Resolving Conflicts in European Fundamental Rights Protection

National and European Courts' Perspectives

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Introduction

1 Setting the Scene

In December 2017 the German Constitutional Court ruled in favour of a claimant who lodged a constitutional complaint against a decision ordering his surrender to Romania on the basis of a European Arrest Warrant (EAW) issued by the Romanian authorities.[1] The German Higher Regional Court had ordered the surrender relying on the assurances provided to it by the Romanian authorities, as required by the previous case law of the Court of Justice of the European Union (CJEU or Luxembourg Court), even though the guarantees provided were not in accordance with the minimum requirements established by the European Court of Human Rights (ECtHR or Strasbourg Court) in relation to the living space available to prisoners. The German Constitutional Court found that the challenged decision violated the complainant's right to a lawful judge (Art. 101(1) of the Basic Law) because of, inter alia, the strong presumption that the restricted personal space in Romanian prisons is in violation of Article 3 European Convention of Human Rights (ECHR) and the domestic court did not take the relevant case law of the ECtHR sufficiently into account. Unlike the Higher Regional Court, the Constitutional Court considered the case law of the CJEU in this context to be incomplete, thus requiring a request for a preliminary ruling in accordance with Article 267(3) TFEU. In particular, the CJEU still has to explain which minimum requirements relating to detention conditions derive from Article 4 of the EU Charter of Fundamental Rights (EUCFR or EU Charter) and which standards apply to the review of detention conditions in accordance with EU fundamental rights. The case has now been referred back to the Higher Regional Court, which is expected to submit question(s) to the CJEU for a preliminary ruling. If the CJEU decides to follow the ECtHR's minimum standards in relation to the living space available to prisoners, then the problem would at least be resolved temporarily, because the German court, by suspending the execution of the warrant and asking for further assurances from the Romanian authorities, would be able to comply

[1] Order of the *Bundesverfassungsgericht* (Second Senate) of 19 December 2017, 2 BvR 424/17.

with the obligations arising from EU law and the ECHR simultaneously. If, however, the CJEU would to decide otherwise, in light of the principle of mutual trust between the Member States and the effectiveness of EU law – both of which are very important elements of EU law[2] – the German court would find itself in a difficult position: executing the warrant would mean complying with EU law but ignoring fundamental rights claims on the basis of the ECHR, thus ultimately risking triggering state responsibility in Strasbourg.

This example reflects the reality and the struggle of the national courts in what has become a very complex system of fundamental rights protection in the European Union (EU). The complexity is caused by the co-existence of at least three legal systems, each with their own catalogue of fundamental rights and their own enforcement mechanism.[3] At the national level, fundamental rights are mainly to be found in constitutions, sometimes complemented by international treaties, and, sometimes also, EU law. Secondly, at the international level, individuals can bring individual complaints before the ECtHR, alleging violations of their fundamental rights as protected by the ECHR. At the moment, all 28 EU Member States are also Members of the Council of Europe and signatories to the ECHR. Thirdly, fundamental rights are also protected in the context of EU law, where they derive from the Charter, unwritten general principles of EU law and, again, the ECHR. Legal action based on the infringement of EU fundamental rights may thus involve the CJEU, national courts, as well as the ECtHR where EU fundamental rights are also protected under the ECHR.

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[2] As reaffirmed in CJEU Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:48. For a short, focused analysis of Opinion 2/13 see Chapter 3 of this book. For a more extensive analysis see B. De Witte and Š. Imamović**,** 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 *European Law Review* 5, 683-705; E. Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law* 35; S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', (2015) 16 *German Law Journal* 213. For a critical discussion on the principles of mutual trust and effectiveness specifically see Chapter 4 of this book.

[3] There are, of course, more human rights treaties and instruments applicable in Europe and in the EU. The focus in this book is on the interplay between EU fundamental rights, the ECHR and national constitutional rights, because of the special relationship between EU law and the ECHR, as well as the special status they both have in the national legal systems. However, other instruments may be mentioned too, where relevant.

The legal relationships between these component parts of the European human rights architecture and between the actors belonging to each of these systems are contested and still evolving. The most important catalyst for change was the entry into force of the Lisbon Treaty. This Treaty gives the EU a binding Charter of Fundamental Rights and obliges the EU to accede to the ECHR – necessitating a new conception of the relationship between the CJEU and the ECtHR. However, the CJEU has rejected the Draft Accession Agreement (DAA) in its controversial Opinion 2/13,[4] which seems to foreclose any real possibility for accession in the near future. In addition, the text of the Charter introduces an interpretative rule in Article 52(3), which provides that the corresponding Charter and Convention rights shall have the same meaning and scope. The provision is intended to ensure the necessary consistency between the Charter and the ECHR rights, without however adversely affecting the autonomy of EU law and that of the CJEU.[5]

In the meantime, the CJEU has been increasingly dealing with human rights cases as a consequence of the continued expansion of the scope of EU law and policy in areas which are very important from a human rights perspective, such as asylum and immigration law, criminal law and data protection. The Court has picked up on the increased human rights salience of EU law, positioning itself as a human rights court and placing the Charter at the heart of its human rights adjudication.[6] At the same time, the ECHR system is struggling with an overburdened Court, whose legitimacy is challenged in several states, as well as with the problems of the non-execution of its judgments.[7] Additionally, political

[4] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:48.
[5] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/20.
[6] G. de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 2, 168.
[7] Criticism has come mainly from 'old' State Parties in relation to the degree of the Court's influence on national law and the Court's legitimacy to exert such influence as well as to the proliferation of the ECHR rights, which is said to be the result of the Court's dynamic and evolutive approach in their interpretation. For a recent comparative study see P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016). Specifically for Belgium, see M. Bossuyt, 'Rechterlijk activisme in Straatsburg' (2013-2014) *Rechtskundig Weekblad* 723-733; M. Bossuyt, 'Judges on thin ice: the European Court of Human Rights and the treatment of asylum seekers', (2010) 3 *Inter-American and European Human Rights Journal* 3-48.

declarations of the Contracting Parties have put a new emphasis on the role of national courts, as well as a direct relationship between national courts and the ECtHR.[8] Following the Brighton Declaration, which called for 'shared responsibility' and 'dialogue' between the courts, the text of Protocol No 16 to the ECHR was drafted creating a system under which national courts could request advisory opinions from the Strasbourg Court on legal questions relating to the interpretation of the Convention and the protocols thereto, in addition to questions of clarification of the Court's case law.[9] Requests for an advisory opinion could be submitted only by constitutional courts or courts of last instance and would, moreover, always be optional and the opinions given by the ECtHR would not be binding.[10] Protocol No 16 entered into force on 1 August 2018[11] but it remains to be seen whether this additional layer of protection will facilitate or rather further complicate fundamental rights matters in Europe.

The increased focus on fundamental rights in the European legal space poses multiple political and legal challenges for the EU as well as for its Member States. It is particularly problematic for national courts, since they are at the crossroads of three legal systems. As state organs, they ensure compliance of their state with the ECHR. At the same time, they must uphold their national Constitution and comply with EU law and EU fundamental rights. Consequently, national courts may be confronted with competing and conflicting obligations for the protection of fundamental rights originating in EU and ECHR law as well as in national (constitutional) law. After all, the catalogues of rights may not require the same level of protection and are interpreted by different highest courts, while

[8] Brighton Declaration, adopted at the High Level Conference on the Future of the European Court of Human Rights on 19 April 2012, para 9. See also the Interlaken Declaration, adopted by the High Level Conference on the Future of the European Court of Human Rights on 19 February 2010, para 4.
[9] Committee of Ministers, Explanatory Report to Protocol No. 16 to the European Convention on Human Rights, CM(2013)31, 2 October 2013, paras 1 and 9.
[10] Ibid, paras 1-3. For a critical appraisal of Protocol No 16 to the ECHR see J. Gerards, 'Advisory Opinions, Preliminary Rulings, and the New Protocol No. 16 to the European Convention of Human Rights, a Comparative and Critical Appraisal' (2014) 21 *Maastricht Journal of European and Comparative Law* 4; K. Dzehtsiarou and N. O' Meara 'Advisory Jurisdiction of the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?' (2014) 34 *Legal Studies* 3, 444.
[11] The ratification by at least ten states has been achieved with the French ratification. The states that have ratified the Protocol are: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine.

clear rules governing their mutual relationship are lacking. As a result, the multi-level system of protection may have the effect of diminishing legal certainty where legal subjects may be put in an unequal position vis-à-vis others and where the rights they enjoy may depend on which jurisdiction is compelled to enforce them. This research focuses specifically on divergences and conflicts between EU and ECHR law and does not, in principle, consider conflicts between EU and/or ECHR law on the one hand and national law on the other, although mention may also be made of these types of conflicts, where relevant.[12] It is important to note at the outset that conflicts (both conceptual and explicit) in the protection of fundamental rights by the CJEU and the ECtHR are not always problematic and will not necessarily result in a conflict; on the contrary, they can be a source of mutual influence, enrichment and cross-fertilization. However, if the EU standard of fundamental rights protection would fall below the ECHR minimum standard, as interpreted by the case law of the ECtHR, Member States would be facing conflicting treaty obligations since they would be required to comply with their EU law obligations and, at the same time, they are required to ensure that the ECHR minimum standards, as determined by the ECtHR, are respected. This book therefore focuses only on divergences between EU and ECHR law where the level of protection provided by the CJEU may be considered to be below the minimum level required by ECtHR. It does not consider instances in which the CJEU provides more, higher levels of protection (which is compatible with the ECHR in light of Article 53 of the Convention).[13] The latter situation would create divergences in

[12] It could be said that conflicts are more likely to occur between EU and/or ECHR law and national law than between EU and ECHR law and, as such, they may pose even greater challenges for national courts, however this is also something that has been dealt with more in the existing literature. See e.g. G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Law Perspective* (Groningen: Europa Law Publishing, 2010).

[13] The example would be digital rights, for which the CJEU has been criticised for providng too much protection. See Joined Cases C-293/12 and 594/12 *Digital Rights Ireland ltd and Seitlinger and others* ECLI:EU:C:2014:238, and C-131/12 *Google Spain* ECLI:EU:C:2014:317. For a discussion see F. Fabbrini, 'The EU Charter of Fundamental Rights and the Rights to Data Privacy: The Court of Justice as a Human Rights Court' in S. de Vries, U. Bernitz and S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing 2015), 261. Interestingly, there are also fields in which the ECtHR has been criticised for going too far in the protection provided, although the criticism only came from certain corners. An example would be the protection provided to asylum seekers under Article 3 of the Convention. See e.g. M. Bossuyt, 'The European Union Confronted with an Asylum Crisis in

the case law in Strasbourg and Luxembourg (and could potentially create issues with national constitutional protection of rights) but not conflicting treaty obligations for the national courts in respect of EU and ECHR law. What remains crucial of course is that the CJEU, even when providing more protection in a balancing exercise, does not go below the ECHR standards.[14]

Against this background, a re-examination of the tensions and conflicts between EU and ECHR law in the new fundamental rights landscape becomes necessary and the following questions arise in that respect:

First, what is the place of human rights in the EU? Can the EU be considered a human rights actor and, if so, how does it relate to other human rights actors in Europe?

Second, what are the main fields in which the conflicts between EU and ECHR law have materialised and when are such conflicts truly problematic for national courts?

Finally, how do and should national courts in the Member States deal with what they perceive to be conflicts between EU and ECHR law and the case law of the Strasbourg and Luxembourg courts?

2 Origin and Aims

Although the focus in this book is on conflicts and ways to overcome conflicts between EU and ECHR law, this was not the original intention of the author. When this research commenced, there was not such a need to look for 'solutions' to the conflicts between EU and ECHR law, because the solution was already there: the

the Mediterranean: Reflections on Refugees and Human Rights Issues' (2015) 5 *European Journal of Human Rights* 581.

[14] This is the case for rights which are not absolute and have to be balanced. Here the CJEU would have to stick to the balance established in Strasbourg and could provide higer protection of one right only to the extent that it would not go below the minimum level of protection of the other right that is at stake.

EU's accession to the ECHR.[15] The aim at the time was to examine how the relationships between the different actors would change after accession. However, as already stated, the CJEU has rejected the Draft Accession Agreement in its Opinion 2/13, which has been perceived as a flagrant motion of distrust towards the ECtHR but also the national courts.[16] While the Strasbourg Court has not retaliated, it is obvious that the Opinion has deeply affected the relationship between the two European Courts.[17] Moreover, any discussion on accession or ways to overcome Opinion 2/13 seems to have reached a dead end, despite the Treaty obligation to accede. It is exactly this development that has triggered the examination undertaken in this book, as there seems to be a need for the re-evaluation of the relationships between the different actors and a search for solutions beyond accession.

This shift in European fundamental rights law is not uncharted territory in national and international academic writing. However, in the debate on the legal issues, the spotlights are usually on the two European Courts[18] while national courts tend to be overlooked.[19] Nevertheless, as things stand now, national courts

[15] On this point see, inter alia, P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford: Oxford University Press, 2013). For earlier accounts see H.C. Krüger and J. Polakiewicz, 'Proposals for a Coherent Human Rights: the European Convention on Human Rights and the EU Charter of Fundamental Rights' (2001) 22 Human Rights Law Journal 1.

[16] Opinion 2/13 Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:48.

[17] See e.g. ECtHR Annual Report 2014, available at http://echr.coe.int/Documents/Annual_Report_2014_ENG.pdf [last accessed 20 June 2018]; D. Spielmann, 'Solemn hearing for the opening of the judicial year of the European Court of Human Rights' Strasbourg, 30 January 2015, available at http://echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf [last accessed 20 June 2018].

[18] See e.g. E. Ravasi, *Human rights Protection by the ECtHR and the ECJ* (Leiden: Brill Nijhoff, 2017); F. Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Heidelberg: Springer, 2015); P. Gragl, *The Accession of the European Union to the European Convention to Human Rights* (Oxford: Hart Publishing, 2013).

[19] There are a few exceptions. See O.M. Arnardóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection* (London: Routledge, 2016); J.H. Gerards, 'Who decides on fundamental rights issues in Europe? – Toward a mechanism to coordinate the roles of the national courts, the ECJ and the ECtHR', in S. Weatherill and S. de Vries (eds), *Five years legally binding EU Charter of Fundamental Rights - What is the state of play in the protection of fundamental Rights in the EU?* (Oxford: Hart Publishing, 2015). Note, however, that the former is a compilation of chapters written by experts from different fields and the latter is one book chapter. See also G. Martinico, 'Is the European Convention Going to Be

are first in line concerning fundamental rights protection, both in the context of the EU, where individuals generally challenge measures adopted by the EU indirectly by challenging their implementation at the domestic level, and in the context of the ECHR, which requires domestic remedies to be exhausted first, with the Strasbourg Court offering only subsidiary protection. This book aims to fill this gap by considering the perspectives of all three partners in the relationship, thus also examining the issues from the perspective of national courts – a challenging task but one that is indispensable for a comprehensive understanding of fundamental rights protection in Europe. There is also a level of urgency regarding the research: national courts have been struggling with competing and conflicting obligations arising from EU and ECHR law on a more frequent basis in the last few years than in the preceding decades. This is due to several factors, including the already mentioned expansion of EU law and policy into human rights-sensitive areas, such as asylum and criminal law, but also due to the fact that the tools have changed. In the early days, the CJEU had to operate on the basis of general principles and indirectly the ECHR, while the heart of EU fundamental rights law today is the Charter, the EU's own bill of rights, which is closely tied in with the ECHR and national constitutions. As a consequence, the judges in Luxembourg are more inclined to invoke human rights arguments in the case law before them and one could even say that human rights have become part of the daily business of the CJEU, making the co-existence of different sources of law and their interpretations more challenging and the conflicts between them more likely. Understanding how the system works as a whole in post-Lisbon Europe and how exactly the different components relate to each other will help in creating a conceptual framework for resolving conflicts when these different components clash. The results of this research may thus ultimately have the effect of facilitating decision-making at the national level in fundamental rights cases.

3 Structure

'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 *The European Journal of International Law* 2, 401.

The book consists of three main parts. Each part considers different questions in the pursuit of answering the main research question and meeting the objectives defined above.

The first part of the book examines the relationships between the different actors in the system and reflects on how the key actors perceive their relationship with other actors. It first shows how the EU, having become a human rights actor, in its own right, is different from other more natural human rights actors in Europe, such as the ECHR and the national constitutional systems (Chapter 1). The book then analyses the relationships and interactions between the different actors in order to understand how they relate to each other exactly and how the system works as a whole (Chapter 2). Since the relationships are in constant flux and the case law is prone to changes and refinement, a detailed analysis was necessary to prepare the ground for what comes in the second and the third part of the book.

