribunal, ex p Shah* [1999] 2 AC 629 (HL).

<sup>51</sup> Seven such instances were found, three at the House of Lords, one at the Court of Appeal and three at the Asylum and Immigration Tribunal. See *Secretary of State for the Home Department, ex p Thangarasa & Yogathas*, [2002] 36 HL; *R ex p Zeqiri v Secretary of State for the Home Department* [2002] (HL); *R v Secretary of State for the Home Department, ex p Adan*, and *R v SSHD, ex p Aitseguer* [2001] 2 WLR 143 (HL); and *EB (Ethiopia)* [2007] EWCA Civ 809; *RD (Algeria)* [2007] UKAIT 00066; *ST v SSHD*, [2005] UKIAT 00006; *Fadil Dyli v SSHD*, [2000] UKIAT 00001. No instances were found at the Scottish Court of Session.

<sup>52</sup> See, for instance, *Sepet and Bulbul v SSHD* [2003] 1 WLR 856 (HL) *Re B (FC)*, *R v Special Adjudicator ex parte Hoxha* [2005] (HL) *Islam v SSHD* [1999] 2 WLR 1015 and *R v Immigration*

actual text of the decisions of the courts. What is certain is that foreign law is only being used at a senior level, ie that of appeal and beyond, not at the initial first-instance level in the decision-making process. It also appears from a reading of the relevant cases that British judges are using foreign law because it is interesting; they are curious about finding out how other judges have responded when faced with a similar issue. In such cases, the aim is ‘less to borrow than to benefit from comparative deliberation’.<sup>53</sup> In most cases where foreign law is being discussed, such an exercise also appears to lend legitimacy to the values of judges when exercising their judicial functions, particularly in instances where the law is ambiguous.<sup>54</sup> Thus, recourse to foreign law in the British courts helps reinforce legitimacy and ‘guides, the exercise of judicial discretion’.<sup>55</sup> The use of foreign law in Britain, therefore, seems to be about the protection of judges themselves in that it provides a form of reassurance and checks on their own power.<sup>56</sup> This is best illustrated with cases where deviations between foreign and domestic approaches were found. In such cases, British judges consider it important to distinguish judgments of foreign courts if these go against the conclusion that they intend to reach.<sup>57</sup> Such instances clearly show that British judges are actively engaged in a dialogue with other judges, just *not* judges from continental Europe, and that they are using foreign law as persuasive authority.

#### IV. TRANSNATIONAL ASYLUM JURISPRUDENCE AND THE BRITISH AND FRENCH JUDGES: JURISPRUDENTIAL QUESTION

This section considers a jurisprudential question: why transnational referencing does or does not happen. Two basic accounts are suggested: a rational account and a cultural account.

##### *A. Rational Account*

The rational account focuses on language, time constraints and access, and training, and it looks at the extent to which these constitute obstacles to the

*Appeal Tribunal and Another, ex parte Shah* [1999] 2 AC 629 (HL), and *R v SSHD, ex p Adan* [1999] INLR 362 (HL).

<sup>53</sup> A-M Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004) 75.

<sup>54</sup> W Lacey ‘Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere’ (2004) *Melbourne Journal of International Law* 108–132, 113.

<sup>55</sup> *ibid* 108–132, 114.

<sup>56</sup> Cherie Booth, remarks at a one-day conference at the British Institute of International and Comparative Law: ‘European Influences on Public Law: 5 years of the HRA 1998 in English Law and Recent Developments in France’ October 2005. See also, J Bell *Judiciaries within Europe—A Comparative Review* (Cambridge University Press, Cambridge, 2006) 9–10.

<sup>57</sup> eg Lord Hope in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, discussing Canadian jurisprudence on the meaning of ‘persecution’ and sufficient ‘protection’ in article 1 A(2) of the Refugee Convention.

volume and direction of the dialogue between judges in France and in Britain.<sup>58</sup> The basic premise is that the extent of such obstacles has a causal impact on the volume of dialogue and also on its direction. This explanation is said to be rational because it is based on opportunity cost, namely, the balance between the benefits of referring to foreign law and the costs that such an exercise entails.<sup>59</sup>

### 1. Language

Analysis of the relevant case law in France shows that where foreign law is used, decisions, legislation and practice from countries as diverse as Germany, the USA, Australia, the United Kingdom, Canada and Belgium have occasionally been used at the National Asylum Court and the Council of State without any obvious preference for French-speaking countries. This suggests that language does not constitute a major obstacle to an exchange in jurisprudence between France and other EU Member States. At first sight, the situation appears different in Britain, where the courts commonly refer to jurisprudence from other Commonwealth countries but hardly ever make reference to decisions from non-English-speaking countries. However, the superior courts of some EU countries translate their key decisions into English. This is the case in France, where since 2004 summaries (more rarely the full text) of important decisions of the National Asylum Court and of the Council of State are translated into English. It would seem therefore that language is not a barrier per se to transnational European legal dialogue in refugee law.<sup>60</sup> Hence, other obstacles need to be considered.

