It oversimplifies but it may help to think of the Union legal order as a struggle between two competing models of jurisprudence. On the one hand there is the vertical or top-down model. In this model the Court of Justice of the European Union (CJEU, formerly the ECJ) sits at the apex and hands down its rulings like tablets of stone and we the national judges below simply obey and apply their rulings. A decision of the ECJ/CJEU has a precedential impact on all national courts within the Union², thus helping ensure the uniform application of EU law throughout the Union.

In the top-down model there is no real role for any notion of a body of Union case law partially comprising key decisions from judges of various Member States.

Competing with that model is a more interactive model, or perhaps one might call it a more “vertizontal” model. In this model, even though the CJEU remains the only source of decisions binding EU-wide, the judges of the various Member States have an active role in shaping Union law and there is some role for lead decisions by national judges in shaping Union law.

Of course, these two models are “ideal-types”; neither fits the legal or practical realities. So, for example, even in the top-down model it is recognised that the preliminary reference procedure is based on the “co-operation” of national judges in ensuring that they make relevant references under the preliminary ruling procedure of Article 267³. The procedure places

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1 International Association of Refugee Law Judges Council member; Senior Immigration Judge, Upper Tribunal, UK. The views expressed herein are my own and do not necessarily represent those of the IARLJ or the UK UT.
2 C and D, pp.471-474.
3 Information Note for National Courts issued by the Court of Justice of the European Communities [CJEU], OJC 2009 C/297/01 para 5, 5 December 2009. See also Case 166/73
the initiative on the national court and depends entirely on the national court’s own assessment as to whether such a reference is appropriate and necessary. In the interactive model it is recognised that the component of EU case law made up of national judge decisions is going to have a limited shelf-life, ceasing to have any role once the CJEU has ruled on the same issue. So it is not so much competition as complementarity.

In truth the Union legal order draws on both models. Take for example, what is said in the landmark judgment of the ECJ on the preliminary reference procedure and the doctrine of acte clair. In Case 283/81 CILFIT [1982] ECR 3415, paras 16-20 the ECJ specified that in order to avoid making a reference the national court must not only itself be convinced as to the correct interpretation of Community law, but also “be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice” (emphasis added).

Whilst the CILFIT criteria only strictly apply to courts of final instance, the need to check what the position is in “…the courts of the other Member States” remains a valid criterion. So we have the ECJ/CJEU itself requiring national judges to check what approach is taken to the relevant EU law provision in the courts and tribunals of other Member States. It is also the position that so far as Union law is concerned, when we decide matters to do with the Citizens Directive or the EU asylum directives, we do so as “Community judges” or now, “juges de l’Union” or “Union judges”. As a result of the doctrine of direct effect, we are not applying national law and, even when we are applying national law (into which EU directives has been transposed), we must apply Community law under the doctrine of indirect effect.

But this point leads me to focus on the current dilemma of Union jurisprudence, at least in the justice and home affairs and public law domain. In practice national judges pay very little regard to how judges in other Member States decide issues of interpretation and application of Union law. Indeed, in a survey of 9 Member States undertaken by G Goodwin-Gill and H Lambert in their book, The Limits of Transnational Law, Cambridge

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4 The preliminary reference procedure has been the principal engine through which the ECJ/CJEU has built up EU case law. The annual rate of references is currently around 250-300.

5 “In addition, the duties of national judges as ‘juge de l’Union’ regarding the interpretation and application of EU law continues to be part and parcel of the ‘acquis de l’Union’. In fact new specific Treaty provisions highlight the importance of the role of national judges in ensuring effective judicial protection of EU rights”, Koen Lenaerts, “The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice”, ICLQ vol 59, April 2010, pp 255-301 at 265.
University Press 2010, their research showed that in certain areas of EU law that are highly technical in content, such as European principles of tort law or European company law, judges have engaged in a transnational and European dialogue for quite some time. Such areas seem more susceptible to comparative work than ‘value-laden’ subject areas such as asylum law. And, in the area of asylum law, there was “a remarkable lack of transnational use of national jurisprudence on asylum across EU countries”, although a very slight increase in patterns of references was discernible recently.