The narrative in the second part of the book focuses on the tensions, divergences and conflicts between EU and ECHR law and the case law of the Luxembourg and Strasbourg courts. Chapter 3 first explores the post-Treaty of Lisbon state of affairs in order to grasp, in particular, the impact that the new institutional setting has had on the two European Courts. It takes a more systematic approach in examining the changes that have triggered the tensions, with a special focus on Opinion 2/13, before going into the substantive rulings of the two European Courts. Chapters 4 and 5 identify the two areas in which the tensions have materialised, namely the Area of Freedom, Security and Justice (AFSJ), in which mutual trust and recognition comes into play, and the field of fundamental social rights. The outcome in these two chapters is an in-depth analysis of the relevant case law of the Strasbourg and Luxembourg courts which points out the incompatibilities and discusses why and the extent to which they are problematic. The two fields are interesting because the former addresses issues arising mainly in the context of absolute rights whereas the latter considers rights that can be limited and have to be balanced against other rights and freedoms. When it comes to non-abolute rights, conflicts are less likely because those rights are subject to derogations, restrictions or limitations on various

grounds. Moreover, the Strasbourg Court has developed the 'margin of appreciation' doctrine which recognises a certain national discretion in balancing the Convention rights against other interests. Nevertheless, as argued in Chapter 5, the field of fundamental social rights may well be the field in which issues involving EU law and the ECHR will come to light in the near future.

Part III, the centrepiece of this book, critically explores different ways for national courts to deal with and overcome conflicts – or what they may perceive to be conflicts – between EU and ECHR law. It looks at different sources of law available to national courts when trying to find a solution for a conflict between EU and ECHR law (Chapter 6). More specifically, it tries to determine which source can be helpful in which case, and to what extent, when dealing with conflicts between EU law and the ECHR. The final chapter (Chapter 7) develops different scenarios using actual cases of national courts in order to examine ways in which national courts have dealt with the issue so far. This final chapter also has a normative dimension, in that it not only discusses how national courts have dealt with conflicts but also how they should deal with what they perceive to be conflicts between their obligations under EU law and under the ECHR. The objective is to identify different strategies for avoiding and ultimately resolving the conflicts.

This book thus aims to contribute to the ongoing and future debates on how to deal with conflicts and tensions in the multi-sourced European fundamental rights law, by identifying the crucial current challenges and the possible solutions to those challenges.

4 Methodology

The methodology in this book is first and foremost that of classic legal research: relevant legal materials are analysed to ascertain and assess the current state of the art. In order to examine how national courts deal with the co-existence of the different instruments, the relevant case law of the two European Courts and national courts is examined. In addition, Treaties, national constitutions, as well as documents and reports of governments, parliaments and advisory bodies involved in designing the new fundamental rights architecture in Europe are scrutinised. The issues discussed in different chapters are explained from the

angle of EU and ECHR law, but since the book intends to give a more complete picture, it will also include the national constitutional perspective, where relevant, and Chapter 6 adds a general international law perspective to the discussion, also examining the relevant sources of international law.

The analysis employed throughout the book consists of a systematic reading of a body of texts, recording consistent and inconsistent features and drawing inferences about their meaning and impact.[20] The largest part of the analysis is devoted to the case law of the European and national courts, allowing for a deeper understanding of what courts do and how and why they do it. The extensive focus on case law has also allowed for a greater number of cases to be addressed, which in turn has provided a more accurate account of the different patterns. The first two parts of the book focus on the case law of the two European courts. In the context of the EU, the relevant cases were initially selected using search criteria on the Curia website database.[21] Subsequently, the selected cases are scrutinised in order to identify relevant clusters in different examples, as well as potential exceptions. As for the ECHR, the relevant decisions are found using the ECtHR's case law guides, factsheets and research reports published on the HUDOC website, since they contain what the Court itself considers to be most important case law. The third part of the book focuses on the case law of national courts. The national cases are selected and categorised primarily through the literature review, as it would not be feasible to conduct a survey of all the cases decided by different national courts in the Member States. Moreover, there are not many cases in which a conflict between EU and ECHR law is clearly exemplified. Therefore, only high-profile cases have been taken into account in this part.

It is important to note that the research conducted in this book is not comparative research in the traditional sense.[22] Rather, the case law of European

[20] M.A. Hall and R.F. Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 1, 63-122. K. Krippendorff, *Content Analysis: An Introduction to Its Methodology* (Thousand Oaks, CA: Sage Publications, 2004).
[21] The search terms used are as follows: 'European Convention for the Protection of Human Rights and Fundamental Freedoms', 'ECHR' and 'European Court of Human Rights'.
[22] What is meant here is that the comparative legal research is not systematic. However, it does have comparative aspects and could be considered comparative in a broader sense. Some authors have indeed argued for a broader comparative methodology which extends

and national courts is used as a tool to illustrate the theoretical part of the research. Therefore, there is no pre-selected list of countries to be studied and the choice has depended on the availability of the relevant case law and the language skills of the author. In that sense, the analysis is focused on a selected number of Member States, including, for most issues, the Netherlands, Belgium, Germany, and the United Kingdom, and sometimes Ireland, Italy and France. Nevertheless, the countries under review provide insights into the legal systems with different approaches in fundamental rights protection, providing an interesting methodological link between them. The differences in fundamental rights protection can be summarised as follows:

- strong versus weak protection of national constitutional rights (e.g. Germany versus the UK)

- the presence of a (strong) constitutional court versus no constitutional review (e.g. Germany and Belgium versus the Netherlands); and

- the intensity of public debate on the role of the ECHR in the domestic legal system (e.g. intense in the UK and NL, moderate in Germany, very little to no debate in Belgium).

Belgium can be seen as a front-runner. Belgian courts are open to cooperation with the European courts and they thus have a prominent Europe-friendly reputation.[23] The trust and confidence in both the ECHR and EU legal systems is commonly shared among the Belgian courts, but this is also true at the political

beyond the traditional comparison of different legal systems and their laws to, inter alia, a comparison of the judgments of one legal system to that of another system. See E.J. Eberle, 'The methodology of comparative law' (2011) 16 *Roger Williams University law review* 1, 52.

[23] See, for instance, P. Popelier, 'Report on Belgium' in G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws* (Groningen, Europa Law Publishers, 2010) 81–99. Note, however, that there has been a slight change in the attitude in recent years in the context of the ECHR. See e.g. W. Verrijdt, 'Belgium', in S. Griller, M. Claes and L. Papadopoulou (eds) *Member States' Constitutions and EU Integration* (Oxford: Hart Publishing, 2018); P. Popelier, 'Belgium: Faithful, Obedient, and Just a Little Irritated' in P. Popelier, S. Lambrecht. & K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016) 103-129; L. Lavrysen en J. Theunis, 'The Belgian Constitutional Court: a Satellite of the ECHR?', in A. Alen et al (eds), *Liberae Cogitationes. Liber Amicorum Marc Bossuyt* (Antwerp, Intersentia, 2013).

level and in academic circles.[24] In this respect, they are pioneers, but, at the same time, they may be the first to encounter problems when the European standards of fundamental rights protection diverge. While courts in many other countries tend to emphasise their own Constitution and downplay the role of the ECHR and the EU Charter, Belgian courts aim to be loyal to all norm systems. This also means that they are primed to encounter problems when the European standards of protection diverge. Germany is an interesting and important country to consider, since it has a robust national protection of fundamental rights and a strong constitutional court. Interestingly, however, it is a country where the legitimacy of the ECHR is not often challenged, except in the context of specific judgments touching on sensitive matters such as religious freedom,[25] the decision to end life-sustaining measures[26] and the rights of homosexuals.[27] Also, the debate in Germany generally focuses more on how the Federal Constitutional Court defines the status of the ECHR in national law and its relationship with the Strasbourg Court rather than focussing directly on the Strasbourg system.[28] This is different in the UK where the role and the legitimacy of the ECHR mechanism and the Strasbourg Court in particular are under severe attack.[29] The UK has even threatened with withdrawal.[30] At the same time, there is a discussion on the

[24] Note, however, that there has been growing 'irritation' recently. See P. Popelier, 'Belgium: Faithful, Obedient, and Just a Little Irritated' in P. Popelier, S. Lambrecht. & K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016) 103-129.
[25] See e.g. *Lautsi v Italy*, App no 30814/06 (EctHR, 18 March 2011).
[26] See e.g. *Lambert v France*, App no 46043/14 (EctHR, 5 June 2015).
[27] See e.g. *Schalk und Kopf v Austria*, App no 30141/04 (ECtHR, 24 June 2010); *Oliari and Others v Italy*, App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).
[28] K. Pabel, 'Germany: The Long Way of Integrating the Strasbourg Perspective into the Proteciton of Fundamental Rights', in P. Popelier, S. Lambrecht. & K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 161. See also E. Klein, 'Chapter 5 Germany', in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law* (Antwerp: Intersentia, 2014) 213.
[29] Much of the current debate can be tracked to older decisions dealing with, for example, prisoner voting rights and the deportation of offenders. For a further discussion and references see R. Masterman, 'The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?' in P. Popelier, S. Lambrecht. & K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 449-478.
[30] Withdrawal from the ECHR has been part of the political debate in the UK in recent years as well as the replacement of the Human Rights Act with a new British Bill of Rights. See e.g. UK Conservative Party, 'Protecting Human Rights in the UK' (2014) available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf. For a discussion

development of the UK homegrown bill of rights. This is in turn strikingly different in the Netherlands, where the legitimacy of the ECtHR has also been challenged, but where this was not accompanied by a further strengthening of the national system of fundamental rights protection.[31] As a result, the ECHR continues to function as the main human rights instrument in the Netherlands.

Another useful, albeit often blurred, distinction that can be made between the countries examined in this research is the monist and dualist character of their legal systems. In contrast to the UK and Germany, the Netherlands and Belgium are monist countries with regard to the effect international treaties have in the domestic legal order and both strongly depend on the ECHR for the national judicial fundamental rights protection, although in different ways. Germany and the UK are (moderately) dualist systems,[32] which means that international treaties have to be transposed into national law in order to have an effect domestically. This brings in an additional and interesting methodological distinction between the countries studied, thus maximizing the usefulness of the results of the research.

The research for this book was completed on 31 December 2017. More recent developments and case law are therefore not considered.[33]

5 Terminology

The pre-Lisbon legal constructions of the European Union were rather complex. For the sake of terminological clarity, it is important to distinguish between the

see K. Dzehtsiarou and T. Lock (eds), 'The legal implications of a repeal of the Human Rights Act 1998 and withdrawal from the European Convention on Human Rights' (2015) Working Paper. Social Science Electronic Publishing.

[31] J.H. Gerards, 'The Netherlands: Political Dynamics, Institutional Robustness', in P. Popelier, S. Lambrecht. & K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 327-360; J. Gerards and J. Fleuren, 'The Netherlands', in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law* (Antwerp: Intersentia, 2014) 215-257; E. Mak, 'Report on the Netherlands and Luxembourg', in G. Martinico and O. Pollicino (eds) *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Groningen: Europa Law Publishing, 2010) 301-326.

[32] This would apply to Germany. See E. Klein, 'Chapter 5 Germany', in J. Gerards and J. Fleuren (eds), Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law (Antwerp: Intersentia, 2014) 191.

[33] However, there are a few exceptions in the Epilogue.

institutional structure of the EU under the Treaty of Maastricht (1993) and the Treaty of Lisbon (2009). The Treaty of Maastricht created the European Union as a single body consisting of three integral pillars: the Community pillar (comprising the three Communities: the European Community, the European Atomic Energy Community and the former European Coal and Steel Community); the pillar devoted to the Common Foreign and Security Policy (under Title V of the Treaty on European Union which was mostly inter-governmental apart from technical programmes and some development policy); and the pillar devoted to police and judicial cooperation in Justice and Home Affairs (JHA) (under Title VI of the Treaty on European Union in which the EU had limited powers but no real ability to enforce laws). The Treaty of Lisbon abolished the pillar structure providing that 'the Union shall replace and succeed the European Community' (Article 1 TEU).

For this reason, only the European Union (and its abbreviated form EU) is referred to in this book even where the correct term would be the European Economic Community (EEC) or European Community (EC). There are however some exceptions to this rule, for instance in regard to explicit references and quotes from judgments or scholarly work, or when the use of old terminology is useful for the readers' understanding of the material.

The same holds true for the reference to the Court of Justice of the European Union (and its abbreviated form CJEU or 'Luxembourg Court'), which was created in 1952 as the Court of Justice of the European Coal and Steel Communities and has changed names a number of times since. The final change came with the Treaty of Lisbon, where the name of the Court of Justice of the European Communities was changed to the Court of Justice of the European Union (CJEU). However, the reader should be aware that the CJEU not only includes the Court of Justice but also its other formations, namely the General Court (former Court of First Instance) and specialised courts within the meaning of Article 19(1) TEU. In cases where the General Court adjudicated on a case, explicit reference to that court will be made. The European Court of Human Rights is mostly referred to in its abbreviated form ECtHR, but sometimes it is also referred to as the 'Strasbourg Court' or even just 'Strasbourg'.

With respect to Treaty articles, the numbering used in the consolidated version of the TEU and the TFEU following the Treaty of Lisbon will be used. Sometimes, where it is useful for the reader, a double reference will be made to both the old and the new numbering.

Lastly, the terms 'human rights' and 'fundamental rights' should be clarified. Fundamental or human rights are generally perceived as rights that any individual enjoys by virtue of her humanity against the exercise of public authority.[34] Traditionally, the concept 'fundamental rights' is used within the legal framework of national legal orders and in the EU, whereas the term 'human rights' is usually used in international law. The two terms refer to similar and often the same substance, as can be seen when comparing, for example, the rights contained in the Charter of Fundamental Rights of the European Union with the rights in the European Convention on Human Rights. Moreover, the case law of the CJEU and ECtHR does not seem to make the distinction either. In this book, therefore, 'fundamental rights' and 'human rights' are used interchangeably.

[34] See e.g. the preamble and Article 1 of the Universal Declaration of Human Rights. See further J. Donnelly, *Universal Human Rights in Theory and Practice* (Itacha, New York: Cornell University Press, 2003), 10.

Chapter 1: The EU as a Human Rights Organisation

1 Introduction

After the end of the Second World War, the international institutional system was designed anew. Although the idea of human rights has a long history, it was not until the end of the Second World War that the international community sought to develop regimes to promote and protect human rights. The reason for this needs no explanation: the horrors of the Second World War had set up the political climate for such action.

On the European level, two main organisations were created for this purpose: the Council of Europe (CoE) and the European Union (EU).[1] At the time of their creation, the CoE and the EU were completely separate systems with different roles and objectives. Today, they both share the same fundamental values – human rights, democracy and the rule of law – but they are still separate entities which perform different, yet complementary, roles.[2] Nevertheless, the links between the CoE and the EU have been institutionalised progressively, at least to some extent.[3] It is now clear that the EU has an increasingly important role to play in the area of fundamental rights protection and that the European Convention on Human Rights (hereinafter ECHR or Convention) has had a tremendous influence on the development of EU fundamental rights law. Even though the two organisations have enriched each other and have worked closely

[1] On the history of European integration see inter alia I. Bache, S. George and S. Bulmer, *Politics in the European Union* (Oxford: Oxford University Press, 2011); D. Dinan, *Origins and Evolution of the European Union* (Oxford: Oxford University Press, 2006); D. Dinan, *Europe Recast: A History of European Union* (New York: Palgrave Macmillan, 2004); P.M. Stirk, *A History of European Integration since 1914* (London: Pinter, 1996). On the history of the Council of Europe and ECHR see B. Wassenberg, *History of the Council of Europe* (Strasbourg: Council of Europe Publishing, 2013).

[2] A.W. Heringa, 'Editorial: Europe's Common Bill of Rights' (1996) 3 *Maastricht Journal of European and Comparative Law* 1.

[3] E.g. the head of the European Union delegation to the Council of Europe participates (without voting rights) in all meetings of the Committee of Ministers. See also the reference in now Article 220 TFEU, which has been in the Treaties since the foundation of the EU as well as the explicit competence for the EU to accede to the ECHR in Article 6(2) TEU.

with each other, they have never been able to make themselves permanently complementary.[4]

The transition from being completely distinct systems to being partly integrated partly autonomous, complementary and overlapping systems, both charged with protecting fundamental rights, took over 50 years. The Treaty of Lisbon extended the scope of the EU action further in many areas, including human rights protection, which has led to an increased cooperation between the two European organisations and has even opened the way for the EU's accession to the ECHR. These developments have been characterised as 'fundamentally changing' the European landscape,[5] taking the protection of human rights 'to a new level',[6] and providing for an 'improved' and 'effective' judicial protection of human rights.[7] Today, more than ever before, the EU portrays itself as an organisation that is committed to human rights protection and that requires the respect of those rights, not only by the EU, but also by its Member States and its partners in the international arena. This raises the question: how did the EU get involved in human rights and in what sense is it a human rights organisation today?

Before examining this question, it is important to understand the broader historical context in which the EU evolved from a limited economic Community to a powerful entity in which the protection of fundamental rights has become a central commitment. The evolution of EU fundamental rights law is divided into three broad periods. The first is the period immediately after the creation of the European Community (now the European Union) and the Council of Europe, characterised by the absence of human rights in the EU legal system (section 2). The second is the period of the emergence of EU fundamental rights as general

[4] J.C. Juncker, 'Council of Europe - European Union: "A Sole Ambition for the European Continent"' Strasbourg: Council of Europe, 11 April 2006, http://www.coe.int/t/der/docs/RapJuncker_E.pdf [last accessed 16 May 2015].
[5] I. Pernice, 'The Treaty of Lisbon and Fundamental Rights', in S. Griller and J. Ziller, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Heidelberg: Springer, 2008), 252.
[6] K. Mathisen, 'The Impact of the Lisbon Treaty, in particular Article 6 TEU, on Member States' obligations with respect to the protection of fundamental rights', University of Luxembourg, Law Working Paper Series Paper 2010-01, 4.
[7] D. Leczykiewicz, 'Effective Judicial Protection of Human Rights after Lisbon' (2010) 35 *European Law Review* 326, 330.

principles of EU law, inspired by the common constitutional traditions of the EU Member States and the ECHR and developed by the CJEU (section 3). The third and final phase is the present day framework, covering the period after the entry into force of the Treaty of Lisbon in December 2009 (section 4). By way of conclusion, section 5 debates whether and to what extent the EU, on the basis of the described evolution, has become a human rights organisation.