### 2. Time constraints and access

It is evident that first-instance decision-makers in France are not adequately equipped to take advantage of foreign law. The normal time limit for a decision by the OFPRA (*Office français de protection des réfugiés et apatrides*) is two months, but it can be reduced to 15 days in the case of a priority procedure or 96 hours when the asylum-seeker is placed in administrative

<sup>58</sup> Other 'rational' explanations have been put forward to account for the lack of traffic between foreign judges, such as institutional capacity and habit.

<sup>59</sup> This rational account is based on regime theory which seeks to explain co-operation between actors in world politics. See A Hansenclever, P Mayer and V Rittberger, *Theories of International Regimes* (Cambridge University Press, Cambridge 1997) 23–82; A Stein, 'Coordination and Collaboration: Regimes in an Anarchic World', in SD Krasner (ed), *International Regimes* (Cornell University Press, Ithaca, 1983), 115–140; and D Snidal, 'Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes' (1985) 79 *American Political Science Review* 923–942.

<sup>60</sup> In addition to language barrier, lack of knowledge of foreign legal systems may be a further inhibiting factor in the use of foreign jurisprudence in that system.

detention.<sup>61</sup> In this context, the time put aside by each officer for researching the facts, analysing the applicant's file, and reflecting upon each case, is extremely short.<sup>62</sup> As a judicial authority, the National Asylum Court can also issue a ruling without being bound by a time limit but, given the sheer number of asylum appeals, the Court has no choice but to rule promptly.<sup>63</sup> In Britain, the New Asylum Model (introduced on 5 March 2007) requires asylum cases to be concluded within six months. Asylum-seekers' interviews take place six days after initial screening. Fast-track cases (namely, 'manifestly unfounded' or 'late and opportunistic') are decided within 11 days; all other decisions are made within one month. As a result, judges in the lower courts have very little time to undertake any research of foreign case law. Concerning access to decisions, the full text of most cases decided by the British courts is published and (easily) accessible to the public,<sup>64</sup> but this is not the case in all European countries (for instance, Ireland), therefore making it difficult for a British judge to access this foreign case law. France too makes most of its decisions available to the public<sup>65</sup>—but as discussed in sub-section B below these decisions are extremely short and reveal little. However, this is not the case of the supporting documents intended for the plenary sessions of the National Asylum Court or of the conclusions of the *Commissaire du Gouvernement* at the Council of State. In sum, difficulty in accessing other countries' decisions, coupled with time constraints, appear to be a considerable barrier to a transnational judicial dialogue in refugee law.<sup>66</sup>

### 3. Training

The French National Asylum Court (previously the Refugee Appeals Board) is an administrative tribunal,<sup>67</sup> whose ordinary members (or judges) are not required to be lawyers; they do not necessarily know French law, and less so (comparative) refugee law or human rights.<sup>68</sup> The *présidents des formations*

<sup>61</sup> Articles R 723-2 and R 723-3 of the CESEDA.

<sup>62</sup> 2.7 dossiers per day at the OFPRA; around 2 dossiers per day per *rapporteur* at the Refugee Appeal Board. J Valluy, 'La fiction juridique de l'asile' (December 2004) *Plein Droit* 63.

<sup>63</sup> The average time for ruling on an asylum appeal was approximately 10.3 months at the Board in 2006. See the Activity Report 2006 of the Refugee Appeals Board, available at: [http://www.commission-refugies.fr/presentation\\_4/actualites\\_5/rapport\\_activite\\_2006\\_2142.html](http://www.commission-refugies.fr/presentation_4/actualites_5/rapport_activite_2006_2142.html), especially 21–22.

<sup>64</sup> Available at <http://www.bailii.org/>

<sup>65</sup> Available at <http://www.legifrance.gouv.fr/>

<sup>66</sup> This finding is echoed in Gabor Gyulai's report on 'Country Information in Asylum Procedures—Quality as a Legal Requirement in the EU' (n 7) 12, with regard to country information.

<sup>67</sup> Act of 25 July 1952, amended by the Act of 10 December 2003. See also article L.731-1 CESEDA and Decree of 14 August 2004.

<sup>68</sup> Since 2004, each section (*formation*) of the National Asylum Court is composed of three judges (including the *président de formation*): one from the civil law branch, one from the administrative law branch, and one representing the UNHCR.