So does it matter that we do not in practice care much about what our fellow judges decide in key cases in other Member States?

Well, within the area of asylum law members of the European Chapter of the International Association of Refugee Law Judges (IARLJ) have begun to focus much more on this dimension of our case law and to believe, increasingly, that we must change the status quo and engage far more in a transnational dialogue.

We have come to focus more on it for a number of reasons.

One has to do with the Lisbon Treaty. The coming into force of the Lisbon Treaty (TFEU) as from 1 December 2009 means that the PR procedure is now available to national courts and tribunals at all levels. It is no longer subject to the Article 68(1) limitations introduced by Title IV of the EC Treaty. We realise that there is now more scope for national judges, through deciding to make references to Luxembourg, and to make references in a different way than we have tended to, to play an active role. It is only by participating in the reference system (in one way or another) that national courts can influence the CJEU case law.

The sudden change within our national legal systems from our asylum law being solely a matter for the national judge to one governed by EU law caused us to look closely at the preliminary reference procedure. We were particularly concerned that matters to do with an international treaty – the Refugee Convention – were going to be decided by a group of non-specialist judges sitting in Luxembourg in the context of procedures that minimised the chances of a fully informed judicial consideration.

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6 Goodwin Gill and Lambert, op.cit. p.16.
7 Markinesinis and Fedtke, Judicial Recourse to Foreign Law, University of College London Press, 2006.
8 Treaty on the Functioning of the European Union.
9 Following the entry into force of the Lisbon Treaty, Article 63(1) and (2) EC is reproduced (with some alterations) in Article 78(1) and (2) TFEU. Article 63(3)(a) is reproduced (with some alterations) in Article 79(2)(a) TFEU.
In October 2009 the focus of our third annual workshop in Berlin on European asylum law focus was on the Court of Justice reference procedures, both from the point of view of the national referring court and the ECJ. One of the judges of the Luxembourg Court met with a group of judges including several who sit at a senior level in their national courts to discuss the respective merits and demerits of the current reference procedure. We noted, inter alia, that the Court of Justice procedures did not allow for third party intervention and that, despite UNHCR being identified in the asylum-related directives as being a source of “valuable guidance” (see e.g. recital 15 of the Qualification Directive) the CJEU Statute does not permit third-party intervention from anyone – unless we take special measures at the national level.

Following a further European Chapter conference in Lisbon in October 2010, we are now finalising a Guidance Note on Preliminary References for judges who do asylum cases. It will emphasise, inter alia, that (if it has not done so already), the national court or tribunal pondering a reference should consider whether to join UNHCR as an intervener or as an “amicus curiae” before making the reference. That is because if UNHCR is joined as an intervener at the national level, then the CJEU will treat it as an interested party. This is what happened in Case C-192/99 R v Secretary of State for the Home Department [2001] 2 C.M.L.R 24 (the Manjit Kaur case) and very recently in the context of references made by the English Court of Appeal and the Irish High Court respectively in cases concerning Dublin II and returns of asylum seekers to Greece.

Another reason we have come to focus on this area of transnational dialogue is our realisation that it was unlikely in this virgin area of EU law that many cases would be dealt with by the CJEU for some time and, in general it was likely to be a very long time before there was any significant body of CJEU case law on key provisions of the Directive. Since the asylum law directives came into force in October 2006 there have now been several references, but so far none, even that concerning the Exclusion clauses, has been subject to the special urgency procedure and so it is likely that the long delay between making a reference and getting a ruling will make the whole process of building up a proper CJ coverage of asylum law very protracted.

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10 Still then governed by Article 68.
11 The Court has taken a strict approach to Article 23 of its Statute: see e.g. Case 2/74 Reyners [1974] ECR 63; Broberg op.cit., pp.344-345.
13 Or other NGOs/INGOs. In a recent reference by the UK Court of Appeal in Saeedi (see n…. above), the interveners were UNHCR, Amnesty International, the Aire Centre and the Equality and Human Rights Commission.
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15
In our view what was and is badly needed in the meantime is the development of a coherent body of case law comprised of key decisions made by national courts and tribunals.