2 The Creation of the European Community and the Silence on Human Rights

'We must re-create the European family in a regional structure called, it may be, the United States of Europe'.[8] In his famous speech in 1946, Winston Churchill called on Europe to unite. His words helped generate the first important step in this endeavour taken in May 1948, when a congress, consisting of approximately 800 Ministers, Members of Parliament, trade unionists, artists, journalists, economists, and members of the liberal professions, was convened at The Hague to discuss and make proposals for a body to represent democratic Europe. The congress proposed the creation of a European assembly resting on common acceptance and the protection of human rights and democracy, and various other measures for coordinating and harmonising European policies.[9] This programme of unity was undertaken to prevent a return to totalitarian regimes, to defend fundamental rights, peace and democracy, and to encourage economic prosperity and stimulate international cooperation.[10]

After some months of negotiations between the governments of Belgium, France, Luxembourg, the Netherlands, the United Kingdom, Denmark, Ireland, Italy, Norway, and Sweden on the specificities of this new body, the Council of

[8] W. Churchill, speech delivered at the University of Zurich, 19 September 1946, http://www.coe.int/t/dgal/dit/ilcd/Archives/selection/Churchill/ZurichSpeech_en.asp [last accessed 16 May 2015].
[9] M.J. Dedman, *The Origins and Development of the European Union 1945-2008* (Oxon: Routledge, 2010).
[10] The Preamble of the Statute of the Council of Europe (1949) states: 'Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples […] there is a need of a closer unity between all like-minded countries of Europe'. The preamble of the EEC Treaty (1957) refers to the laying of 'foundation of an even closer union among the peoples of Europe'.

Europe was created. It was an inter-governmental entity comprising ten Member States (now 47) with the primary mission to promote and protect human rights and fundamental freedoms, the rule of law and democracy.[11]

The Statute of the Council of Europe was signed in London on 5 May 1949. The Parliamentary Assembly of the Council of Europe (PACE), which held its first session on 10 August 1949, can be considered as the oldest international parliamentary assembly with a pluralistic composition of democratically elected members of parliament at the national level, established on the basis of an intergovernmental treaty.[12]

The European Convention on Human Rights (ECHR or Convention) – a treaty negotiated under the auspices of the Council of Europe – is the first international human rights treaty with enforcement mechanisms. It came into force on 3 September 1953. Distinctive at its conception already, the ECHR has since evolved into a sophisticated legal system. While creating the Council of Europe was certainly the first milestone on the way to a closer Europe, some states wanted even closer and deeper integration.

The French Foreign Minister, Robert Schuman, took the first step in the process of the foundation of the European Union. In his speech, inspired by Jean Monnet, Schuman proposed that France and Germany, and any other European country wishing to join them, pool their coal and steel resources. Schuman argued:

> Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries. […] The pooling of coal and steel production should immediately provide

[11] See Preamble and Article 1 of the Statute of the Council of Europe.
[12] The Assembly is one of the two statutory organs of the Council of Europe, which is composed of a Committee of Ministers and the Consultative Assembly (Article 10 of the Statute of the Council of Europe).

> for the setting up of common foundations for economic development as a first step in the federation of Europe [...].[13]

The first agreement created was the Treaty establishing the European Coal and Steel Community (ECSC), signed by Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands in 1951. It entered into force on 23 July 1952 and expired on 23 July 2002, exactly 50 years later. Another Treaty that was also created in 1952 was the European Defence Community Treaty (EDC Treaty), initially signed by the six countries but ultimately rejected on a procedural motion by the French National Assembly in 1954. The European Political Community Treaty (EPC Treaty), which was never formally signed, was also drafted to accompany the EDC Treaty. Interestingly, however, this EPC Treaty contained provisions that are actually maintained in the EU Treaties today. According to the EPC Treaty, the main objective of the (then) European Community was to contribute towards the protection of human rights and fundamental freedoms in the Member States and to integrate the ECHR into the system.[14] This is proof that, even at its inception, the EU was a project with goals that go beyond economics and even politics, even if the states were not (yet) ready to make such a commitment.[15] The next step was taken in 1957 when the Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) were signed in Rome.[16] These treaties did not contain express human rights clauses except for a limited number of economic rights, such as freedom from discrimination on the basis of nationality in relation to free movement of workers (Article 7 EEC) and in the workplace (Article 199 EEC).

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[13] The Schuman Declaration, 9 May 1950.

[14] See Articles 2 and 3 of the Draft Treaty embodying the Statute of the European Political Community (1952-1953). For a detailed analysis of the draft EPC Treaty see G. De Búrca, 'The Road Not Taken: The EU as Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649.

[15] As Weiler has put it 'It [the European project] had a spiritual dimension: Redefining human relations, the very way individuals relate to each other and to their community'. See J. Weiler, 'On the Values, Virtues (and Vices) of the European Construct: What we can learn from Aristotle, Aquinas and Maimonides', presentation at the Hertie School of Governance (13 March 2012), 2-3.

[16] Joseph Weiler commented that '[n]either the Treaty of Paris nor the Treaty of Rome contained any allusion to the protection of fundamental human rights'. See J.H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in JHH Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 107.

The silence on human rights was further reflected in Article 2 of the EEC Treaty, which specifies that 'the Community shall have as its task, […], to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it'. This is of course very different from Article 2 of the TEU today, which refers to the respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities, as the most fundamental values of the Union.

The early case law of the Court of Justice of the EU (CJEU, Luxembourg Court or Court) also reflects the reluctance to engage with human rights. The first time the Court was confronted with claims based on fundamental rights was in the 1959 *Stork* case.[17] The CJEU refused to annul decisions of the High Authority of the European Coal and Steel Community on the basis of their incompatibility with the rights as protected in the German *Grundgesetz*. The Court's unwillingness to annul decisions on the basis of national human rights standards was plausible given that the Court was competent only to adjudicate the case on the basis of European law. In the subsequent *Geitling and Sgarlata* cases,[18] the Court maintained the restrictive approach, limiting itself to matters concerning purely economic integration. Both the lack of a catalogue of human rights in EU law and the fact that the Court was not expressly given the power to review EU acts for infringements of human rights contributed to the Court's early refusal to exercise such a review.

In *Geitling*, the Court insisted:

> It is not for the Court (…) to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected. Therefore the Court may neither interpret nor apply (…) German basic law in examining the legality of a decision of the High Authority. Moreover Community law, as it arises

[17] C-1/58, *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* [1959] ECLI:EU:C:1959:4.
[18] Joined Cases C-36, 37, 38 and 40/59 *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others v ECSC High Authority* [1960] ECLI:EU:C:1960:36; C-40/64 *Marcello Sgarlata and others v Commission of the EEC* [1965] ECLI:EU:C:1965:36.

> under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.[19]

Strictly speaking, the case demonstrates the division between EU law and national constitutions and a not division between EU law and the ECHR. However, the case also shows the reluctance of the CJEU to engage with human rights more generally. The ECHR system was to fulfil this role, operating as a 'Bill of Rights' for Europe.[20] Even though the CJEU's rather formalistic reading and interpretation only applied to the ECSC Treaty, the Court also adopted the same approach initially with respect to the EEC Treaty. This was to change gradually, as we shall see.

3 Fundamental Rights as General Principles of EU law

Former Advocate General Jacobs wrote some years ago that 'the whole foundations [of the protection of fundamental rights at the EU level] were the work of the Court',[21] and, indeed, the CJEU has played a crucial role in developing EU fundamental rights. Accordingly, the Court has to be put at the centre of this narrative.

The big trigger for change in the fundamental rights landscape of the EU came in the early 1970s and it came from Germany. Over the years, it became apparent that, in the continually growing economic cooperation between different states, human rights standards cannot be ignored. This is especially true for Member States with a constitutional tradition that found it unacceptable that an international organisation with such powers was not officially obliged to respect basic human rights and freedoms.[22] Therefore, some national courts reserved the

[19] Joined Cases C-36, 37, 38 and 40/59 *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others v ECSC High Authority* [1960] ECR I-423, p 438-439.
[20] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 4.
[21] F.G. Jacobs, 'Human Rights in the European Union: the Role of the Court of Justice' (2001) 26 *European law Review* 337. See also A. Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights' in
A. Arnull, P. Eckhout and T. Tridimas (eds) *Continuity and Change In EU Law: Essays in Honour of Francis Jacobs* (Oxford: Oxford University Press, 2008).
[22] M. Kuijer, 'The Accession of the European Union to the ECHR: A gift for the ECHR's 60th anniversary or an unwelcome intruder at the party?' (2011) 3 *Amsterdam Law Forum* 17.

right to declare EU law inapplicable if they found it to be incompatible with domestic fundamental rights as protected in the national constitutions. This, however, would be found to be incompatible with the principle of primacy of EU law already proclaimed in the *Van Gend en Loos*[23] and *Costa v ENEL*[24] judgments, which is why the CJEU decided to introduce fundamental rights as unwritten general principles of EU law.

3.1 The New Approach

The new attitude in the jurisprudence of the Luxembourg Court was revealed for the first time in the 1969 *Stauder*[25] judgment in which the Court implicitly pointed to the fact that fundamental rights are enshrined in the general principles of EU law, stating that 'the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of EU law and protected by the Court'.[26] The Court however failed to provide a detailed reasoning for such a bold statement, essentially based on an assumption of what the intentions of the Treaty drafters had been at the time. Advocate General Roemer concurred, suggesting that fundamental rights recognised by national law represented 'an unwritten constituent part of Community Law'.[27]

In more elaborate wording, the Court confirmed that respect for fundamental rights forms an integral part of the general principles of EU law in the *Internationale Handelsgesellschaft* judgment:

> [T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

[23] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECLI:EU:C:1963:1.
[24] Case 6/64 *Flaminio Costa v ENEL* [1964] ECLI:EU:C:1964:66.
[25] Case 29/69, *Erich Stauder v City of Ulm - Sozialamt* [1969] ECLI:EU:C:1969:57.
[26] Ibid, 419.
[27] Case 29/69 *Erich Stauder v City of Ulm – Sozialamt*, Opinion of AG Roemer, ECLI:EU:C:1969:52, 428.

> However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[28]

Here the Court confirmed that fundamental rights form an integral part of the general principles of EU law, but it also explained that they shall be interpreted in the light of the demands of European integration.[29] In any case, the standard for review had to come from the EU itself, because any special criteria for assessment coming from a particular Member State would damage the uniformity and effectiveness of EU law and would hence jeopardise the unity of the common market and ultimately of the EU itself.[30] The new approach did not end the ongoing debate in Germany concerning the lack of a catalogue of rights in the EU, however, and the same case was submitted to the German *Bundesverfassungsgericht*. In the decision, famously known as *Solange I*[31] (derived from the German 'as long as'), the German Constitutional Court reserved the right to review the compatibility of EU law with the German Constitution, as long as the Union does not have a catalogue of its own, comparable to the catalogue of fundamental rights in the German Basic Law.[32] Another constitutional court that was not convinced was the Italian *Corte Constituzionale*. In the *Frontini* decision,[33] the Constitutional Court interpreted Article 11 of the Italian Constitution, which determines conditions under which Italy may transfer part of its sovereignty by

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[28] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114, paras 3 and 4.
[29] A. Clapham, *Human Rights and the European Community: A Critical Overview* Vol. I (Florence: Baden-Baden, 1991), 47-48.
[30] Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, para 4.
[31] BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß* (29 May 1974).
[32] The decision was criticised by the Commission (see *Commission of the European Communities, Eighth General Report on the Activities of the European Communities* 270, 1974) as well as by the European Parliament but also by many commentators. See e.g. W. Edeson and F. Wooldridge, 'European Community Law and Fundamental Human Rights: Some Recent Decisions of the European Court and National Courts' (1976) 1 *Legal Issues of European Integration* 44.
[33] Frontini and associates, *Giurisprudenza Constituzionale*, 1973, 2406 (Judgment of 27 December 1973). See also F.P. Ruggieri Laderchi, 'Report on Italy', in A.M. Slaughter, A.S. Sweet, and J. Weiler (eds), *The European Courts and National Courts* (Oxford: Hart Publishing, 1998).

means of an international agreement, as requiring that EU competences must not infringe fundamental rights.

Notwithstanding the challenges posed by the German and the Italian Constitutional Court, the Court of Justice further developed the internal control mechanism reaffirming that human rights and freedoms are general principles of Community law, now Union law, based on the constitutional traditions common to the Member States and pertinent international instruments, in particular the ECHR.

The first reference to international human rights treaties was made in that same year in *Nold*,[34] where the Court held that, in order to determine the common constitutional standards for the EU Member States, it would look at the human rights treaties ratified by all states.[35] Moreover, it stated that 'in safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, and it cannot, therefore, uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States'.[36] In addition, the Court argued that the protection of fundamental rights not only is compatible with economic integration, but it is also necessary for the attainment of such a project. No specific reference to the ECHR had been made since France had not ratified the Convention at this point. As of 1974, all EU Member States had become contracting parties to the ECHR,[37] which led the Luxembourg Court to look for inspiration in the ECHR, in addition to common constitutional traditions, in developing its own EU law standard of protection of fundamental rights.

The Convention was first referred to specifically by the Court in the 1975 *Rutili* judgment[38] and has since then been referred to numerous times more. In *Rutili*, the Court examined the conditions under which the concept of public policy may be used as a justification for derogating from the fundamental principles of

[34] Case 4/73 *Nold v Commission* [1974] ECLI:EU:C:1975:114.
[35] Even though the applicant specifically referred to the ECHR, the Court of Justice did not make a specific reference to it at this point.
[36] Case 4/73, *Nold v Commission* [1974] ECLI:EU:C:1975:114.
[37] France was the last EC Member State to ratify the ECHR in 1974.
[38] Case 36/75, *Rutili v Ministre de l'intérieur* [1975] ECLI:EU:C:1975:137, para 32.

equality of treatment and freedom of movement for workers. The Court concluded that the public policy grounds shall be interpreted strictly and shall not be put to improper use by being invoked to serve economic ends. In order to support its argument, the Court referred to, inter alia, Articles 8, 9, 10, and 11 of the ECHR, which provide that no restrictions in the interests of national security or public safety shall be placed on the rights secured by those provisions other than restrictions that are necessary for the protection of those interests in a democratic society.

In the *Hauer* judgment[39] of 1979, the Court examined the right to property as protected in Article 1 of the First Protocol to the ECHR, as well as specific provisions of the German Basic Law and of the Irish and Italian Constitutions. This case is a good example of the 'comparative constitutional approach' adopted by the CJEU at the time.[40]

Ten years later, in the *Wachauf* case, the Court developed its reasoning further:

> The Court has consistently held, […], that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding those rights, the Court has to look to the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognised by the constitutions of those states may not find acceptance in the Community. International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law.
>
> The fundamental rights recognised by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of the common organization of a market, provided that those restrictions in fact correspond to the objectives of general interest pursued by the Community, and do

[39] Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECLI:EU:C:1979:290.
[40] B. De Witte, 'Balancing of Economic Law and Human Rights by the European Court of Justice', in P.M. Dupuy, F. Francioni & E.U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford : Oxford University Press, 2009).

> not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of these rights.
>
> Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.[41]

Even though the Treaty did not explicitly provide the competence for the Court of Justice to make use of general principles common to the laws of the Member States,[42] this act by the Court could arguably be justified under Article 230 EC (ex-Article 173) which refers, among the grounds for the annulment of Community acts, to 'infringement of this treaty or of any rule of law relating to its application', and Article 220 EC (ex-Article 164), which describes the general function of the Court to be ensuring that 'in the interpretation and application of this Treaty the law is observed'.[43] Under its general principles case law, the Court protects and upholds fundamental rights in relation to the actions of the EU institutions, but also against Member States when they act 'within the scope of Community law'.[44] There are two main categories to be distinguished concerning the latter: national

[41] Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:321, paras 17-19.
[42] It explicitly provided for this competence only within the specific context of the non-contractual liability of the Community (Article 288(2), ex Article 215(2)).
[43] B. De Witte, 'The Past and the Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston (ed), *The European Union and Human Rights* (Oxford: Oxford University Press, 1999).
[44] On the notion 'scope of Community law' see J. Temple Lang, 'The Sphere in Which Member States are Obliged to Comply with the General Principles of Community Fundamental Rights Principles' (1991) 2 *Legal Issues of European Integration* 23; F.G. Jacobs, 'Human Rights in the European Union: the Role of the Court of Justice' (2001) 26 *European law Review* 337.

measures implementing or applying EU law (*Wachauf* line of cases)[45] and national measures derogating from EU law (*ERT* line of cases).[46]

The political institutions confirmed their commitment to fundamental rights in the Joint Declaration on Human Rights issued in 1977.[47] It provides as follows:

> 1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention on Human Rights and Fundamental Freedoms.
>
> 2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.
>
> Even though not legally binding, the Declaration added some political weight to the new jurisprudence of the Luxembourg Court. The European Council endorsed the Joint Declaration the following year and respect for human rights was said to be one of the 'cherished values' of the Union.[48]

The Court of Justice thus ultimately succeeded in the endeavour it undertook rather hesitantly in the 1960s, developing fundamental rights case law without the guidance of any express treaty provisions or a catalogue of defined rights. This remarkable transformation is often explained by reference to the need for 'defending' the supremacy of EU law, which is why it has led to scepticism regarding the Court's genuine commitment to human rights protection.[49]

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[45] Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:321. In this line of cases the CJEU ruled that Member States are bound by EU fundamental rights when they adopt measures to implement regulations or transpose directives or more generally, when they apply national rules whose subject-matter is governed by provision of EU primary and/or secondary legislation.