(chairs of sections), who exceed 100 in number,<sup>69</sup> and *rapporteurs*<sup>70</sup> have nonetheless such a background, but again not specifically in comparative refugee law. A law background is not a prerequisite to being appointed to the Council of State, though its members are typically top graduates of the ENA (*Ecole nationale d'administration*), the most well-known national institution training the highest French civil servants. On occasion, members of the Council of State can be from another background, such as university professors.<sup>71</sup> Thus, reference to foreign (comparative) jurisprudence in the French courts remains traditionally driven by the intellectual curiosity of some judges. The situation is similar in Britain where, despite a greater emphasis on judicial training in contrast to the long tradition of 'learning on the job',<sup>72</sup> such training does not include the study of comparative systems of law. Therefore, it remains the case that elements of comparative law and jurisprudence are only used by British judges when put forward by counsel and/or academics, or when judges themselves, as individuals, are intellectually curious about how it is done elsewhere. However, the establishment of a common European asylum system has created the necessity for training in new EC laws on asylum; this training is being provided by individual members of the International Association of Refugee Law Judges and the European Commission (and in future by the new European Asylum Support Office). An 'invisible traffic' of legal ideas and exchange of key principles and good practice between judges of the EU Member States is therefore happening through such training<sup>73</sup> but, as noted in section III, so far such traffic has had little impact on the use of transnational jurisprudence.

### B. Cultural Account

In contrast to the rational account, the cultural account emphasises social perceptions about the (non-)usefulness of foreign decisions resulting in default rejection of foreign jurisprudence. These social perceptions (for example, a decision is not worth considering) are produced by culture and would create an exaggerated sense of the barriers to dialogue. It is here that one finds other reasons why so little traffic of legal ideas takes place between EU countries.

<sup>69</sup> All the *présidents des formations* are appointed from the administrative or financial branch of the judiciary (that is, the Council of State, the Appeal Administrative Tribunal or the Administrative Tribunals, or the National (and Regional) Audit Office(s), respectively); they therefore have a general law background.

<sup>70</sup> *Rapporteurs* are granted primary responsibility for preparing cases (that is, follow the enquiry and prepare a draft decision for the National Asylum Court to be examined at the time of decision). Strictly speaking not all of them are lawyers but they must at least have done a training course in refugee law.

<sup>71</sup> For more details on the background of members of the Council of State, read article L 133-1 f of the code of administrative justice, and J Bell, *Judiciaries within Europe* (n 57) 44-107.

<sup>72</sup> <sup>73</sup> *ibid* 319.  
Thanks to Hugo Storey for pointing this out.



For the purpose of this article, and drawing upon scholarship on legal culture and comparative law,<sup>74</sup> three elements are considered.

First is the style of judgments, as an indication of legal culture. In particular, is there evidence that style ‘may set different systems apart’<sup>75</sup> and be used to explain ‘more deeply rooted activities’,<sup>76</sup> in the context of refugee law? The second element is the conceptual legal framework within which the judge operates, as an indication of an open versus a closed judicial mentality. Indeed, comparative law scholarship suggests that judicial mentality can constitute an important obstacle to real harmonization between civilian lawyers and common lawyers, even on the basis of common texts.<sup>77</sup> The final element is the domestic dynamic surrounding asylum cases, as an indication of the role of civil society in this system of legal reasoning. In particular, is there evidence of practising lawyers or other actors such as NGOs, human rights associations or academics, in fact using other EU countries’ jurisprudence? The role played by formal or informal contacts between judiciaries, such as the IARLJ, must also be acknowledged here, to the extent that such contacts contribute to an ‘invisible traffic’ of legal ideas.

#### 4. *Style of judgments*

Traditionally, judgments of the French superior courts are concise to the point of hiding any apparent legal reasoning.<sup>78</sup> In the area of refugee law, this is particularly true of the decisions of the National Asylum Court/Board. Some of these decisions have been described (perhaps unfairly considering the sheer volume of cases considered by the Court/Board) as consisting of merely a ‘concise summary of the asylum-seeker’s story, followed by a purely stereotypical sentence indicating a positive or negative conclusion’.<sup>79</sup> As a result,

<sup>74</sup> BS Markesinis and J Fedtke, ‘The Judge as Comparatist’ (n 5) 11–167; BS Markesinis and J Fedtke, *Judicial Recourse to Foreign Law* (n 5); BS Markesinis ‘A Matter of Style’ (n 5) 607–628; BS Markesinis, ‘Judge, Jurist and the Study and Use of Foreign Law’ (n 5) 622–635; J Bell (n 41) Bell (n 57); C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *European Journal of International Law* 214–245; M Andenas and D Fairgrieve, ‘Introduction: Finding a Common Language for Open Legal Systems’ in *Comparative Law Before the Courts* (n 5) xxvii; O Duthéillet de Lamothe, ‘Constitutional Court Judges’ Roundtable’ (2005) 550 *International Journal of Constitutional Law*; F Lichère, *Le dialogue entre les juges européens et nationaux: incantation or réalité*.

<sup>75</sup> Markesinis, ‘Judge, Jurist and the Study and Use of Foreign Law’ (n 5) 607.

<sup>76</sup> Bell (n 41) 17 and Markesinis, ‘A Matter of Style’ (n 5) 607, respectively.

<sup>77</sup> Legrand (n 5) 60–61. Markesinis and Fedtke, *Judicial Recourse to Foreign Law* (n 5) 173–218.