So far, as the Goodwin Gill and Lambert study demonstrates, our progress towards this goal has been very slow. But we recognised from the outset that there were considerable obstacles to making cross references in our decisions to other national court decisions, such as: lack in some EU countries of any practice of case summaries or head notes, language and translation difficulties, time constraints, difficulty in access and training, lack of familiarity with other judge’s legal systems, varying styles of judgments, different conceptual legal framework in which the judge operates, differing domestic dynamics surrounding asylum/refugee law, dualism, judicial pragmatism, legal positivism etc.

Nevertheless we have made some progress in overcoming these obstacles. Just to give you some illustrations of significant cases in which this has happened:

In KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023 the UK Asylum and Immigration Tribunal dealt with a case concerning Article 15c of 2004/83/EC, the Qualification Directive, which identified as one type of serious harm requiring international protection, real risk of being exposed to indiscriminate violence in situations of international or internal armed conflict. In deciding to take an international humanitarian law (IHL) approach to key terms in Article 15c the Tribunal stated at para 34:

“One reason which could be given is that an IHL approach to Article 15(c) is also one which has been taken by a number of courts and tribunals in other EU Member States: see e.g. French Commission des Recours des Refugies (CRR) 22 November 2005, MA); the Belgian court decision in VB/05- 5833/W12.182/SB5 (27 October 2006); the Dutch Council of State judgment, Raad van Staat, 20-07-2007,200608939/1 LJN BB0917; the Swedish Migration Court of Appeal 2007.9 decision (UM 23-06) and the Higher Administrative Court of Schleswig-Holstein (Northern Germany) judgment 21 November 2007, 2 LB 38/07. Given that one of the objectives of the Directive is to achieve the application of common criteria throughout the EU, that is not an unimportant matter. But lacking as we do any full picture of the approach taken by judicial decision-makers throughout the EU, we shall not rely on it to justify our own reasoning. “

Shortly after, the German Federal Administrative Court decided a case in which it decided to adopt the UK Tribunal’s position, case BVerwG 10 C 43.07, expressly citing and approving KH (Iraq).

16 These obstacles are discussed in detail in Goodwin Gill and Lambert, op.cit.
Soon after the ECJ had given its ruling on a Dutch reference on Article 15c, in the Elgafaji case, C-465/07, but this did not deal with the armed conflict provisions of Article 15c as such and so left matters unclear on how they should be interpreted.

Then in March 2009 the Supreme Administrative Court of the Czech Republic of 13 March 2009, No. 5 Azs 28/200817 decided its first “Art. 15c case”. The SAC referred to the following decisions from other EU Member States: Swedish case (MIG No. 2007:9, UM 23-06), French case (Kulendarajah), German case (BVerwG 10 C 43.07), Dutch cases (Nos. 200608939/1, 200701108 and 200804650/1) and UK cases (KH and HH). However, the SAC discussed in more detail only the decisions of the German Federal Administrative Court (BVerwG 10 C 43.07) and of the UK Asylum and Immigration Tribunal in KH /Article 15(c) Qualification Directive/ Iraq CG [2008] UKIAT 00023, in particular for the following two reasons: (1) it is not very common at the SAC to cite and comment upon so many foreign cases; and (2) space constraints (the judgment – approx. 25 pages – was very long according to their standards). The SAC’s judgment of 13 March 2009 also applied the ECJ’s judgment in C-465/07, Elgafaji.

Shortly after, in June 2009, the English Court of Appeal decided a case on Article 15c in which it rejected the IHL approach to Article 15c taken by the English Tribunal in KH(Iraq) - in a case called QD(Iraq) [2009] EWCA Civ. 620. For whatever reason it declined to address decisions made by courts in other EU countries.