[46] Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECLI:EU:C:1991:254. In this line of cases, the CJEU widened the interpretaiton of holding that the Member States are also bound by EU fundamental rights when they are trying to jusitfy a national measure that limits any of the Treaty rights, especially EU free movement rights. For an overview of the Wachauf/ERT line of cases see X. Groussot, L. Pech and G.T. Petursson, 'The Reach of EU Fundamental Rights on Member States Action after Lisbon' in S. de Vries, U. Bernitz and S. Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Oxford: Hart Publishing, 2013).

[47] Joint Declaration on Fundamental Human Rights [1977] OJ C-103/1.

[48] European Council Copenhagen Declaration on Democracy, EC Bull 3-1978.

[49] See e.g. J. Coppell and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669; G. De Búrca 'The European Court of Justice

Mendelson called it an 'act of self-preservation'[50] and Weiler wrote that the language of the CJEU was a human rights language on the surface but in reality it was 'all about supremacy'.[51]

After having witnessed the development of the CJEU's fundamental rights case law, both the *Corte Costituzionale* and the *Bundesverfassungsgericht* reconsidered their position and decided, inter alia, that they would no longer review the compatibility of EU legislation with fundamental rights, as long as the EU, and in particular the CJEU, continued to protect fundamental rights adequately.[52] Moreover, in Germany, the Constitutional Court decided to drop the requirement that was established and imposed in *Solange I* and a written catalogue of fundamental rights at the European level was no longer indispensable.[53] What was decisive for the *Bundesverfassungsgericht* was the fact that (the respect for) fundamental rights, inspired by national constitutions and the ECHR, had become mandatory in the EU and that the CJEU was entrusted with ensuring compliance with those rights.[54]

This case law of the CJEU, through which a significant number of fundamental rights and general principles of law have been recognised as an

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and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal* 1.

[50] M.H. Mendelson, 'The ECJ and Human Rights' (1981) 1 *Yearbook of European Law* 125, 130.

[51] J. Weiler, The Transformation of Europe' (1992) 100 *Yale Law Journal* 2403, 2483.

[52] *S.p.A. Granital v Amministrazione delle Finanze dello Stato*, Case n. 170/84, [1984] and *Solange II*, BVerfGE 73, 339 2 BvR 197/83 [1986]. See also M. Kumm and V.F. Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/archive/papers/04/040501-15.pdf [last accessed 24 February 2015].

[53] This position was subsequently confirmed and even strengthened in the *Solange III* judgment; see BVerfGE 2 BvL 1/97 (2000). Yet, the concerns of the *Bundesverfassungsgericht* about the lack of robust fundamental rights protections in the EU have not completely disappeared after *Solange III*, as demonstrated in the ruling on the Maastricht Treaty in 1993, and more recently in 2009, when it ruled on the Lisbon Treaty (or, more accurately: on the German laws implementing the Lisbon Treaty). All of the rulings share a common theme: the *Bundesverfassungsgericht* considered that the lack of democratic legitimacy and robust fundamental rights protections in the EU risk undermining German constitutional rights.

[54] See e.g. G.F. Mancini, 'Safeguarding Human Rights: The role of the Court of Justice of the European Communities' in G.F. Mancini (ed) *Democracy and Constitutionalism in the European Union: Collected Essays* (Oxford: Hart Publishing, 2000), 81.

integral part of Community law and later EU law,[55] prompted further steps by other EU institutions and Member States to underline the Union's political commitment to respect for fundamental rights.

3.2 Treaty Amendments – Building in a Human Rights Perspective

The first reference to fundamental rights in the Treaties can be found in the preamble to the Single European Act (1987), which was the first major treaty reform of the EEC Treaty. The preamble referred to respect for the fundamental rights recognised in the constitutions and laws of the Member States, in the ECHR and in the European Social Charter. The reference in the Treaties was included due to the developments in the case law of the CJEU, but also because it became clear to the Member States that the growing powers of the EU, now also covering human rights-sensitive areas, could no longer be sustained without a reference to fundamental rights in the Treaties.

The formal treaty reference was finally inserted in the Maastricht Treaty in Article F(2) of the EU Treaty (now Article 6(2) of the TEU):

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1959 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The provision confirmed the case law of the CJEU reflecting an increased awareness at the political level of the need for the Union to respect fundamental rights.[56] At the same time, however, it caused confusion, as it was excluded from the jurisdiction of the Court of Justice.[57] In other words, there was no judicial

[55] See for a detailed description and analysis of the CJEU's early human rights jurisprudence A. Clapham, *Human Rights and the European Community: A Critical Overview* Vol. I (Florence: Baden-Baden, 1991); N. Foster, 'The European Court of Justice and the European Convention for the Protection of Human Rights' (1987) *Human Rights Law Review* 245.

[56] A.M. Arnull, 'Opinion 2/94 and Its Implications for the future constitution of the Union' in University of Cambridge Centre for European Legal Studies, *The Human Rights Opinion of the ECJ and its Constitutional Implications* (1996) CELS Occasional Paper No.1, available at: http://www.cels.law.cam.ac.uk/publications/occasional%20papers/Paper_1.pdf [last accessed 26 October 2015].

[57] Article L of the TEU excluded Article F(2) from the jurisdiction of the Court of Justice. Some scholars have also argued that the provision failed to codify the European Court of

mechanism for enforcing the obligation Article F(2) of the EU Treaty imposed on the Union. Nevertheless, the CJEU continued to develop its case law, as it did before the Maastricht Treaty: outside of the Treaty framework and on the basis of its general principles.

What became obvious in the process of the ratification of the Maastricht Treaty was that it was no longer possible to legitimise and sustain the EU's growing power in areas where violations of human rights may occur more easily, such as immigration, without a formal reference to fundamental rights in the Treaties.[58] In addition, the ratification of the Maastricht Treaty came alongside the 2004 enlargement preparation, which concerned the accession of states from Central and Eastern Europe (CEE) and which might have also played a role in the increased awareness and perceived need for the formal recognition of fundamental rights in the EU legal order. At the same time, the CEE states strongly favoured accession to the EU, hoping that their membership in the EU would strengthen the process of democratization after the fall of Communism.[59]

The Treaty of Amsterdam (1999) deepened the commitment for fundamental rights protection within the Union, mainly by strengthening the role of the Luxembourg Court in this matter. First, it confirmed the Member States' 'attachment to the principles of liberty, democracy and the respect for human rights and fundamental freedoms and of the rule of law'.60 Secondly, and more

Justice's case law adequately. No reference has been made neither to the Convention Protocols or other human rights treaties such as the European Social Charter. See for instance G. Gaja, 'The protection of Human Rights under the Maastricht Treaty', in D. Curtin & T. Heukels (eds), *Institutional Dynamics of European Integration* (Dordrecht: Nijhoff Publishers, 1994).

[58] H. Aden 'Human Rights before the Courts – Concurrence or complementary protection by the European Court of Human Rights, the European Court of Justice and by national Constitutional Courts?' in M. Brosig, *Human rights in Europe: a fragmented regime?* (Frankfurt: Peter Lang, 2006). See also B. De Witte & G.N. Toggenburg, 'Human Rights and Membership of the European Union' in S. Peers and A. Ward (eds), *The EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2004) 59-82.

[59] W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford: Oxford University Press, 2012); W. Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe' (2004) 10 *European Law Journal* 4, 371; W. Sadurski, 'EU Enlargement and Democracy in New Member States', in W. Sadurski, A. Czarnota and M. Krygier (eds) Spreading Democracy and the Rule of Law? (Dordrecht: Springer, 2006).

[60] See third recital of the Preamble of the Treaty on European Union as amended by Amsterdam Treaty.

significantly, Article 6(1) TEU establishes that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law' and Article 6(2) TEU provides that the Union 'shall respect fundamental rights as general principles of EU law'. Furthermore, the Treaty of Amsterdam introduced a political mechanism for sanctioning Member States guilty of a 'serious and persistent breach' of the principles on which the Union is founded, including respect for fundamental rights. According to Article 7 TEU, as amended by the Treaty of Amsterdam, a 'serious and persistent breach' of fundamental rights may result in the suspension of Member States' rights derived from the Treaty, including voting rights.

In addition, the Treaty of Amsterdam also corrected the 'mistake' of Maastricht, and formally clarified that the jurisdiction of the Court of Justice applies to Article 6(2) TEU with regard to actions of the EU institutions (Article 46(d) TEU). In addition, the Treaty of Amsterdam also added an important category of legislative competence in Article 13 EC, to combat discrimination based on sex, racial or ethnic origin, religion or belief, age, disability, or sexual orientation. However, even after Amsterdam, the incorporation of fundamental rights in the Treaty did not go beyond the confirmation of the jurisprudence of the CJEU and thus the codification of rights that already existed.61

Until the early 1990s, the CJEU's fundamental rights jurisprudence has been limited to ensuring that individuals are protected from violations of their fundamental rights resulting from acts of Community institutions. However, in cases such as Wachauf62 and Elliniki Radiophonia Tileorassi (ERT),63 the Court asserted a greater role for itself in the field of fundamental rights protection and ruled that its review powers also extend to Member States' acts when they implement EU law. The tables have turned and now the Court of Justice observes

[61] For an overview of the changes brought by different treaty amendments see B. Moriarty, 'Human Rights in EU law' in B. Moriarty and E. Massa, *Human Rights Law* (Oxford: Oxford University Press, 2012) 155-201. See also B. De Witte, 'The Past and the Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston (ed), *The European Union and Human Rights* (Oxford: Oxfor University Press, 1999).
[62] Case 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:321, 2639.
[63] Case 260/89, *Elliniki Radiophonia Tileorassi (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECLI:EU:C:1991:254, 2964.

and ensures that the Member States live up to what, initially in fact, were their own standards.64

It should be noted that the Court's interpretation of fundamental rights as general principles of EU law is an original feature of the EU's constitutional architecture, which has several advantages. The Court is able to adopt a non-exhaustive approach to fundamental rights using the legal systems of the Member States as well as the ECHR to adopt and adapt EU fundamental rights.[65]

Yet, this *solution de dépannage*, a term derived from the French language writings of the former President of the CJEU Robert Lecourt,[66] did not rectify at least some limitations of the lack of a written catalogue of fundamental rights: the problem of the identification as well as the unpredictability of the Court's interpretation and application of those rights.

3.3 An EU Bill of Rights

The initiative for drafting an EU Bill of Rights dates back to the German presidency of the European Council in the first half of 1999.[67] It was prepared by an extraordinary Convention made up of 62 representatives of national governments and parliaments, the Commission and the European Parliament. The decision to

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[64] R.A. Lawson, 'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in R.A. Lawson & M. De Blois (eds) *The Dynamics of the Protection of Human Rights in Europe - Essays in Honour of Professor Henry G. Schermers vol. III* (The Hague: Martinus Nijhoff Publishers, 1994) 219.

[65] J.H.H. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 *European Law Journal* 96. Some examples of recognized rights include: Case C-29/69 *Stauder* [1969] ECLI:EU:C:1969:57 (freedom of assembly); Case 130/75 *Prais v Council* [1976] ECLI:EU:C:1976:142 (freedom of religion); Case 149/77 *Defrenne III* [1978] ECLI:EU:C:1978:130 (principle of equality); Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECLI:EU:C:1986:206 (right to a judicial remedy); Case C–404/92P, *X v Commission* [1994] ECLI:EU:C:1994:361 (right to privacy); Case C–274/99, *Connolly v Commission* [2001] ECLI:EU:C:2001:127 (freedom of expression); Case C–36/02, *Omega* [2004] ECLI:EU:C:2004:614 (human dignity).

[66] R. Lecourt, 'Cour européenne des Droits de l'Homme et Cour de Justice des Communautées européennes', in F. Matscher & H. Petzold (eds), *Protecting Human Rights: The European Dimension (Essays in honour of G.J. Wiarda)* (Köln/Berlin: C. Heymanns Verlag, 1988) p. 336.

[67] It is not surprising that the initiative came from Germany. Germany already initiated the incorporation of fundamental rights in the Union law through general principles of EU law through *Solange* case law and now the creation of a written catalogue containing those rights. See European Council, Presidency Conclusions, Cologne 3-4 June 1999.

compose a Charter of fundamental rights was taken the same year by the European Council.[68]

The EU Charter of Fundamental Rights (hereinafter the Charter or CFREU), 'solemnly proclaimed' by the European Commission, the European Parliament and the Council of Ministers on 7 December 2000, in Nice, is the first formal EU document to combine and declare all fundamental rights and values to which EU citizens are entitled. The Conclusions of that European Council described the Charter as 'combining in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European or national sources'.[69] The main objective was therefore to 'to make more visible and explicit to EU citizens the fundamental rights they already enjoy at European level'.[70] The Charter was to be 'a task of revelation rather than creation, of compilation rather than innovation'.[71]

At this stage, however, the Charter was a non-binding declaration.[72] This demonstrates the continuing reluctance of (some of) the Member States[73] to commit themselves to a legally binding Bill of Rights, presumably because they wanted to keep the scope of application of EU law as limited as possible and prevent an unintended extension of the Union's competencies.[74] The lack of

[68] Summit of the Heads of State and Government of the Member States of the European Union, Cologne, Germany, 3-4 June 1999.
[69] European Council, Presidency Conclusions, Nice 7, 8 & 9 December 2000, p. 1.
[70] As underlined by the (then) President of the European Commission in 2000, Romano Prodi. As to the doubts whether or not the EU needed the Charter see J.H.H. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 *European Law Journal* 95.
[71] COM (2000) 559, *Commission Communication on the Charter of Fundamental Rights of the European Union*, para 7. See also Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17.
[72] The Charter was published in the C part of the Official Journal, indicating that it was not a legally binding document.
[73] The firm opposition came from the British government. The Irish, the Dutch and the Scandinavian Member States also had certain reservations. Belgium, France, Germany, and Italy, on the other hand, were strong supporters of giving the Charter a legally binding status.
[74] See e.g. J. Weiler, 'Eurocracy and Distrust: Some Questions concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities' (1986) 612 *Washington Law Review* 1112; G.F. Mancini, 'Safeguarding Human Rights: The role of the Court of Justice of the European Communities' in G.F. Mancini (ed) *Democracy and Constitutionalism in the European Union: Collected Essays* (Oxford: Hart Publishing, 2000).

binding force did not, of course, mean that the Charter had no legal value. It was referred to in the preambles to texts of secondary legislation and used as a document of reference by the various EU institutions. As such, the Charter had an important role in the construction of a European corpus of human rights law, even if it was not yet formally binding.[75] Moreover, many of the rights contained in the Charter were already a part of the *acquis communautaire* as an emanation of the constitutional traditions common to the EU Member States, as well as the ECHR, which the CJEU could enforce by virtue of Articles 6(2) and 46(d).[76]

The foundation for the next important step in EU fundamental rights law was laid in the Treaty establishing a Constitution for Europe, which was signed on 29 October 2004 but was never ratified by all the EU Member States and, thus, never entered into force.[77] Nevertheless, most of the changes made in Title II of Part I of the Treaty were later incorporated into the new, now ratified, Treaty of Lisbon.

4 Fundamental Rights Protection in the post-Lisbon Europe

The Treaty of Lisbon came into force on 1 December 2009, marking what EU leaders have described as a 'new era' for the Union.[78] The Treaty was originally

[75] J. Dutheil de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration', in A. Arnull, P. Eeckhout and T. Tridimas, *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008).

[76] K. Lenaerts and E. De Smijter, 'The Charter and the role of the European Courts' (2001) 8 *Maastricht Journal of European and Comparative Law* 90. See also Case C-131/03 P *R.J. Reynolds Tobacco Holdings* v *Commission* [2006] ECLI:EU:C:2006:541, para 122 and Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* v *Secretary of State for Trade and Industry* [2001] Opinion of AG Tizzano ECLI:EU:C:2001:81, para 28.

[77] Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 310/1 (never ratified). The Treaty was ratified by 18 Member States but subsequently rejected by French and Dutch voters in May and June 2005 which brought the ratification process to an end. For an analysis of the Treaty see J.C. Piris, *The Constitution for Europe: a legal analysis* (Cambridge: Cambridge University Press, 2006).