<sup>78</sup> Bell (n 57) 74. One exception might be *Société Arcelor Atlantique et Lorraine et autres, Conseil d’Etat Assemblée*, 8 February 2007, appl 287110, an environmental law case in which the Council of State adopted an unusually long *considérant de principe*; see M-P Granger, ‘France is “Already” Back in Europe: The Europeanization of French Courts and the Influence of France in the EU’ (2008) 14 *European Public Law* 335, 367.

<sup>79</sup> J Valluy ‘La fiction juridique de l’asile’ (December 2004) *Plein Droit* 63 (translation by the author).

and in such a context, no mention of foreign law should appear in the text itself of a decision, unless this is expressly provided by statute or the Constitution. Thus, French administrative courts may be required to quote decisions of the ECJ or may choose to refer to decisions of the European Court of Human Rights. And there are plenty of examples by now where the Council of State has referred to the jurisprudence or methods of interpretation of these two courts, thereby becoming familiar with the method of comparative law.<sup>80</sup> However, as seen above, citing or referring to foreign law from another national jurisdiction remains rare in French administrative courts.<sup>81</sup>

In Britain, it is the 'use of language' that gives the common law judgment 'its distinctive edge'.<sup>82</sup> The broad use of language makes it particularly 'informative of what is really going through a judge's mind when he is trying a case',<sup>83</sup> and in particular of the motives behind judges' decisions to consider foreign law.<sup>84</sup> Such a characteristic makes the common law judgment highly 'suitable for export'.<sup>85</sup> It can thus be inferred that the English judgment—alongside the English language—will necessarily constitute an important element that will shape the European legal culture in the area of asylum and refugee law.<sup>86</sup> But the judgments from the British courts have other characteristics. In particular, it allows judges and representatives of the parties to refer to foreign judgments. To this end, the British courts have often referred to judgments of other Commonwealth countries which fit the same style. They have also increasingly relied upon the jurisprudence of the Strasbourg Court, particularly in those cases directly involving provisions of the European Convention on Human Rights (where section 2 of the Human Rights Act 1998 requires them to take that case law into account),<sup>87</sup> in spite of the more condensed and even opaque tradition of Strasbourg reasoning.<sup>88</sup>

<sup>80</sup> R Errera 'The Use of Comparative Law Before the French Administrative Law Courts', in Canivet et al (eds) (n 5) 161; and G Canivet, 'The Use of Comparative Law Before the French Private Law Courts' in Canivet et al (n 5) 189.

<sup>81</sup> See also, Errera *ibid* 153–163.

<sup>82</sup> BS Markesinis (n 5) 608.

<sup>83</sup> *ibid* 610.

<sup>84</sup> These may be of three kinds: to help shape their own law, to help towards a better understanding of the problem to be solved, or 'as a mere 'padding' for a judgment already reached on other grounds' BS Markesinis and J Fedtke, 'The Judge as a Comparatist' (n 5) 25–26. See also, C McCrudden, 'A Common Law of Human Rights?' (n 5) 499, 523: who noted that the purpose of using foreign law may be manifold: it may be to fill a gap in the law, to interpret domestic law provisions, or to be used as a 'security blanket'—to be seen to be doing a good job.

<sup>85</sup> Markesinis, 'Judge, Jurist and the Study and Use of Foreign Law' (n 5) 610.

<sup>86</sup> For other elements of strong British influence, see Granger (n 79) 344 and 346.

<sup>87</sup> *R [on the application of Razgar] v SSHD* [2004] 3 WLR 58 (HL) (article 8 ECHR—mental health); *A (FC) and others (FC) v SSHD and X (FC) v SSHD*, [2004] 56 (HL) (detention of suspected terrorists).

<sup>88</sup> eg compare the House of Lords decision in *R on the application of Dianne Pretty v Director of Public Prosecutions and SSHD* [18 October 2001] (HL) with the reasoning in the European Court of Human Rights' judgment (*Pretty v United Kingdom*) (*Judgment*) [29 April 2002] appl 2346/02; the former is more fluid and full.