Interestingly, the German Federal Administrative Court in April 2010 then decided to grapple with the shift in the UK case law and what implications it had for its own earlier agreement with KH(Iraq). In its judgment, BVerwG 10 C 4.09, the Court sought to synthesise the two approaches, concluding at para 24:

“In sum, this approach takes sufficient account of the concern, emphasised in the more recent British case law, with making sufficient allowance for the different objectives of international humanitarian law on the one hand, and international protection under the Qualification Directive, on the other hand, without interpreting the characteristic of an armed conflict entirely in isolation from the previous understanding of this concept in international humanitarian law, and thus depriving it of any contour and – contrary to the letter of the provision – making it virtually superfluous.”

In October, the UK Tribunal, which had now become the Upper Tribunal (Immigration and Asylum Chamber), convened a lead case hearing to once

17. It is available at www.nssoud.cz (but unfortunately only in Czech).
again address the position in Iraq in relation to Article 15c: HM and Others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC).

This case illustrates very well how far we have travelled since we all began having to apply EU asylum law. In HM & Others the Tribunal decided to invite UNHCR to join the case as an “intervener”. As well as putting before the Tribunal its own UNHCR Guidelines on Iraq, UNHCR also made submissions on the law, citing two cases in particular: the decision of the Conseil d'État in Office Français de Protection des Réfugiés et Apatrides v Baskarathas, 3 July 2009, (French Text: No.32095) (as translated by UNHCR) 18; and a decision of the Supreme Administrative Court of the Republic of Bulgaria, First College dated 5 March 2009 (Administrative Case No 300/2009 in the matter of Hassan Fayed (again as translated by UNHCR)19).

The British Tribunal did not in the event take any significant notice of the Bulgarian decision because it did not appear to be based on comprehensive background information, but it did say that it agreed with the French approach20.

18 In which the Conseil d'État upheld a decision by the French National Court of Asylum that had found that a Sri Lankan national was entitled to subsidiary protection under Article 15(c) on the basis that there was a situation of generalised violence existing in the eastern part of Sri Lanka, notwithstanding that the Sri Lankan army had taken control of that area. It was submitted that in addition to illustrating the effect of Article 15(c) in relation to regional levels of indiscriminate violence, the judgment also made clear that the threat to a person’s life or person need not arise from actions of a combatant to the armed conflict and that the violence from which protection is granted need not be limited to areas where the armed conflict itself is concentrated. This was consistent with the submissions made by UNHCR in QD that it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question – it can simply be the product of the breakdown of law and order - and there does not have to be active military or armed combat taking place in that precise area at that precise time.

19 In upholding a claim for subsidiary protection based on Article 15(c) the Supreme Administrative Court stated that in the light of “irrefutable evidence, including but not limited to the opinion of the International Law Directorate of the Ministry of Foreign Affairs”, the situation in Iraq was one of internal armed conflict and the situation in the appellant’s home area (Diwaniq, Kadisha Province in southern Iraq) “is defined as unstable with acts of indiscriminate violence and therefore, there is a real threat of a basic attack(s) against [the appellant].”

20 “81.We agree with that approach. In our judgment the nexus between the generalised armed conflict and the indiscriminate violence posing a real risk to life and person is met when the intensity of the conflict involves means of combat (whether permissible under the laws of war or not) that seriously endanger non-combatants as well as result in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive. Such violence is indiscriminate in effect even if not necessarily in aim. As the French Conseil d’État observed in Baskarathas, it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question: it can simply be a product of the breakdown of law and order.”
The British Tribunal also drew attention to an academic article by Helene Lambert and Theo Farrell “The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence” IJRL (2010) Vol 22 (2) at 237 in which the authors noted the continuing reference to IHL (to inform the spirit of the measures) by French courts (at 251-255). The Tribunal went on to adopt some of the criteria proposed by these two authors for assessing violence in situations of armed conflict in an Article 15c context. Its eventual approach was very similar to that taken in the latest German decision.

What this (selective) survey illustrates is that there is a growing investment by national judges in EU countries in the value of transnational dialogue.

But of course, it has to be asked, what is the value of this cross-referencing? It is not done in order to apply a foreign decision as a precedent, although the approach is informed by a belief in judicial comity and the decisions having persuasive value.