[78] The Lisbon Treaty is one of the most momentous steps in European integration since the entry into force of the Treaty of Paris establishing the European Coal and Steel Community (ECSC) in 1951. Other important steps in European integration include the first enlargement of the EC in 1973 (when the UK, Ireland and Denmark joined the EU), the launch of the Single Market in 1985, the abolition of internal frontiers under the Maastricht Treaty in 1992, the achievement of monetary union and the introduction of the euro in 1999/2002 and the re-unification of Europe through the enlargements of 2004/2007.

conceived as a 'Constitution for Europe' but its problematic ratification process, meeting popular rejection in France and the Netherlands, resulted in a re-ordering of the first agreed text and partial renegotiations. The majority of innovations proposed in the original Treaty however were carried over to the Treaty of Lisbon.[79]

The changes made in the Lisbon Treaty in the field of human rights protection, most notably in Article 6 TEU, are significant and mark a new stage in the EU's commitment to human rights protection. Article 6 sets out three main strands of EU fundamental rights protection under EU law: first, it states that the Union shall respect the Charter of Fundamental Rights, which has the same legal value as the Treaties; second, it makes accession to the ECHR a legal obligation; and third, it confirms that fundamental rights, as guaranteed by the ECHR and as they result from the common constitutional traditions of the Member States, constitute general principles of EU law. Furthermore, Article 7 TEU now gives the EU the power to act against a Member State that seriously and persistently violates common values enshrined in Article 2 TEU, thereby entrusting the EU with the protection of the most fundamental values the EU and the Member States have in common, in case national safeguards fail.[80] Article 7 establishes three different stages and procedures intended to safeguard the values referred to in Article 2.[81] The first stage is to declare the existence of a 'clear risk of a serious

[79] For the discussion on the differences and similarities between the Constitutional and the Lisbon Treaty see J. Ziller, 'Comparing the Lisbon Treaty with the Constitutional Treaty: Transparency in Process vs. Transparency in Results' in J. Roy and R. Dominguez (eds) *Lisbon Fado: The European Union under Reform* (University of Miami: Thomson-Shore, 2009) 61.

[80] On Article 7 TEU see, among many, L. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press, 2017); B. Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in C. Closa and D. Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016); D. Kochenov and L. Pech, 'Better Late Than Never?' (2016) 24 *Journal of Common Market Studies* 1062; C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in C. Closa and D. Kochenov (eds), Reinforcing the Rule of Law Oversight in the European Union (Cambridge, Cambridge University Press, 2016); W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) 16 *Columbia Journal of European Law* 385.

[81] 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

breach' of the values. The same procedure can be used to make recommendations to the recalcitrant Member State on how to resolve the issue. The second stage is determining whether a 'serious and persistent breach' of values has occurred, for which a more rigorous procedure has been established. If it is determined that there has been a serious and persistent breach of Article 2 values, sanctions can be applied against the Member State in question which is the third and last stage. The Council, acting by qualified majority, can then suspend certain rights of the Member State, such as voting rights in the Council. The consequence would be that the Member State would still be subject to EU rules but would be excluded from decision-making. The procedure envisaged in Article 7 has generally been perceived by the EU institutions as being politically unfeasible, a so-called 'nuclear option'.[82] Recently, however, the Commission has decided to activate the procedure in Article 7(1) in the context of Poland's proposed reforms, which would significantly reduce the independence of the judiciary and as such would be considered a serious threat to the rule of law, and has already submitted a set of recommendations. It can be concluded, therefore, that the EU Treaties not only commit the EU to the values enshrined in Article 2 (also including the respect for fundamental rights), but they also foresee such a policy in relation to the Member States. Moreover, fundamental rights have become part of the entire policy cycle in the EU and are at the centre of the EU's very purpose and identity.[83] All EU institutions, bodies, offices, and agencies are under the same duty to respect, observe and promote the Charter when exercising their competences[84] and thus have a role and a capacity to 'protect' fundamental rights. The obligation to promote and support fundamental rights equally applies in the external relations of the EU, both in trade and investment policies and in the area of Common Foreign and Security Policy (CFSP).[85]

[82] See e.g. President Barroso (2012) State of the Union Address, European Parliament, Speech/12/596. For a discussion see e.g. D. Kochenov, 'Busting the myths nuclear: A commentary on Article 7 TEU' EUI Working Paper 2017/10.
[83] M. Dawson, *The Governance of EU Fundamental Rights* (Cambridge: Cambridge University Press, 2017).
[84] Regarding the three main institutions, namely, the Commission, the Council and the Parliament see Section 4.1.4. of this chapter.
[85] Case C-366/10, *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864, para 101, and Case C-263/14, *Parliament v Council* [2016] ECLI:EU:C:2016:435, para 47. See also Joint Communication to the European Parliament

The EU and its Member States were thus finally ready to take decisive steps towards a Union of fundamental rights. In this way, they also addressed the well-known criticism that had been raised against the EU for its inconsistent approach to fundamental rights protection. The criticism particularly related to the EU's strong insistence on fundamental rights protection in its external relations that did not match its own internal fundamental rights developments. Indeed, some critics considered that a reference to the EU as a human rights actor would be incorrect and inappropriate and questioned its future role in that context.[86] Fast-forwarding some 18 years, that criticism now appears in a different light and is in need of a re-evaluation.[87]

As mentioned at the beginning of this section, the changes made in the Lisbon Treaty, most notably in Article 6 TEU, mark a new stage in the EU's commitment to human rights protection. The first most significant and immediate change relates to the legal status of the Charter of Fundamental Rights of the European Union, which at last acquired binding force. Secondly, accession of the EU to the ECHR became a legal obligation and, thirdly, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, became recognised as general principles of EU law. The following subsections examine these three topics in turn.

4.1 EU Charter of Fundamental Rights

4.1.1 Legal Status

The EU Charter of Fundamental Rights, proclaimed in 2000, is now primary EU law as provided in Article 6(1) TEU of the Lisbon Treaty:

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and the Council: Action Plan on Human Rights and Democracy (2015 -2019) 'Keeping human rights at the heart of the EU agenda', 16 final, 28 April 2015.

[86] A. Von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the core of the European Union' (2000) 37 *Common Market Law Review* 1307.

[87] See, for instance, O.M. Arnardóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection* (London: Routledge, 2016); S. Morano-Foadi and L. Vickers (eds*), Fundamental Rights in the EU* (Oxford: Hart Publishing, 2015); S. de Vries, U. Bernitz and S. Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Oxford: Hart Publishing, 2013).

> The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

The Charter itself is thus not incorporated into the Treaties, but it is accorded the same legal value as the Treaties. According to its Preamble, the Charter reflects the common values of the peoples of Europe and is based on the common constitutional traditions of the EU Member States and the international human rights treaties they have concluded in view of safeguarding human rights protection.[88] Its main objective is to make EU fundamental rights more visible and explicit to EU citizens.

4.1.2 Content

The EU Charter of Fundamental Rights comprises 54 articles which fall under seven headings or titles, six of which are devoted to listing specific types of rights, while the last clarifies the scope of application of the Charter and the principles governing its interpretation.

The Charter draws on the ECHR, the European Social Charter and other human rights conventions, as well as the rights and principles resulting from the common constitutional traditions of EU Member States. Furthermore, the Charter contains the rights developed in the case law of the Court of Justice, but it also incorporates some of the 'third generation' rights, such as guarantees on bioethics and transparent administration, which demonstrates its innovative character.

[88] Preamble of the Charter of Fundamental rights of the European Union (2000/C 364/01).

These rights do not often appear in national constitutions or in other international conventions ratified by the EU Member States.[89]

In addition, the Charter can be considered distinctive, in that it uses broader language for some otherwise specific provisions.[90] Importantly, the Charter makes a distinction between rights and principles. The latter, according to Article 52(5) of the Charter, are to be implemented through additional legislation and only become relevant for the courts in cases involving the interpretation and legality of such laws. The Charter however does not clarify which articles are rights – that are indisputable and can be enforced before the CJEU – and which are merely principles that need to be implemented through legislative or executive acts before they can give rise to direct claims for positive action. The Explanations to the Charter do not shed much light on this question either, except for giving a few examples of the latter category.[91] Notwithstanding these imprecisions, the Charter remains extremely valuable, as it acknowledges that citizens' fundamental rights are at the heart of the EU.

4.1.3 Scope of Application

The scope of application of the Charter is defined in its Article 51(1):

[89] C. Ladenburger, FIDE 2012 – Session on 'Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions', Institutional Report http://www.fide2012.eu/index.php?doc_id=88 [last accessed 11 April 2015].

[90] Some rights are broadly formulated, which leaves significant space for interpretation. For example, Article 18 of the Charter provides for the 'right to asylum', which presumably includes the right to seek asylum but can be associated with other rights as well, such as the right to escape persecution on grounds of political belief etc. Moreover, the CJEU has also remained silent on the exact scope of the right to asylum in Article 18 in its case law. As Yowell formulates it: 'The EU Charter is distinctive, however, in the way it collects various rights traditions in one instrument and synthesises them at a high level of abstraction, using language that is often even broader that the UDHD (which was formulated so as to reach worldwide agreement)'. See P. Yowell, 'The Justiciability of the Charter of Fundamental Rights in the Domestic Law of Member States' in P.M. Huber and K. Ziegler (eds), *The EU and National Constitutional Law* (Munich: Richard Boorberg Verlag, 2012), 111.

[91] Examples of principles recognised in the Charter include Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, such as in Articles 23, 33 and 34. For a discussion see, inter alia, C. Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?' (2008) 15 *Maastricht Journal of European and Comparative Law* 2, 193-215.

> The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application hereof in accordance with their respective powers.

This wording of the provision suggests a rather limited scope of application: in order for the Charter to be applicable to actions of the Member States, they must be 'implementing EU law'.[92] This has raised doubts among the legal scholars and practitioners: did the wording of Article 51(1) imply that the scope was more limited than under the pre-Charter case law of the CJEU? The Explanations to the Charter,[93] to which, according to Article 52(7) of the Charter, due regard must be had in the interpretation of '[t]he rights, freedoms and principles in the Charter', state that 'As regards the Member States, it follows unambiguously from the case-law of the [CJEU] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of [EU] law'. Furthermore, a reference has been made to the landmark cases already mentioned, such as *Wachauf* (implementation as transposition) and *ERT* (derogation from a market freedom), which seems to suggest that Article 51(1) does not intend to deviate from the existing case law and 'implementing EU law' also covers the ERT type of situation where a Member State acts within the scope of EU law, without 'implementing EU law' in the strict sense.

Some authors have endorsed this broader interpretation, arguing that the concept of 'implementing EU law' should be seen as equivalent to the case law notion of 'acting within the scope of EU law' for all practical purposes;[94] others

[92] The pre-Charter scope of application of EU fundamental rights was broader: Member States were bound by EU fundamental rights when they were 'implementing' EU law (*Wachauf*) and when they were acting 'in the scope of [EU] law', also including when they adopted rules on the basis of a derogation conferred by the Treaty freedoms (*ERT*).
[93] Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17.
[94] P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010) at 210; M. Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts' (2008) 45 *Common Market Law Review* 663–665.

have contended that the Charter should have a more limited scope of application, as intended by the Treaty drafters.[95]

The CJEU provided some clarification in the *Åkerberg Fransson* judgment,[96] a case referred by a District Court in Sweden, asking whether the EU principle of *ne bis in idem* prevented a Member State from imposing criminal sanctions for tax evasion where it already had imposed administrative penalties. The Swedish government, all the intervening Member States,[97] as well as the European Commission argued that the Court had no jurisdiction to answer the questions referred for a preliminary ruling, as the tax penalties and the criminal proceedings in question did not arise from the implementation of EU law. The Court first recalled that, according to its settled case law, the fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law, but they are not applilcable outside such situations.[98] The Court continued by stating that '[…] tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 […] and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter'.[99] Therefore, the Court concluded that 'The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective

[95] E.g. P. Yowell, 'The Justiciability of the Charter of Fundamental Rights in the Domestic Law of Member States' in P.M. Huber and K. Ziegler (eds), *The EU and National Constitutional Law* (Munich, Richard Boorberg Verlag, 2012) 107. For more general comments on the scope of the Charter see K. Lenaerts, 'The EU Charter of Fundamental Rights: Scope of Application and Methods of Interpretations', in V Kronenberger, M.T. D'Alessio, and V. Placco (eds) *De Rome* à *Lisbonne: les juridictions de l'Union européenne à la croisée des chemins. Mélanges en l'honneur de Paolo Mengozzi* (Brussels: Bruylant, 2013), 107-143. For an overview of the drafting history of Article 51(1) of the Charter see P.M. Huber, 'The Unitary Effect of the Community's Fundamental Rights: The ERT-Doctrine Needs to be Reviewed' (2008) 14 *European Public Law* 323.
[96] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.
[97] The Czech Republic, Denmark, Ireland, and the Netherlands.
[98] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105, para 19.
[99] Ibid, para 27.

penalties for conduct prejudicial to the financial interests of the European Union'.[100] In other words, the CJEU opted for a broader interpretation of the Charter's scope. As for the EU institutions, bodies, offices, and agencies, the Charter is binding upon them even when they are act outside the scope of the Treaties.[101]

Referring to Article 51 of the Charter again, the second paragraph further provides that 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. In a similar vein, Article 6(1) TEU reiterates that the Charter's provisions shall not extend EU competences in any way.[102] These provisions make it clear that the Charter itself cannot offer a legal basis for legislative action and as such extend Member State action that is considered to be for the 'implementation of EU law'. This shows the efforts of the Member States to limit the EU's meddling in fundamental rights issues. Nevertheless, the Charter could still bind national authorities even in areas where the EU does not necessarily have legislative power.[103] The scope of application of the Charter thus remains a sensitive political question.[104]

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[100] Ibid, para 28.

[101] For instance, in the context of the EMS Treaty. See Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising and Others v European Commission and European Central Bank* [2016] ECLI:EU:C:2016:701, para 67.

[102] Additionally, Declaration 1 annexed to the Charter repeats that 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties'.

[103] S. Prechal, S. de Vries and H. van Eijken, 'The Principle of Attributed Powers and the 'Scope of EU Law' in L.F.M. Besselink, F.J.L. Penning and S. Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Alphen aan den Rijn: Kluwer Law International, 2011).

[104] For further discussion on the scope of application of fundamental rights on Member States' actions pre and post-Lisbon see X. Groussot, L. Pech and G.T. Petursson, 'The Scope of Application of Fundamental Rights on Member States' Actions: In Search of Certainty in EU Adjudication' (2011) Eric Stein Working Paper No. 1/2011, http://www.era-comm.eu/charter_of_fundamental_rights/kiosk/pdf/EU_Adjudication.pdf [last accessed 11 April 2015. For a further analysis and references see G. De Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *European Law Review* 136; L.F.M. Besselink, 'The Member States, the national constitutions, and the scope of the Charter' (2001) 8 *Maastricht Journal of European and Comparative Law* 68. For more recent analyses see L. Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez' (2012) 49 *Common Market Law Review* 40; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375.

4.1.4 The Charter and the EU Legislative Process

The EU Charter of Fundamental Rights has had a major impact on the law and policy-making process in the EU, not only in the judicial process but also in the *ex ante* political and legislative processes. The Charter is also the point of reference for the EU legislature, especially when EU legislation gives specific expression to fundamental rights. This is particularly important because *ex ante* mechanisms seek to protect fundamental rights by preventing violations from occurring, which is different from the *ex post* judicial processes that are triggered only when a violation has occurred.[105] Moreover, averting any potential conflict between EU legislation and fundamental rights at an early stage will ensure that the CJEU is not confronted with sensitive and controversial cases. The European Commission, the Council of Ministers and the European Parliament have all adjusted their procedures in order to ensure that all proposals for EU legislation and policy are in compliance with the newly binding catalogue of human rights. The Commission has lead the process and the Council and the Parliament have followed suit.

4.1.4.1 The Commission

As early as in 2001, the European Commission committed itself to ensuring the compatibility of all legislative proposals with the Charter.[106] In 2005, the Commission set out its 'methodology for ensuring the Charter is properly implemented in Commission proposals',[107] followed by a report on the operation

[105] For a general argument, see M. Ryle, 'Pre-Legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights' (1994) *Public Law* 192. In the context of the EU specifically see M. Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press, 2017); V. Kosta, *Fundamental Rights in EU Internal Market Legislation* (Oxford, Hart Publishing, 2015).

[106] European Commission, Decision on the Application of the Charter of Fundamental Rights of the European Union SEC(2001) 380/3. Note, however, that, even before the Charter was proclaimed, some EU law instruments contained statements of compatibility with fundamental rights, as protected by the ECHR or as general principles of EU law. Nevertheless, the creation of the Charter was undeniably a turning point in this respect.