### 5. Conceptual legal framework within which the judge operates

It is a characteristic of the French legal system that a refugee law judge is only allowed to operate within strict legislative boundaries. This conceptual framework includes (a) the 1958 Constitution (which in its Preamble refers to the right of asylum); (b) international treaties (particularly the Refugee Convention on Human Rights) and EC law (particularly the Qualification and Procedure Directives) as binding sources of law and (c) domestic legislation (such as, the Act of 1952 and the new *Code de l'entrée et du séjour des étrangers et du droit d'asile* CESEDA 2003).<sup>89</sup> Apart from this legal framework, the French judge also looks at existing jurisprudence, and will apply French jurisprudence as well as the jurisprudence from the European Court of Human Rights, but without actually citing it in the text of decisions. French jurisprudence plays a particularly important role in the application and interpretation of the refugee definition, but purely as a basis of intellectual reference, not as a binding source of law. There is indeed no rule of precedent in France, and this applies to the National Asylum Court as well as the Council of State. Judges aim to follow a coherent line of jurisprudence, but that is all.<sup>90</sup> Previous case law is seen as an example, not more than that; therefore a judge at the National Asylum Court will never base his or her case on a previous decision, be it French or foreign. And when judges apply previous jurisprudence, they do not cite it.<sup>91</sup> Foreign law as a source of inspiration, therefore, is still some distance away.<sup>92</sup> In sum, it would be unseemly for a French judge to refer to foreign jurisprudence, except that of the ECJ which is binding on French courts, and that of the Strasbourg Court as a source of ECHR law, unless one has a particular intellectual curiosity towards foreign law. In this regard, the current President of the National Asylum Court, Mr Bernard, and his predecessor, Mr Massot, both keen comparative lawyers, have been moving things forwards in that direction.

Unlike France, the conceptual framework within which a British judge operates can be described as flexible. Much reference is made by British judges to sources of law that are not necessarily strictly binding on the British courts. To take two examples, in the case of *Fornah and K (FC) v Secretary of State for the Home Department*, the five Lords and Baroness made plenty of references to UNHCR guidelines, academic writing, and foreign authority

<sup>89</sup> The French judge has also been active in creating law in the area of asylum on quite a wide scale through the concept of general principles of law. See F Tiberghien, 'La jurisprudence du Conseil d'Etat sur la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés' in *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: Bilan et perspectives* V Chetail (ed) (Bruylant, Brussels, 2001) 289, 317–320; and L Jeannin, M Meneghini, C Pauti, and R Poupet, *Le Droit d'Asile en Europe—Etude comparée* (Paris, L'Harmattan, 1999) 144–145.

<sup>90</sup> Author's interview with François Bernard (President of the National Asylum Court) Paris, 20 June 2006.

<sup>91</sup> *ibid.*

<sup>92</sup> Author's interview with Vera Zederman (National Asylum Court) Paris, 20 June 2006.

from Canada, Australia, New Zealand and the US as valuable authority.<sup>93</sup> In the case of *R v SSHD, ex p Adan, Subaskaran and Aitseguer*, Laws LJ held: 'While the Handbook is not by any means itself a source of law, many signatory States have accepted the guidance which on their behalf the UNHCR was asked to provide, and in those circumstances it constitutes in our judgment, good evidence of what has come to be international practice within art 31(3)(b) of the Vienna Convention'.<sup>94</sup> Indeed, British judges have long been preoccupied with searching and reaching 'international consensus' or 'broad consensus' on the interpretation of the Refugee Convention, whether through foreign authority or academic writers.<sup>95</sup> And in doing so, they have referred extensively to the jurisprudence of the common law countries with which they have long-established reciprocal relations that are conducive to dialogue. These relations have also been reinforced by the belief that some European countries interpret the Refugee Convention less flexibly than Britain. This would be the case of Sweden, for instance, where the Aliens Appeals Board has been criticized for being too strict and too politicized, or of France and Germany which for many years followed a restrictive approach to the interpretation of 'persecution' in article 1A(2) Refugee Convention.

#### 6. Domestic dynamic surrounding asylum cases

Refugee law as a specialist subject is not taught in French universities, and one can find very few academic books on the subject, and no specialized academic journal of refugee law. The *Dictionnaire Permanent, Droit des Etrangers* (Editions Legislatives) is what it says it is, a dictionary that is regularly updated and which discusses legislation and case law relating to asylum and refugees, by themes. Of the few books on the subject, less than a handful show an inclination towards comparative foreign law. One such example is D Alland and C Teitgen-Colly, *Traité du droit d'asile* (PUF, 2002), which in its first part offers a valuable account of the various conceptions of the right of asylum: international, European (including comparative national laws) as well as French.<sup>96</sup> One might infer from this apparent disinterest in refugee law that academics have little engagement in the asylum decision-making process in France. However, the influence of doctrinal legal writing exists and is both formal and informal. Formally, the influence of academic writing can be seen at the Council of State in the conclusions of the *Commissaire du Gouvernement*. At the National Asylum Court, such influence takes place

<sup>93</sup> House of Lords, judgment of 18 October 2006 [2006] UKHL 46.

<sup>94</sup> [1999] Imm AR 521. See further M Symes and P Jorro, *Asylum Law & Practice* (Butterworths, Lexis Nexis UK, 2003) 7–12.