The answer is that there is increasing recognition on the part of European judiciaries and the other institutions of the EU, in particular the Commission and the Council, that the aim behind EU asylum legislation, of harmonising EU asylum law through a Common European Asylum System (CEAS), cannot be realised by EU legislation or CJEU rulings alone. As the European Commission has noted, for harmonisation to happen there needs to be a parallel harmonisation of practices and procedures. Thus, how this common legislation is interpreted and applied by domestic courts is equally important.

Hélène Lambert in the book written by her and Goodwin Gill make this further observation:

“A comparative approach by judges appears to be essential for the development of a system that is not only common but that is also coherent and built on trust; these are necessary elements for any common system to work.”

In asylum cases, there is also the important dimension, that in relation to generic issues, e.g. Article 15c in Iraq or Afghanistan, it looks very odd if

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21 Judgment of Federal Administrative Court (Bundesverwaltungsgericht) BVerwG 10 C 4.09 VGH 8 A 611/08.A, 27 April 2010, paras 2223, 33-34.
courts in different Member States take wildly differing approaches. This indeed did happen with Iraq and is possibly happening now with Afghanistan. Arguably once we all come to operate under the same body of law, the essential principle of Union justice that like cases be treated alike, becomes more and more important.

I agree therefore with Lambert’s conclusion that:

“The success of harmonisation, as a tool for international protection in the EU, substantially depends on the development of common judicial understandings, principles and norms, concerning refugee matters” (p.3)

“…the role of transnational jurisprudence (and therefore of national courts and tribunals as decision-makers) is in fact essential to the establishment of a truly ‘common’ European asylum system (p.9).

Free Movement of Workers/Persons

Up to now I have held back from saying anything about free movement of persons. This seminar is intended to bring together national judges doing either asylum law or aliens law or immigration law and the latter includes, of course, free movement of workers.

Now it might be said that the experience of national judges under the EU law on free movement of workers is a powerful argument in favour of the “top-down” model because (a) it has been built up by the ECJ over a period of half a century and has resulted in a relatively settled and coherent body of jurisprudence which, in one way or another, we, the judges at the national level, apply in a straightforward way. We may from time to time be jolted by some of the CJ decisions, e.g. the ruling in Metock whose effect was that even illegal failed asylum seekers in Member States can achieve a right of residence if they marry an EU national from another Member State. But basically we just get on with the job.

However, it is at least arguable that free movement is also an area where there is now greater need for transnational dialogue. Although free movement is one of the “Four Freedoms” of the Union system, the consolidation and enhancement of almost all the existing EU legislation into the Citizens Directive 2004/38/EC (the Citizens Directive) has meant that since April 2006 national judges have been grappling with a host of questions to which there is no ready answer. By contrast with the 70s and 80s and early 90s - when the number of Member States was in single figures and the repercussions of Community law on migration flows were minimal, we are now in a different ballpark. The EU has grown to 27 Member States and the provisions made in the Citizens Directive – e.g. for “facilitation” of the admission and residence of “other family members”, means that potentially any third country national
who can find an uncle or cousin or brother or sister who has acquired nationality of one of these 27 countries has the potential to qualify for Union rights of residence. Already the CJEU has filled in some blanks, e.g. recently in Lassall about the effects of residence accrued prior to April 2006, but there are a significant number of new problems relating to retained rights of residence, students, expulsion etc. Whilst in time gone by it did not matter that the ECJ took years and years to build up a jurisprudence covering most of the key matters, today it matters hugely.

So it arguable that in the area of free movement of persons also there is a need for a new approach to transnational dialogue. As with asylum, this has two main aspects: (1) being more proactive about references; and (2) trying to build on each other’s jurisprudence pending CJ clarification.

I read the other day that associations such as the European Chapter of the IARLJ and the various bodies within the ARC network etc are now known under the title of “TANGOS” (transnational non-governmental organisations). And indeed the CJ itself can be described as a TANGO.

If that is true, then the main message of my paper is “It takes two to tango”.