[107] European Commission Communication, 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring' (27 April 2005) COM(2005) 172.

of the methodology in 2009.[108] The report provided a general assessment of the working of internal monitoring since 2005, noting the positive developments in establishing a 'fundamental rights culture' but also acknowledging the shortcomings and suggesting improvements. As a consequence, the methodology was reinforced in 2010 by a further Communication announcing the 'Charter Strategy'.[109] The objective of the Charter Strategy is to make the fundamental rights set out in the Charter as effective as possible and to ensure that the EU's approach to legislation is exemplary, which, in turn, would help to build mutual trust between the Member States and, more generally, public confidence in the Union's policies. The Communication emphasised that effective protection is also necessary to strengthen the credibility of the Union's efforts to promote human rights around the world. In addition, the Commission announced the publication of an annual report on the application of the Charter and a number of practical measures to start building a 'fundamental rights culture' at all stages of EU legislative procedures. In the Commission's view, 'all components of an ambitious fundamental rights policy' were present at the time.[110] In line with the objective of promoting a fundamental rights culture, the Commission offered assistance to the other institutions to 'find an effective way to take into account the effects of their amendments on the implementation of the Charter' and announced its intention to launch an inter-institutional dialogue to determine methods for dealing with amendments that raise questions of compatibility with fundamental rights.[111]

At the heart of the Charter Strategy is the fundamental rights 'checklist', which has been implemented in the context of impact assessments. It consists of six questions[112] designed to help the drafters identify which fundamental rights

[108] European Commission Report, 'On the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights' (29 April 2009) COM(2009) 205 final.
[109] European Commission Communication, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (19 October 2010) COM(2010) 573/4.
[110] Ibid, at 2.
[111] Ibid, at 8.
[112] 1. What fundamental rights are affected? 2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)? 3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)? 4. Do the options have both a beneficial and a negative

could be affected by draft legislation and policies and to assess the impact on these rights of each envisaged policy option. Legislative proposals are to be accompanied by an explanatory memorandum which 'must contain a summary explaining how fundamental rights obligations have been met'.[113]

In order to reinforce the Charter Strategy further and make it more effective in practice, the Commission introduced the 'Optional Guidance on taking account of Fundamental Rights in Commission Impact Assessments',[114] which complement the Commission's Impact Assessment Guidelines introduced earlier.[115] This was another way of adding a fundamental rights element to the early stages of the EU legislative process. The problem, however, was that the Charter rights have been divided according to the existing economic-social-environmental structure of the impact assessments, without any internal revision. It turned out to be an exercise of fitting fundamental rights into the existing structure rather than revising the existing structure to accommodate fundamental rights. This kind of integrated approach allows the impact of fundamental rights to be factored into a broader set of considerations, which may have positive effects, but it could also result in some rights being overlooked and/or the consideration of the impact on certain rights being unfocused.

The Commission's strategies and fundamental rights 'checklist' have been criticised in the literature as being inadequate to ensure a truly systematic

impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)? 5. Would any limitation of fundamental rights be formulated in a clear and predictable manner? 6. Would any limitation of fundamental rights:
- be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)?
- be proportionate to the desired aim?
- preserve the essence of the fundamental rights concerned?

[113] European Commission Communication, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (19 October 2010) COM(2010) 573/4, 8.

[114] Commission Staff Working Paper, Operational Guidance on taking account of Fundamental Rights in Commission Impact assessments (6 May 2011) SEC(2011) 567 final.

[115] Note that the Commission's Impact Assessments (IAs) are standard practice since 2002, used as a tool to improve the quality and coherence of EU policies and laws and ensure that they are achieved in the most efficient and effective manner. The IA method integrates all partial and sectoral assessments (i.e. economic, social or environmental) into one global instrument. For a further explanation and details see Communication from the Commission on Impact Assessment (5 June 2002) COM(2002) 276 final.

fundamental rights assessment of legislation. There are specific arguments to be made in relation to different aspects, but the general criticism concerns the lack of legal expertise on fundamental rights in the Impact Assessment Board and inadequate strategy regarding consultations with the relevant stakeholders, which, taken together, may lead to a 'box ticking exercise' rather than a systematic in-depth assessment.[116]

The role of the Charter rights in the Commission's impact assessments has been enhanced gradually. In 2014, following the CJEU's judgment in *Digital Rights Ireland*,[117] in which the Court declared the Data Retention Directive[118] invalid on fundamental rights grounds, the Commission committed itself to revising the Optional Guidance, which was achieved by the Commission's Better Regulation Agenda.[119] The Better Regulation Guidelines and associated 'toolbox' aim to boost transparency and accountability in EU decision-making and to improve the quality of laws. One of the key points is the comprehensive involvement of citizens and stakeholders in order to ensure that economic, social and environmental impacts, together with fundamental rights, continue to be considered at all stages of the legislative process. The specific tool 28, entitled 'fundamental rights and human rights', gives an overview of the most salient points to consider when assessing fundamental rights in impact assessments, also including a fundamental rights checklist which is now more elaborate. In addition, in 2015, the Commission trained specific departments to ensure that officials are

[116] For a detailed discussion on different aspects, criticism and recommendations see J. Morijn, 'The EU Fundamental Rights Charter, the European Commission and the Council of Ministers: checking the 'Charter checklist' Part 1 and 2 (2011) https://eutopialaw.com/2011/09/28/the-eu-fundamental-rights-charter-the-european-commission-and-the-council-of-ministers-checking-the-%E2%80%98charter-checklists%E2%80%99-part-1/ [last accessed 7 November 2017]; I. de Jesus Butler, 'Ensuring compliance with the Charter of Fundamental Rights in legislative drafting: the practice of the European Commission' (2012) 37 *European Law Review* 4, 397; V. Kosta, *Fundamental Rights in EU Internal Market Legislation* (Oxford: Hart Publishing, 2015).
[117] Case C-293/12 *Digital Rights Ireland* [2014] ECLI:EU:C:2014:238.
[118] Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communications networks and amending Directive 2002/58/EC (Data Retention Directive) [2006] OJ L105/54.
[119] European Commission Communication, 'Better regulation for better results — An EU agenda' (19 May 2015) COM(2015) 215 final.

able to apply a fundamental rights-based approach to policy and lawmaking.[120] The Commission has also called upon other institutions to 'mirror the Commission's commitment to better regulation, as should Member States when transposing and implementing EU law'.

Most recently, the new Interinstitutional Agreement on Better Law Making[121] now commits all institutions involved in the legislative process to go further, by preparing an impact assessment in certain cases, which would presumably also include considerations related to fundamental rights. While there are still further points of improvement,[122] the Commission's work demonstrates its dedication and willingness to engage further in the discussion and its search for ways to improve the *ex ante* fundamental rights assessment at all the stages of the legislative process.

4.1.4.2 The Council

The Council of Ministers, unlike the Commission and the Parliament, did not have an established procedure for a fundamental rights assessment when the Charter came into force. During the informal meeting of the Justice and Home Affairs Ministers in January 2011, the Council invited a reflection and discussion on the different ways in which a fundamental rights examination could be fulfilled.[123] Later that year, the Council adopted 'Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council preparatory bodies' framed as 'non-binding advice' intended to help the Council's preparatory bodies to identify and deal with fundamental rights issues arising in connection with the

[120] Report on the Application of the EU Charter of Fundamental Rights' (19 May 2016) COM(2016) 265 final.
[121] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (12 May 2016) OJ L 123.
[122] See, e.g., I. de Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' (2012) 37 *European Law Review* 4, 397-418.
[123] Council discussion document, 'The Role of the Council in Ensuring the Effective Implementation of the Charter of Fundamental Rights in the Legislative Process', informal meeting of the Justice and Home Affairs Ministers (20-21 January 2011).

proposals under discussion.[124] The ruling in *Digital Rights Ireland* was also a red flag for the Council. In December 2014, the Council revised its Guidelines in order to facilitate the assessment of the compatibility with fundamental rights further.[125] The new Guidelines now include a fundamental rights checklist, which is similar to that of the Commission but not identical.[126]

Another point worth noting is that, in the methodologies for assessing the proposal, the revised Guidelines provide expressly for reference to be made to the case law of the ECtHR, alongside the Charter and the case law of the CJEU, whereas, in the earlier version, the ECHR and the case law of the ECtHR were only listed at the end under 'other sources of interpretation'.[127] This is particularly important in the context of the conflicts between EU law and the ECHR, since at least some potential conflicts could be mitigated *ex ante*. Further, the Guidelines recommend involving the Fundamental Rights Agency (FRA) in assessing the proposal.[128] In case of doubt, the Guidelines recommend consulting the Council Legal Service, national experts in the Member States, the Working Party on Fundamental Rights, Citizenship and Free Movement of Persons (FREMP Working Party), or any other preparatory body specialised in human rights.[129] It is curious that the Council does not refer to the FRA in the 'in case of doubt' situations, but the real issue is more that the opinions on legislative proposals, especially those from the FRA, are seldom requested by the Council and the Commission. The Parliament, discussed below, has been more proactive in engaging the FRA.

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[124] Council of the European Union, Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies (18 May 2011) Council Doc No 10140/11.
[125] Council of the European Union, Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies (16 December 2014) Council Doc No 16957/14.
[126] Ibid, 24 (annex 5).
[127] Ibid, 8.
[128] Ibid, 8-9. Note that the FRA commenced its work on 1 March 2007. Its main purpose is, in accordance with Article 2 of the Regulation establishing the Agency 'to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights'.
[129] Ibid, 10.

Finally, the Council also provided training to Council staff in order to make the guidelines more operational, stressing the importance of providing further training in order to raise awareness and enhance the protection of fundamental rights at all levels of the Council's work.[130]

4.1.4.3 The European Parliament

The European Parliament has sought to promote fundamental rights much earlier than the Commission through annual reports on different issues, debates and resolutions.[131] However, its actual role in checking the compatibility of EU legislation with fundamental rights has not been systematic – the Parliament Legal Service checks the compatibility only when the issue has been raised in the committees dealing with the proposal or when the legislation is being amended.

In 2009, the Parliament adapted its Rules of Procedure to the Treaty of Lisbon and strengthened the compatibility check with the Charter by adding another procedure: a political group of at least 40 Members can request that a proposal for a legislative act or parts of it is referred to the committee responsible for the interpretation of the Charter, i.e. the Committee on Civil Liberties, Justice and Home Affairs (LIBE), if they are of the opinion that it does not comply with rights enshrined in the Charter.[132]

In early 2012, the Parliament established the Impact Assessment (IA) unit as a part of the Directorate for Impact Assessment and European Added Value, which deals with various aspects of an *ex-ante* or *ex-post* evaluation of EU legislation and policies. The IA unit now carries out its own impact assessment,

[130] See e.g. Outcome of the Council Meeting (23 June 2015) 10228/15, at 17-18.
[131] On 10 February 1977, the Parliament issued a Declaration on Fundamental Human Rights, which was subsequently adopted by the Commission and the Council on 5 April 1977 [1977] OJ C103/1. On 12 April 1989, the Parliament proclaimed the Declaration of Fundamental Rights and Freedoms [1989] OJ C120/51, followed by several attempts to make this declaration legally binding. These attempts were, however, unsuccessful. In 1997, after the adoption of the Amsterdam Treaty, the Parliament again called for the adoption of a binding Charter of Fundamental Rights and during its drafting process the Parliament adopted several resolutions insisting on its legally binding nature.
[132] European Parliament, Rules of Procedure, 8th parliamentary term (2014-2019), rule 38, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20150909+0+DOC+PDF+V0//EN&language=EN.

primarily by checking if the Commission complied with the Better Regulation and the Toolbox. The establishment of the IA unit was an important step in supporting the Parliament's committees throughout the legislative cycle, also including ensuring that the legislative proposal or proposed amendment complies with fundamental rights. This is a welcome development, as it enhances inter-institutional dialogue and allows for the fundamental rights proofing of EU legislation and policies beyond one main institution – the Commission. Finally, the Parliament may also seek advice from the FRA when in doubt about the compatibility of a proposal or an amendment with fundamental rights. The Parliament has made use of this more than the Council and the Commission, but the power to request opinions of the FRA is generally underutilised among the institutions. In any event, the involvement of the FRA and other expert EU agencies[133] should be enhanced, given their independence and proven expertise, in order to ensure that they have a more active role in safeguarding fundamental rights in the EU's legislative process.

Overall, it can be concluded that the *ex ante* rights-based review, which is carried out at different phases of EU law-making procedure, is very important in the context of conflicts between EU law and the ECHR, as it can mitigate some of the conflicts and even prevent them. While the relevant EU institutions have taken important steps to ensure that EU legislation is in line with fundamental rights, more efforts can be made in the coming years, such as through the adoption of a more proactive policy by the relevant institutions as well as a closer involvement of the FRA and other expert agencies in the process.[134]

4.1.5 The Charter and the Case Law of the CJEU

The EU Charter did not play an important role in the jurisprudence of the Court of Justice in the first years after its proclamation. The Court continued to use general principles of law in fundamental rights cases and remained silent on the Charter, although it was invited explicitly to use it on a number of occasions, since the

[133] Such as the European Border and Coast Guard Agency (FRONTEX), the European Institute for Gender Equality (EIGE) and the European Asylum Support Office (EASO).
[134] See, with further references, M. Dawson, *The Governance of EU Fundamental Rights* (Cambridge, Cambridge University Press, 2017).

parties as well as Advocates General invoked the Charter. It is not entirely clear why the Court did not use or refer to the Charter in those early years of its existence. One could think of several explanations, but the most obvious one is that the Court was being careful since the Charter was not yet legally binding. Another more practical explanation could be that the Court simply did not need the Charter in order to give a ruling in the case or the Court was not yet sure how to go about using the Charter and waited to see how the other institutions and the Advocates General would use it. The Court may also have preferred the flexibility of using unwritten general principles, which gave the Court the possibility to deal with fundamental rights cases while also achieving other objectives along the way, such as advancing European integration. Making the Charter justiciable, either through the Treaties or judicial application, would limit, or at least change, the ways in which the Court would develop its fundamental rights jurisprudence.[135]

The first (direct) reference to the Charter was made only in 2006.[136] After this judgment, the Court continued to use the concept of general principles of law and, occasionally, specified that these rights are also 'reaffirmed' in the Charter.[137] Interestingly, the Advocates General referred to the Charter from the very beginning, but even those references were brief and sometimes also with an emphasis on the Charter's non-binding character.[138]

After the Treaty of Lisbon entered into force on 1 December 2009, and the Charter became legally binding, the Court started to apply the Charter directly.

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[135] See C. Engel, 'The European Charter of Fundamental Rights – A Changed Political Opportunity Structure and its Normative Consequences' (2001) *European Law Journal* 7, 151; J. Morijn, 'Judicial Reference to the EU Fundamental Rights Charter: First Experiences and Possible Prospects' (2004), http://www.fd.uc.pt/hrc/pdf/papers/john_morjin.pdf [last accessed 9 September 2017].
[136] Case C-540/03 *European Parliament v Council* [2006 ECLI:EU:C:2006:429, para 38.
[137] According to the data provided by Gráinne de Búrca, the Charter was referred to in 59 judgments of the Court over this nine-year period, but many of these references did not entail any serious engagement with Charter provisions. See G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168.
[138] See, for example, Opinion of AG Jacobs in C-270/99 *Z v Parliament* ECLI:EU:C:2001:180 para 40; Opinion of AG Mischo in Joined Cases C-122/99 and C-125/99 *D and Kingdom of Sweden v Council* ECLI:EU:C:2001:113 para 97; Opinion of AG Jacobs in Case C-377/98 *Netherlands v EP and Council* ECLI:EU:C:2001:329 paras 197 and 210.

The first time the Court officially confirmed the new legal status of the Charter was in the *Kücükdeveci* case from 2010, stating that 'the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties'.[139] In the same year, the Court struck down secondary EU legislation, in the *Volker and Schecke* judgment,[140] for being incompatible with the Charter. The most prominent example came two years later in the *Digital Rights Ireland Ltd* case,[141] where the Court declared the Data Retention Directive invalid because it did not lay down precise rules governing the extent of its interference with the fundamental rights enshrined in Article 7 and 8 of the Charter (respect for private and family life and protection of personal data) or provide sufficient safeguards, as required in Article 8, to ensure the effective protection of the data retained against the risk of abuse or any unlawful access and use of the information.[142]

Today, the Charter is the main 'reference point' for the EU political institutions and for the Court with regard to fundamental rights. The number of decisions in which the CJEU refers to and quotes the Charter has increased tremendously, from 27 in 2010 to 114 in 2013, whereas the general number of CJEU decisions in the same time increased only from 1,152 in 2010 to 1,587 in 2013.[143] In 2013 alone, the CJEU referred to the Charter more often than in the nine years from the Charter's proclamation in late 2000 until the end of 2009, when it became legally binding. The move from unwritten general principles to a written catalogue of rights has thus had an important effect: the fundamental rights case law of the CJEU has become more advanced and developed. Perhaps it is not surprising, but possibly it is problematic, that the ECHR is no longer mentioned frequently by the CJEU, as had been the case before the Treaty of Lisbon, and it is referred to even less in the case law of the Strasbourg Court.

[139] C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECLI:EU:C:2010:21, para 22.
[140] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* and *Hartmut Eifert v Land Hessen* [2010] ECLI:EU:C:2010:662.
[141] Joined Cases C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* and C-594/12 *Kärntner Landesregierun* [2014] ECLI:EU:C:2014:238.
[142] Joined Cases C-293/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, paras 65-71.
[143] Fundamental Rights Agency, 'The EU Charter of Fundamental Rights before national courts and non-judicial human rights bodies', Annual Report 2013.

4.1.6 The Charter and the ECHR

As discussed before, the special status of the ECHR has been recognised in EU law for a long time. The Court of Justice explicitly recognised its 'special significance' well before the European Council issued the drafting mandate for the Charter[144] and the reference to the ECHR has been included in the Treaties since the Maastricht Treaty.