<sup>95</sup> Lord Lloyd Berwick's opinion in *R v SSHD, ex parte Adan*, [1999] INLR 362 (HL). See also, Lord Millet in *Islam v SSHD* [1999] 2 WLR 1015 (HL) and *R v Immigration Appeal Tribunal and Another, ex p Shah* [1999] 2 AC (HL) paras 19–20; and *Sepet v SSHD* [2003] UKHL 15 (HL) (Lord Bingham).  
<sup>96</sup> See also L Jeannin et al (n 90).

most notably when an academic professor is elected to represent the UNHCR and therefore sits at the Court sessions and is actively involved in decision-making. This is the case presently of Professor Catherine Teitgen-Colly. Informally also, doctrinal legal writing can be influential through numerous contacts between academics and judges. Academics may on occasion be consulted by *avocats* (especially at the Council of State) when considering difficult legal issues or may indeed be employed in their offices.<sup>97</sup> The role of French associations and some international non-governmental organizations (INGOs) is also increasing.<sup>98</sup> Generally speaking, immigrants and refugees tend to rely more on national associations than INGOs (such as Amnesty International and the *Fédération internationale des droits de l'homme* or FIDH) because their role is more focused on these persons' rights. One of the most specialized associations in the legal protection of aliens' rights is the *Groupe d'information et de soutien des immigrés* (GISTI—Information and Support Group for Immigrants).<sup>99</sup> Since its creation in the early 1970s, GISTI has brought many cases before administrative judges, some of which have been successful.<sup>100</sup> One of its greatest successes is the 1978 GISTI case (8 December 1978) in which the Council of State recognized the principle of a 'normal family life' as a general principle of law. GISTI also provides legal advice on procedure to immigrants and sometimes helps in the drafting of asylum claims. GISTI has recently started to pay attention to foreign jurisprudence. For instance, in a recent case before the Paris Administrative Tribunal, a member of the GISTI relied on a decision of the English High Court<sup>101</sup> in seeking to prevent the expulsion of an asylum-seeker.<sup>102</sup> This points to a more general trend, namely a slight but noticeable increase in the use of foreign jurisprudence by national associations working on behalf of asylum-seekers. *Forum réfugiés* offers another illustration of this trend towards a greater use of foreign jurisprudence in French cases.<sup>103</sup>

In Britain, refugee law as a specialized subject has caught the attention of academics for many years and it has been taught for over a decade in some

<sup>97</sup> Bell (n 57) 81, 86.

<sup>98</sup> See generally, G Breton-Le Goff 'Mondialisation et démocratie: évaluation de la participation normative des OING à la gouvernance', Université de Québec à Montréal sur les fondements philosophiques de la justice et de la société démocratique, October 2001.

<sup>99</sup> Other well-known associations or support groups include CIMADE (*Comité Inter-Mouvements Auprès des Evacués*), ANAFE (*Association nationale d'assistance aux frontières pour les étrangers*) and *Forum réfugiés*.

<sup>100</sup> The Council of State has ruled in more than 40 cases where the GISTI was a claimant, alone or with other associations, eg *Conseil d'Etat*, 12 June 2006, appl 282275. I thank Janine Silga for this point.

<sup>101</sup> *Javad Nasserri v The Secretary of State of the Home Department*, [2007] EWHC 1548 (Admin), [2009] 2 WLR 523.

<sup>102</sup> Tribunal Administratif de Paris, 9 August 2007, *Mohammad Afzali*, No. 0712180/9/1.

<sup>103</sup> A Ouareff, 'La France doit cesser le transfert de demandeurs d'asile sous Dublin vers la Grèce', expert note n. 6/2008, April 2008. Available at: [http://www.forumrefugiés.org/FR06-dublin%20transfert\\_da\\_vers\\_grece.pdf](http://www.forumrefugiés.org/FR06-dublin%20transfert_da_vers_grece.pdf) (28. 04.2008).

universities. Research and teaching centres have been built around the subject, and Britain is home to two specialized academic journals on the topic (namely, the *Journal of International Refugee Law* and the *Journal of Refugee Studies*) both published by Oxford University Press.<sup>104</sup> In addition, academic writing is often referred to by judges.<sup>105</sup> For instance, in *R v Secretary of State for the Home Department, ex p Adan*, Lord Lloyd noted that in cases where no precedents exist, the works of academic writers ‘provide the best hope of reaching international consensus on the meaning of the Convention’.<sup>106</sup> In *T v Secretary of State for the Home Department*, Lord Mustill observed that in the area of public international law ‘the writings of scholars have always exerted great authority’.<sup>107</sup> And in *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, albeit not an asylum case, Lord Bingham and Lord Hoffmann dismissed relevant foreign case law (mainly put forward by representatives of the parties) by relying on critical comments made by distinguished academics.<sup>108</sup> So, British judges are frequently engaged in a *dialogue* with academics.<sup>109</sup> Legal interventions by IGOs (such as UNHCR) and INGOs (such as Amnesty International) are also part of the overall picture at least in the senior courts.<sup>110</sup> The role of NGOs is also particularly strong. Among the different kinds of NGOs dealing with refugees and asylum issues, those with a focus on legal representation play a significant role in the asylum determination process. In this regard, the role of the Refugee Legal Centre (RLC) is particularly interesting because of its strong focus on case work. The RLC was founded in 1992 as a centre for the provision of (free) quality legal representation for asylum-seekers from the very first initial stage of the asylum determination process up to the Court of Appeal and House of Lords stage.<sup>111</sup> One team of case-workers specializes in the initial phase of the asylum determination process, another team does the appeal work at the Asylum and Immigration Tribunal, while a third team deals with strategic litigation in the High Court, Court of Appeal and House of

<sup>104</sup> See also the more practitioner-orientated Tolley’s *Immigration, Asylum and Nationality Law Journal*.

<sup>105</sup> The works of Professors GS Goodwin-Gill and JC Hathaway have been particularly influential in several House of Lords’ judgments, as well as abroad.

<sup>106</sup> [1998] Imm AR 338; [1998] INLR 325. <sup>107</sup> [1996] Imm AR 443.

<sup>108</sup> House of Lords, judgment of 14 June 2006, paras 22 and 63.

<sup>109</sup> To read more widely on the relationship between judges and academics, see Bell (n 57) 326–329.

<sup>110</sup> eg *Fornah and K(FC) v SSHD and UNHCR (Intervener)*, (House of Lords, judgment of 18 October 2006) [and Amicus Curiae brief submitted to the Nigerian Federal High Court reviewing refugee status granted to Charles Taylor (23 September 2004 available through REFWORLD)].

<sup>111</sup> RLC also contributes to the public debate on asylum policy and procedures at the national and European level. It is an independent, not-for-profit organisation, and a registered charity. The quality of its work is subject to the regulations of the Legal Services Commission and the Office of the Immigration Services Commissioner. More specifically, it is funded by a contract with the Legal Services Commission on the basis of a merit test (that is, a case must be found to have more than 50 per cent of chances of success for the RLC to be allowed to represent the applicant).

Lords.<sup>112</sup> It is within these last two teams that great interest lies in what is occurring in other countries to ensure such cutting-edge jurisprudence is produced in the UK. In this context, RLC keeps track of other countries' interpretations of the Refugee Convention, and now of the Qualification Directive. Another issue on which foreign jurisprudence is proving useful in informing the refugee status determination process is that of safe third countries.<sup>113</sup> It has been observed that neighbouring States are of particular concern and that it is particularly important to know about their jurisprudence in the context of the new Directives (especially the Qualification Directive).<sup>114</sup> In sum, academics and NGOs are very much involved in asylum cases in Britain. They too sometimes look at the jurisprudence of other European countries. So far such references appear to be mostly driven by the Qualification Directive.

#### V. CONCLUSION

French and British judges rarely use each others' jurisprudence, or that of other EU countries, when making decisions on asylum. An examination of asylum case law in France up to 2006 reveals that the Refugee Appeals Board (now the National Asylum Court) only made explicit reference to such jurisprudence in one decision in 2001. However, the jurisprudence of other EU countries is cited in the supporting documents of a dozen cases of the Board/Court, and in two conclusions of the *Commissaire du Gouvernement* of the Council of State, over this period. An examination of asylum case law in Britain up to 2007 reveals seven instances where judges have made explicit reference to the jurisprudence of other EU countries in their decisions: in three cases before the Asylum and Immigration Tribunal, one before the Court of Appeal, and three before the House of Lords. There is also evidence of some use of other elements of foreign law (eg legislation and administrative practice) by British and French courts in asylum cases. It should be noted that anecdotal evidence suggests that there may be a fair amount of 'invisible traffic' in transnational use of jurisprudence through informal contacts and networks. We should also note that the trend (in so far as a trend may be inferred from so few cases) in both countries is towards increasing use in asylum cases of jurisprudence from other EU countries.

The rational account only gets us so far in explaining the lack of a transnational European legal dialogue in French and British asylum jurisprudence. Language is not such a major obstacle. French courts, in so far as they refer to foreign law, do not show a particular preference for the jurisprudence of other

<sup>112</sup> *R (Bagdanavicius) v SSHD* [2005] 2 WLR 1309 (HL), [2005] 1 All ER 263 (HL).

<sup>113</sup> Eg *Javad Nasseri v SSHD* [2008] 2 WLR 523; see now the judgment of the House of Lords [2009] UKHL 23 [2007] EWHC 1548 (Admin).

<sup>114</sup> Author's interview with Nick Oakeshott (Head of Legal Services, Refugee Legal Centre, London, 19 July 2007).

French-speaking countries. Whilst there is a preference among British courts for Commonwealth case law, British courts have for a number of years had access to English translations of key decisions by non-English speaking foreign courts. Time constraints are a problem at the level of first appeal. French and British tribunals often have a matter of days, if not hours, before considering an asylum claim in court, leaving no time to consider foreign law. However, the higher courts in both countries do not operate under such time restrictions. Both France and Britain provide good public access to refugee case law, but access is less good in many other parts of the EU, thus restricting the ability of French and British judges easily to get a hold of the asylum jurisprudence in these countries. In both France and Britain, there is little attention to foreign law in the training of refugee law judges.