The relationship between the Charter and the ECHR is mainly regulated in Article 52(3) of the Charter, comprising two complementary rules intended to ensure the consistency between the Charter and the ECHR. According to the first rule, when the Charter rights correspond to the Convention rights 'the meaning and scope of those rights shall be the same'. This would actually be the case in most disputes, since approximately 90 per cent of the Charter's justiciable rights are borrowed from the Convention or from Strasbourg jurisprudence.[145] It is important to note in this context that the ECHR rights have evolved significantly over the years and their meaning and scope has changed considerably (from the original wording) and therefore, in order to understand the meaning and scope of the ECHR rights, it is necessary to look at the Strasbourg case law.[146] Indeed, according to the Explanations to the Charter,[147] the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the ECtHR. The Charter's Official Explanations provide more clarification as to the meaning of Article 52(3) and, while they are not legally binding, they should nonetheless be given due regard by the EU and Member State courts, in accordance with Article 52(7) of the Charter.[148] The second complementary rule states that EU law is free to provide more extensive

[144] Cologne European Council 3 - 4 June 1999 Conclusions of the Presidency.
[145] J. Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) 6 *European Human Rights Law Review* 768. Note, however, that the wording of the corresponding provisions is not the same because of the Charter drafters' intention to simplify the Convention provisions and make them easier to understand, while sticking to the scope and meaning they have under the Convention.
[146] On the Convention as a 'living instrument' see G. Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in A Føllesdal, B Peters and G Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013) 106-141.
[147] Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17.
[148] For a detailed discussion on the interpretation and meaning of Article 52(3) of the Charter see Chapter 3.

protection. In any event, according to the Explanations, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

Furthermore, Article 53 of the Charter, entitled 'Levels of Protection', provides that 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law, international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions. The aim of these types of provisions, found in many human rights instruments, is to ensure that the rights and freedoms protected by the instrument are applied as minimum standards and not seen as a ceiling of protection. However, the CJEU has interpreted Article 53 of the Charter to determine the minimum but sometimes also the maximum level of protection in the EU. This point is discussed further below.

4.1.7 The Charter and National Constitutional Rights

The EU Charter of Fundamental Rights complements national systems of fundamental rights protection but it does not replace them. It comes into play only when Member States are acting within the scope of EU law, as stipulated in Article 51 of the Charter. However, having in mind that the Charter's catalogue of rights is extensive and that, as demonstrated earlier, it may have a wide scope of application in the Member States as a result of its interpretation by the CJEU, means that interactions between the Charter and national constitutional rights are likely to undergo a significant development in the years to come.

Article 52(4) of the Charter provides that, where the Charter recognises fundamental rights 'as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'. By referring to the constitutional traditions common to the Member States, the Charter does not seek to define the lowest common denominator of the Member States' constitutions but rather a higher standard of protection that

is adapted to the nature of EU law and is in harmony with the national constitutional traditions.[149]

Furthermore, Article 53 of the Charter, cited above, provides that nothing within the Charter is to be interpreted as restricting protections already recognised by, inter alia, Member States' constitutions. The text is reminiscent of Article 53 ECHR,[150] but it has been interpreted differently by the CJEU. The CJEU considered that Article 53 fails to address the practical reality of the EU's unique supranational order and the primacy doctrine, which are its essential features[151] and that, by using the language of minimum and maximum protection, it does not address the potential conflicts between rights when different value systems and institutions are at stake. This issue became obvious in the *Melloni* case,[152] following the Spanish Constitutional Court's request to the CJEU for a preliminary ruling. The case concerned the issue of divergent levels of protection of fundamental rights at the national and European levels in relation to the execution of the European Arrest Warrant (EAW).

The Spanish Constitutional Court asked the CJEU whether the EAW Framework Decision[153] must indeed be interpreted in a way which is more restrictive in relation to the defendants' rights than is the case under Spanish law and, if so, whether the relevant provision of the Framework Decision was invalid for a breach of the right to a fair trial contained in the EU Charter of Fundamental rights? If the answer to the latter question would be negative, the Spanish Constitutional Court further asked whether it could apply its own constitutional rights and leave the Framework Decision unapplied, on the basis of Article 53 of

[149] K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 3.
[150] 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'.
[151] See Opinion 1/91 *Draft Agreement relating to the creation of the European Economic Area* ECLI:EU:C:1991:490, para 21 and *Opinion 1/09 Creation of a unified patent litigation system* ECLI:EU:C:2011:123, para 65.
[152] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* **[**2013] ECLI:EU:C:2013:107.
[153] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

the Charter. In other words, the Spanish Constitutional Court raised one of the most difficult questions for the multilevel system of rights protection in Europe: to what extent does EU law require a lower level of constitutional rights protection?[154] The CJEU essentially ruled that, whenever the EU harmonises legislation in a certain area in an exhaustive way, the Member States are no longer allowed to require a higher standard of procedural safeguards, not even on the basis of their national constitutions. In those cases, the EU decides on the level of fundamental rights' protection which it considers to be adequate as it strikes a balance between those rights, on the one hand, and the effectiveness of EU law, on the other.

According to the Court, national authorities and courts are free to apply higher national standards of protection of fundamental rights, a possibility envisaged by Article 53 of the Charter, 'provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'.[155]

The significance of the *Melloni* judgment should not be underestimated. *Melloni* can be seen as a step taken by the CJEU towards the centralisation of standards of fundamental rights protection in the EU, at least in areas where Member States' authorities are implementing EU acts. When such centralisation leads to a diminished protection, which national courts are allowed to offer, constitutional conflicts are likely to (re-)emerge.[156] This case will be discussed in detail in Chapter 5.

4.2 Accession of the EU to the ECHR

The Treaty of Lisbon not only gives the EU a binding Charter of Fundamental Rights, but it also obliges the EU to accede to the ECHR.

[154] A. Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue' (2014) 10 *European Constitutional Law Review* 2.
[155] Case C-399/11 *Melloni* ECLI:EU:C:2013:107, para 60.
[156] D. Leczykiewicz, 'Melloni and the future of constitutional conflict in the EU' 22 May 2013, http://ukconstitutionallaw.org [last accessed 30 April 2015].

Accession was long awaited. Officially proposed by the European Commission and Parliament in 1979,[157] accession was consistently opposed by a number of Member States for many years, as there was a lack of political will in those countries to submit themselves to supplementary obligations under the ECHR with regard to EU law. Following the CJEU's Opinion 2/94,[158] in which the Court held that EU accession requires a treaty revision, as it would result in a substantial change to its system for the protection of human rights, the idea was put on hold until it re-emerged at the time of the drafting of the Constitutional Treaty. This time around, the Member States expressed sufficient political will to achieve accession to the ECHR[159] and a provision giving the Union the competence to accede was included in the Constitutional Treaty and, later on, in the Treaty of Lisbon. Article 6(2) TEU provides that the Union 'shall accede' to the ECHR.

There were many perceived advantages to the potential of EU accession to the ECHR. First of all, accession would ensure that the actions of the EU institutions, including the decisions of the CJEU, would become subject to an independent external judicial control mechanism. Conversely, accession would enable the EU to participate in the proceedings before the ECtHR and represent itself in cases concerning EU law. This would end the present anomaly according to which all EU Member States are bound by the guarantees and control mechanisms of the ECHR, while the EU institutions are not subject to, but moreover they are exempt from, any kind of external control over human rights compliance. Furthermore, accession would facilitate a harmonious development of European fundamental rights and would enhance consistency in the case law of the Strasbourg and Luxembourg Courts, as there would be a formal hierarchy between the two systems. Politically, accession would send out important positive signals in several directions. It would be proof of a mature organisation that is willing to submit itself to external review and to close the gap between the focus on human rights in external relations and the alleged lack of a robust system of

[157] Commission Memorandum, Bulletin of the European Communities: Accession of the Communities to the European Convention on Human Rights, Supplement 2/79, COM (79).
[158] Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECLI:EU:C:1996:140.
[159] Presumably because the states had accepted the EU's commitment to human rights and then decided to fully realise that commitment both internally (giving the Charter a biding status) and externally (requiring accession to the ECHR).

fundamental rights protection internally.[160] Finally, it could be part of Europe's 'search for a soul' and an expression of the values the EU is built on.[161]

Accession became crucial as more and more powers are transferred from the Member State level to the EU level in areas which are sensitive in terms of fundamental rights, such as in the area of freedom, security and justice.[162] After accession, European citizens would be able to bring complaints against the EU and/or its Member States before the ECtHR for alleged violations of the ECHR through acts and omissions in the context of EU law.

Before negotiations could start, some adjustments to the ECHR system were also necessary in order to have the EU, which is a non-state entity with a specific and complex legal system, accede to the Convention (membership was only open to states). Article 59(2) introduced by Protocol 14 to the Convention now explicitly provides the possibility for the EU to become a contracting party to the ECHR. Although no time limit is set, the European Council envisaged a rapid accession process in the Stockholm Programme.[163]

On 26 May 2010, the Committee of Ministers of the Council of Europe gave an ad-hoc mandate to its Steering Committee for Human Rights (hereinafter CDDH) to develop, in co-operation with the European Commission, the necessary legal instruments for the accession.[164] The CDDH entrusted the informal working group CDDH-UE with this task. It was composed of 14 experts from the Council of Europe Member States (seven from EU Member States and seven from non-EU

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[160] This argument was put forward by *Bundesverfassungsgericht* in several of its judgments relating to European integration. See also e.g. Human Rights Watch World Report 2014, http://www.hrw.org/sites/default/files/wr2014_web_0.pdf [last accessed 17 May 2015].

[161] Laeken Declaration on the Future of the European Union, 15 December 2001. On Europe's values, see A. Williams*, EU Human Rights Policies: A Study In Irony* (Oxford: Oxford University Press, 2004) and 'Fundamental Rights in the New European Union', in C. Barnard (ed) *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford: Oxford University Press, 2007), 71.

[162] For the discussion on the problems that accession will create for the implementation of EU legislation adopted within the framework of the former third pillar see C. Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) *Human Rights Law Review* 287.

[163] The Stockholm Programme – An open and secure Europe serving and protecting the citizens (2 December 2009) 17024/09. The Commission followed suit in the Action Plan Implementing the Stockholm Programme, COM (2010) 171.

[164] CDDH(2010)008 (Strasbourg, 3 June 2010).

Member States). As for the EU, its Justice Ministers gave the Commission the mandate to conduct the negotiations on their behalf.[165] Official talks on the EU's accession to the ECHR finally started on 7 July 2010. The CJEU also had its role in the negotiations, first as a part of the Council working group in charge of establishing the negotiation mandate and later during the accession negotiations as an observer.[166]

On 14 October 2011, the CDDH transmitted a report to the Committee of Ministers on the work done by the CDDH-UE and the draft legal instrument in appendix.[167] Given the political implications and some of the issues that were raised, on 13 June 2012, the Committee of Ministers instructed the CDDH to pursue negotiations with the EU within the ad hoc group '47+1' and to finalise the legal instrument dealing with the accession modalities. The Draft Accession Agreement (DAA) was finalised in June 2013.[168]

The conditions for the adoption of an accession agreement are set out in Article 218 TEU. It requires unanimity in the Council and the consent of the European Parliament as well as ratification by all the EU Member States in accordance with their national constitutional requirements. It would, moreover, require the approval of all the 47 signatories to the Convention (Article 50 ECHR).

Soon after the DAA was finalised, the CJEU was asked, on the basis of Article 218 (11) TFEU, to give its opinion on its compatibility with the EU Treaties. To the surprise (and disappointment) of many, the CJEU held in Opinion 2/13 that the DAA is incompatible with the EU Treaties, because it undermines the specific

[165] 10630/1/10 REV 1, press release of the 3018th Council meeting Justice and Home Affairs, Luxembourg, 3-4 June 2010, http://europa.eu/rapid/press-release_PRES-10-161_en.htm?locale=en [last accessed 29 January 2015.

[166] See Council Document 17807/09, JAI 948, INST 255 (Brussels, 5 January 2010) and Council Document 13714/10, JAI 747, INST 333 (Brussels, 17 September 2010).

[167] CDDH(2011)009 (14 October 2011).

[168] It consists of a draft agreement on the accession of the EU to the ECHR and a draft explanatory report, a draft declaration by the EU, a draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU would be a party, and a draft model of a memorandum of understanding, http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf [last accessed 30 January 2015].

characteristics and the autonomy of EU law.[169] This Opinion, while highly controversial, blocks accession for the time being.

The progress of accession has been anything but smooth. We have not yet reached the end of the road to accession and we will probably encounter few more obstacles before we do. Even though temporarily blocked by the CJEU, accession remains important and necessary. The discussion on accession will be taken up again in Chapter 3.

4.3 General Principles of EU Law

Article 6(3) of the TEU provides that 'fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. This provision, as well as its earlier versions, reflects the case law of the CJEU in which the Court declared that respect for fundamental rights constitutes an integral part of the general principles of EU law. One may wonder about the purpose of this provision, now that the Charter is legally binding and the EU is required to accede to the ECHR. Perhaps it was simply to show that the Lisbon Treaty dooes not break from the past but it is possibly also a way to allow the Court of Justice, if necessary, to integrate new rights into the EU system, rights which are not mentioned in the Charter or the ECHR but which may emerge over time[170] or, importantly, to protect Charter rights whose impact is limited due to the existence of protocols such as those of the UK and Poland. Lastly, the general principles could also be used to protect rights that already exist but are limited by vertical application.[171]

The situation of rights that already exist but are limited by vertical application is well illustrated in *Kücükdeveci*,[172] decided on 19 January 2010. The

[169] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:48.
[170] G. Arestis, 'Fundamental Rights in the EU: Three years after Lisbon, the Luxembourg Perspective' (2013) Cooperative Research Paper 02/2013, College of Europe.
[171] Protocol No 30 TEU on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. See also S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 4, 645.
[172] C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-365.

case concerned a claim of age discrimination based on German employment law that did not take periods of work served prior to the employee's 25th birthday into account when calculating the notice period prior to dismissal. The German law was incompatible with the requirements of Directive 78/2000, the transposition period for which had passed prior to the applicant's dismissal. However, as the respondent in the case was a private party, the general prohibition on allowing untransposed Directives to be relied upon against a private party would ordinarily have hindered Ms Kücükdeveci's case. Yet, the Court held that non-discrimination on grounds of age must be regarded as a general principle of EU law, which was given specific expression in the relevant Directive and, as such, could result in having horizontal direct effect.[173] The Court also referred to the Charter, which is puzzling. The Charter indeed prohibits any discrimination on the grounds of age, but its scope is limited to EU institutions' and Member States' actions, as discussed earlier, and the reference to the Charter did not help support the horizontal application argument. This must be regarded as yet another example of the CJEU – rightly or wrongly – expanding the scope of EU law. In this case, a directive giving expression to a general principle of EU law appears to be binding not only on the Member States but also on individuals and, due to the primacy doctrine, national courts must not apply the national provision contrary to the general principle as expressed in the directive. Accordingly, the provisions of directives expressing general principles of EU law may have full direct effect, even in horizontal situations. Similarly, in *Prigge*,[174] the CJEU referred to the Charter only at the advanced stage of analysis to confirm the prior existence of the corresponding general principle of EU law. There are other examples which could be mentioned in this context,[175] however there is no discernable pattern in the CJEU's case law with regard to the use of general principles in its reasoning, particularly in the first few years of the Charter becoming legally binding.[176] Interestingly, Article 6 TEU is silent on the relationship between the general

[173] Ibid para 50. See also an earlier case concerning non-discrimination on grounds of age C-144/04 *Mangold v Helm* [2005] ECLI:EU:C:2005:709.
[174] Case C-447/09 *Prigge and Others v Deutsche Lufthansa* [2011] ECLI:EU:C:2011:573.
[175] See e.g. C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECLI:EU:C:2010:674; C-648/10 *ASNEF* [2011] ECLI:EU:C:2011:777.
[176] In more recent years, the Charter has acquired the central place in the Court's case law. On this point see further Section 3.2., Chapter 3.

principles of EU law (and thus indirectly the ECHR and common constitutional traditions) and the Charter, and this silence seems to presume that they will normally coincide or, at least, they will not conflict.[177] It can be concluded that this source will continue to be relevant with respect to the Member States' fundamental rights obligations in parallel with those contained in the Charter and the ECHR, because of the margin the CJEU has in reshaping these principles and their application in contrast to the margin of discretion the CJEU has with regard to written catalogues of rights.[178] Given this state of affairs, one may also wonder whether the system would be any different without the general principles, given the extensive list of rights in the Charter and their broad and comprehensive scope of application.

5 Is the EU a Human Rights Organisation?

As demonstrated above, the EU has undergone a remarkable evolution since its creation, in particular with regard to human rights. The latest catalyst for change was the Lisbon Treaty which established a binding Charter of Fundamental Rights for the EU and obliges the EU to accede to the ECHR.

Weiler and Alston argued in 2000 that the EU should take international leadership in human rights by providing an outstanding example of a comprehensive, coherent and forward-looking human rights policy.[179] The authors stressed the importance of bridging the gap between the EU's voiced commitment to human rights and its actions. In that context, they proposed major organisational and procedural changes arguing for a move away from negative to positive integration in the field of human rights and the need for a clear

[177] M. Claes, 'Fundamental Rights' in F. Amtenbrink et al, *The Law of the European Union* (Alphen a/d Rijn: Kluwer Law International, 2018, forthcoming).
[178] See e.g. T. Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 *Cambridge Yearbook of European Legal Studies* 361-392.
[179] P. Alston and J.H.H. Weiler, 'An Ever Closer Union in Need of a Human Rights Policy, The European Union and Human Rights', in P. Alston (ed), The EU and Human Rights (Oxford: Oxford University Press, 1999), also published as 'An Ever Closer Union in Need of a Human Rights Policy' (1988) 9 *European Journal of International Law* 658.

commitment to human rights as well as effective political and organisational structures to give effect to those commitments.