The cultural account completes the picture. More to the point, culture presents a more profound barrier in both cases to the use of foreign jurisprudence by refugee judges. It is notoriously difficult to recover culture and trace its causal impact on social outcomes (in this case, use and disuse of foreign law).<sup>115</sup> Hence, this article has adopted a three-step approach. The first step was to assess the extent to which the style of legal reasoning in France and Britain provide *possibilities* for inclusion of foreign jurisprudence. Here there is indeed a stark contrast between the stripped-down, almost mechanical, reasoning of French courts, and the expansive judgments of British courts: the latter provide far more possibility for reference to a variety of sources, whereas in the former there is no expectation (let alone space) for this. The second step was to explore the mentality of judiciaries in both States, in particular, in terms of the *willingness* to draw on foreign jurisprudence in deciding asylum cases. Here again there is a sharp contrast between French courts which only consider binding sources of law, and British courts which tend to look at a wide variety of sources of persuasive authority. Hence, British courts are more open to including foreign jurisprudence in their judgments than French courts. The third step was to explore the domestic dynamic surrounding adjudication of asylum cases in both countries, in particular, to look for evidence of other actors that might *encourage* courts to consider foreign law. In both cases, academics and refugee organizations play a role in the asylum process. Academics are more interested in refugee law scholarship, and more involved in asylum cases, in Britain than France. Refugee organizations appear to have an increasing role in both countries. This cultural account strongly points to greater possibility, willingness and (to a lesser extent) encouragement for the inclusion of foreign jurisprudence in deciding on asylum cases in Britain than France.

These findings have implications for the establishment of a common European asylum system by 2012. Prior to the adoption of EC legislation in the area of asylum and refugee law, this area of law was primarily regulated by

<sup>115</sup> Bell (n 41) 20.



the Refugee Convention (that is, an international treaty) and domestic legislation. Article 31(3)(b) of the Vienna Convention on the Law of Treaties requires that State practice be taken into account, together with the context, in interpreting the Refugee Convention. British courts are more sensitive than French courts to this provision, but they have tended to concentrate on state practice of Commonwealth countries. The adoption of key EC Directives (and Regulations) in the area of asylum and refugee law is forcing the judiciaries in both France and Britain (and more generally across all the EU Member States) to look at State practice *within* the Union. Here is where the real challenge lies ahead for European judges. Whereas in the past, judges were free to consider (or not) State practice from countries as far a field as Australia or Canada, the creation of a common European asylum system now requires them to look at State practice from neighbouring countries. Hence, a whole new kind of trans-state activity (based on reciprocity and trust between national courts), and which is conducive to dialogue, needs to occur for this system to work. Given the trend noted above, there are grounds for hope that such dialogue will develop, though the cultural account suggests that it will develop more rapidly in Britain than France.

The findings in this article are echoed in studies relating to other areas of law, whether in the area of constitutional law, private law or public law, namely considerable imperatives for, and a general trend towards, greater transnational judicial dialogue.<sup>116</sup> This process is well on its way in areas such as human rights law and private international law, helped no doubt by the European Court of Human Rights, and the inherent concept of transnational contract, respectively.<sup>117</sup> But even there we are still far from a systematic use of foreign jurisprudence by the French and British courts. It is generally recognized that comparative law does not play as important a role in administrative law (including refugee law) as in private law.<sup>118</sup> This is particularly true in areas of law such as (European principles of) tort law and (European) company law, where judges have engaged in a transnational and European dialogue for quite some time. Markesinis and Fedtke argue that matters that are highly technical in content (eg wide areas of private and commercial law) may be more prone to comparative work than 'value-laden issues'.<sup>119</sup> If one accepts this argument, then refugee law probably falls into the category of 'value-laden issues', where particular values or policy considerations play an important role, and where the use of foreign law is considered to be more contentious. The area of human rights may be an exception where comparison with other jurisdictions has always been considered to be appropriate due no doubt to a 'common ancestor', the Universal Declaration of Human Rights,

<sup>116</sup> Canivet, Andenas and Fairgrieve (n 5), Markesinis and Fedtke 'The Judge as Comparatist' (n 5) and *Judicial Recourse to Foreign Law* (n 5).

<sup>117</sup> Andenas and Fairgrieve, 'Introduction' in Canivet et al (n 5) xxxv–xxxviii.

<sup>118</sup> R Errera (n 81)153.

<sup>119</sup> Markesinis and Fedtke *Judicial Recourse to Foreign Law* (n 5) 138.

with 'descents' through the European Convention on Human Rights and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.<sup>120</sup> Moreover, as argued in this article, the Europeanization of asylum law is likely to encourage transnational judicial dialogue in this area.

<sup>120</sup> S Kentridge 'Comparative law in Constitutional Adjudication' in Markesinis and Fedtke, *ibid* 329.