This idea was challenged by several authors who were very sceptical about the EU assuming such a role in the future. One of the key responses came from Armin von Bogdandy.[180] He argued that an EU human rights policy is not desirable as it would have strong centralizing effects and would impact on the existing relationship between the EU and the Member States, overshadowing national constitutions and affecting the independence of the national legal orders. Furthermore, it was doubtful whether the EU (at the time) 'wield[ed] enough political and moral clout' to develop and implement such policies.[181] Von Bogdandy also questioned whether a fully-fledged fundamental rights policy would be beneficial to the EU, the Member States and for fundamental rights themselves. The same query relates to the role of the CJEU, which may not have the necessary legitimacy but also the abilities to assume the role of a human rights court, given its situational logic embedded in the broader EU system and the manner in which it functions and communicates. In the same vein, the specific question whether the EU is a human rights organisation has been met with doubts leading some scholars to conclude that the EU is not a human rights organisation.[182]

However, the claim that the EU has become a human rights organisation holds more ground today than it did just a few years ago. It is not a human rights organisation *stricto sensu* where the promotion and protection of human rights is its only mandate,[183] but there is no denying that human rights are at the core of the EU's internal and external policies today. It has become clear that the binding force of the Charter and the strengthened mandate of the EU institutions to engage in fundamental rights protection have significantly shaped, and in a way

[180] A. Von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) *Common Market Law Review* 37, 1307. See also A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: Oxford University Press, 2004).
[181] Ibid, 1317.
[182] See, for example, A. Rosas, 'Is the EU a Human Rights Organisation?' Cleer Working Papers 2011/1. For a debate on this and releted questions see C. Leconte and E. Muir, 'Understanding Resistance to EU Fundamental Rights Policy' (2014) 15 *Human Rights Review* 1.
[183] Ibid.

transformed, the EU. To take one example, one of the European Commission's ten priorities today is 'justice and fundamental rights' – something we could not have seen ten or fifteen years ago. Recently, the President of the European Commission Juncker stated:

> Our values are our compass. For me, Europe is more than just a single market. More than money, more than a currency, more than the euro. It was always about values.[184]

Another example is the recently proposed ratification of the Istanbul Convention by the Commission, which is a Council of Europe instrument on preventing and combating violence against women and domestic violence.[185] The EU signed the Convention on 13 June 2017 and the Council reiterated its intent to proceed with the ratification in its conclusions on the application of the Charter of Fundamental Rights of the European Union adopted on 13 October 2017. The Istanbul Convention, which is the first binding and comprehensive international instrument in Europe that addresses violence against women, will allow the EU and its Member States to develop and strengthen the prevention, prosecution and elimination of violence against women and girls and domestic violence. Moreover, the EU is already a party to the UN Convention on the Rights of Persons with Disabilities (UNCRPD)[186] and shall accede to the ECHR. These are all signs of the EU actively pursuing EU fundamental rights policy notwithstanding the lack of general fundamental rights competence in the Treaties. Further, the EU acquired a more explicit competence to develop policies to protect certain fundamental rights such as data protection, equal treatment and the rights of migrants and suspected persons in criminal proceedings.[187] At the same time, the EU institutions have

[184] President Jean-Claude Juncker's State of the Union Address 2017.
[185] For more details see Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.V.2011.
[186] Council Decision of 20 March 2007, CS/2007/7404.
[187] For example, Article 16 of TFEU, introduced by the Lisbon Treaty, is the new legal basis for the adoption of comprehensive data protection rules. It provides that 'everyone has the right to the protection of personal data concerning them' and, taken together with Article 8 (1) of the EU Charter, it guarantees the fundamental right to the protection of personal data applying to all Union policies. Another example is European asylum and refugee policy. Article 78 TFEU provides that 'the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third country national requiring international protection and ensuring compliance with the

called for an active and consistent pursuit of human rights policies in all areas of EU law.[188] As for its external policies, Article 21 TEU states that 'the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms [...]'. This provision calls for a convergence towards a more enhanced fundamental rights protection in all EU external actions, be they trade, investment, development, CSFP and CSDP, or migration. Finally, establishing the FRA, which commenced its work on 1 March 2007, was another step in the expansion of an EU policy on fundamental rights. Although the FRA's mandate is relatively limited and arguments have been made for the extension of its powers, its unique contribution to promoting and protecting fundamental rights has been generally considered highly valuable both nationally and at the EU level.[189] Moreover, the FRA (like other EU institutions) has also engaged in mandate stretching and has conducted tasks that are not explicitly mentioned in its founding Regulation.[190] Nevertheless, a greater involvement of the FRA in the EU legislative process is needed in order to realise its full potential in EU fundamental rights governance.[191]

It is true that the EU does not have a fully-fledged competence to regulate fundamental rights and the fields in which it does have such competence are fairly limited. It is also true that the Charter does not explicitly demand an EU human rights policy, while it emphasises that it cannot extend the existing competences.

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principle of non refoulement', which must be in compliance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties. This, taken together with Article 18 of the Charter (the right to asylum), is at least partly a human rights policy.

[188] E.g. in various documents issued by the European Parliament. See most recently European Parliament, Draft Report on the Annual Report on Human Rights and Democracy in the World 2016 and the European Union's policy on the matter (2017/2122) (INI), http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-608.041&format=PDF&language=EN&secondRef=01.

[189] See the First and the Second Independent External Evaluation of the EU Agency for Fundamental Rights (November 2012 and October 2017), available at: http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf and http://fra.europa.eu/sites/default/files/2nd-fra-external-evaluation-october-2017_en.pdf.

[190] Council Regulation 168/2007/EC establishing a European Union Agency for Fundamental Rights. For a discussion see M. Dawson, *The Governance of EU Fundamental Rights* (Cambridge: Cambridge University Press, 2017) 126-133.

[191] Ibid.

Nevertheless, the binding force of the Charter has given the EU a new 'soul' and the Charter has become the fundamental rights yardstick for monitoring actions of both the EU and the Member States when implementing EU law in all EU policies. In that sense, it could be argued that the EU has a general obligation to pursue fundamental rights actively and to develop fundamental rights policies when exercising its competences, thus also in the areas where the EU does not have an explicit fundamental rights competence.

The case law of the CJEU also shows the increasingly important role and place of fundamental rights in EU law. The Court has been willing to engage more with fundamental rights arguments, including also arguments against the EU institutions. It has been tightening its scrutiny of the EU legal acts on the basis of their compliance with fundamental rights and bolstering its fundamental rights jurisprudence, albeit in an inconsistent way. It has done so by focusing on the Charter and making its assessments independent from national constitutions and the ECHR. This was also the message conveyed in Opinion 2/13 on the EU's accession to the ECHR – the EU already has a system for human rights protection and a Court that will enforce it. In that sense, the EU sees itself as a human rights organisation, putting fundamental rights at the core of its values and its actions. It would be unsatisfactory to conclude otherwise as it would be an answer that does not reflect the new reality. Nevertheless, classifying the EU as a human rights actor is also paradoxical. The EU is not *only* a human rights organisation; it is an international organisation with extensive policies which also (increasingly) include fundamental rights. But fundamental rights remain one of the elements of the EU legal order, which means that they have to be balanced with other policies. This makes the EU different from other (more natural) human rights actors, such as the ECHR and the national constitutional systems and it illuminates why and how it is different, which, in turn, makes the EU fundamental rights landscape ever more complex.

A different question to be posed is *should* the EU be a human rights actor? This chapter does not aim to provide an answer to this more normative part of the question, as it is a very complex question which is beyond the scope of this discussion. However, a few comments are in order. The first component of this

question and a possible answer concerns negative obligations towards fundamental rights: should the EU comply with fundamental rights in its actions? The answer in this case is obviously affirmative: fundamental rights should guide the exercise of the EU's powers and there is little discussion in this context. The second component, however, is more difficult and concerns the question whether the EU should also actively pursue human rights policies. As stated earlier, there is no general human rights competence in the Treaties and the EU was not intended to assume this role. In fact, there are some good reasons to be sceptical about the desirability of such a role for the Union and development in this direction remains contested.[192] However, as argued above, the EU has already been moving in that direction. The third component concerns the question whether the EU should actively interfere with EU Member States' human rights issues, firstly, when they act in the scope of EU law and, secondly, when the actions are outside of the scope of application of EU law. While the answer to the first part of the question may be more obvious, since Article 51(1) of the EU Charter refers to situations in which the Member States 'are implementing Union law', the second part of the question is an extremely sensitive issue. The more technical answer would be that the EU should not interfere, because this would be outside of the competences that have been transferred to it. However, it is also arguable, particularly in line with some of the arguments made in this chapter, that the EU should intervene even when the actions of the Member States fall outside of the scope of application of EU law, because the EU constitutes a community of values which Member States should uphold, even when they are acting in an area outside of EU law.

6 Conclusion

EU fundamental rights have undergone a remarkable evolution. The EU was originally created as an international organisation with an economic scope of

[192] For a discussion on the scepticism of EU human rights see M. Dawson, *The Governance of EU Fundamental Rights* (Cambridge: Cambridge University Press, 2017). See also the special issue of C. Leconte and E. Muir, 'Understanding Resistance to EU Fundamental Rights Policy' (2014) 15 *Human Rights Review* 1.

action and, accordingly, the EEC Treaty did not contain – with very few exceptions – provisions concerning respect for fundamental rights. The lack of explicit fundamental rights provisions did not mean, however, the absence of legal protection. As early as 1969, the Court of Justice held that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For the next three decades, the Court developed and shaped EU fundamental rights, drawn from the general principles of EU law and from the common constitutional traditions of the Member States. The absence of a written catalogue of fundamental rights, which would be easily accessible to European citizens, remained an issue of concern however. Two main proposals were made on repeated occasions with the aim of filling this gap.

The first proposal was for the EU to accede to the ECHR, an already existing European instrument aimed at protecting human rights to which, moreover, all Member States are subscribed. Such a change, however, was held by the CJEU to constitute a fundamental constitutional change, which could not be implemented without a Treaty amendment. The second proposal was that the Union should adopt its own Bill of Rights, granting the Court of Justice the power to ensure its correct implementation. After years of vigorous debates, the EU Member States have decided to include both in the Treaty of Lisbon: a legally binding Charter of Fundamental Rights and a competence (and legal obligation) for the EU to accede to the ECHR. While the former is in full operation ever since, accession to the ECHR has been postponed and it may take a long time before it can be realised.

The EU was not created to be a human rights organisation and yet, today, it has become one. However, it is much more than this human rights dimension which has rendered its original economic nature more complex and makes every-day business more challenging. The result is that now we have two big human rights organisations in Europe (to the extent that one considers the EU to be a human rights organisation) that reinforce each other but that also sometimes compete with each other[193] and with the national human rights actors. This raises

[193] See, for instance, the signs of rivalry between the two European Courts expressed in the interview with

the stakes for the Union as well the expectations resulting from the new responsibilities. It also raises difficult questions as to the interpretation of fundamental rights according to the different layers, the already complicated relationship between the EU and the ECHR systems and, ultimately, the impact on national law and national courts. These questions are addressed in the remainder of this book.

David Thór Björgvinsson, a former judge of the European Court of Human Rights, in G. Butler, 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights (2015) 31 *Utrecht Journal of International and European Law* 81, 104.

Chapter 2: A European Web of Human Rights Regimes: the EU, the ECHR and the National Legal Systems

1 Introduction

The European web of regimes could be described as an area in which national law, EU law and the ECHR co-exist, drawing on and incorporating each other, together with other treaties and treaty mechanisms. These national, international and supranational regimes make up the legal and institutional context within which actors belonging to different regimes function. The Lisbon Treaty changed the web and the relationships within it, at least formally. The binding status of the EU Charter and the growing fundamental rights case law, as well as the requirement for the EU to accede to the ECHR, followed by the controversial Opinion 2/13,[1] have all had an impact on the relationships in the web. The debate is still ongoing and expanding its ground. The end is not yet in sight and there are several possible outcomes.

This chapter explains how these different regimes relate to each other, whereby it first focuses on the relationships between the EU and the ECHR systems and the two highest Courts within those systems. It does this first from the perspective of Strasbourg (section 2) and then from the perspective of Luxembourg (section 3). The analysis in these two sections will demonstrate that the two European courts have been engaging in various types of dialogue, most notably by citing each other's case law. The case law of the CJEU provides many examples of the guiding role of the ECHR in EU law, revealing a general tendency, on the part of the CJEU, to avoid conflicts in the form of divergent interpretations and the application of ECHR rights. This interplay is also reflected in the

[1] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:48. Opinion 2/13 has been widely criticised in the literature, because it seems almost impossible to remedy the objections made by the CJEU and have the other ECHR parties agree to them. See e.g. B. De Witte and Š. Imamović**,** 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 *European Law Review* 5, 683.

Strasbourg system where the rulings of the ECtHR show the influence of EU law and the CJEU's case law, as well as the willingness of the Strasbourg Court to go to great lengths to avoid conflicts with EU law. However, the risk for divergences continues to exist, because of the lack of a formal mechanism between the Strasbourg and Luxembourg Courts ensuring a coherent and complementary protection of fundamental rights in Europe. The solution was sought in the Charter finally attaining binding force and, more importantly, in the EU's accession to the ECHR.[2] The former has proven not to be sufficient to mitigate all potential conflicts, especially because of the way some of its provisions have been interpreted in the case law of the CJEU, and the latter may not be achieved for a very long time, which leaves the underlying problem unresolved.

Section 4 examines the status of EU law and the ECHR in the national legal systems and the role of national courts vis-à-vis the two European Courts. This section paints a broad picture using selected examples from different Member States in order to illustrate important similarities and differences. Each time, the perspectives are changed in order to provide a deeper understanding of the relationships between the different instruments and actors in the web.

2 The View from Strasbourg

2.1 The General Picture

At the time of writing, the EU is not party to the ECHR and hence not directly bound by it on the international plane.[3] Complaints cannot be brought against the EU acting as a defendant in Strasbourg, and the EU itself cannot be held responsible.

[2] J.R. Wetzel, 'Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts' (2003) 71 *Fordham Law Review* 2823.
[3] For the discussion on whether or not the EU is bound by the ECHR as matter of EU law, see section 2 above.

However, as early as 1958, the now defunct European Commission of Human Rights,[4] in *X & X v. Germany*,[5] concluded that a contracting party of the ECHR could be held responsible for not complying with its ECHR obligations, even if non-compliance would be a result of the states' international obligations. Yet, in *M & Co v. Germany*,[6] decided in 1990 (in which the applicant was claiming a breach of the right to a fair trial under Article 6 of the ECHR in the course of the execution of a CJEU judgment in a competition case) the European Commission of Human Rights held that a transfer of powers to an international organisation by a Member State would not be incompatible with that state's obligations under the ECHR, providing that, within the international organisation, fundamental rights would receive 'equivalent protection'. The European Commission went on to determine that the EC legal system did provide equivalent protection notwithstanding the absence of a catalogue of rights and dismissed the application as incompatible with the Convention *ratione materiae*.

The *M & Co* judgment proved influential at the time, as it seemed to acknowledge the existence of a separate body of EU human rights law, which provides an equivalent level of protection to that provided for in the ECHR system. The approach adopted by the European Commission of Human Rights was often compared to that of the German *Bundesverfassungsgericht* in *Solange II*,[7] decided in 1983. In that decision, the German Constitutional Court regarded the level of human rights protection in the EU as substantially comparable to the level of protection required by the German Basic Law and held that it would therefore no longer exercise its jurisdiction to decide on the compatibility of EU law with German fundamental rights, *as long as* the EU preserves that level of protection. In contrast to *Solange II*, the European Commission of Human Rights did not

[4] Originally, two organs supervised the application of the ECHR: the European Commission of Human Rights and the European Court of Human Rights. On 1 November 1998 Protocol No 11 replaced the original two-tier structure comprising the Commission and the Court by a single full-time Court. This change put an end to the Commission's filtering function, enabling applicants to bring their cases directly before the Court.
[5] *X v Germany* App no 342/57 (EComHR, 4 September 1958) unreported.
[6] *M & Co. v Germany* App no 13258/87 (ECtHR, 9 February 1990).
[7] *Solange II decision*, 22 October 1986, BVerfGE 73, 339 2 BvR 197/83.

explicitly reserve the right to review measures, should the standard of human rights protection in the EU drop.[8]

In the following years, several cases against the EU (or, put differently, against all the Member States, individually and jointly) or involving EU law had been brought to Strasbourg, but they were generally declared inadmissible on the ground that the EU was not a party to the Convention.[9] However, there were also exceptions. In *Cantoni*,[10] for instance, the ECtHR stated that the fact that the challenged provision of the French legislation originated in EU law (transposition of Directive 65/65/EC), and was based almost 'word for word' on EU law, did not eliminate the responsibility of France under Article 7 ECHR.[11]

Since the 1990s, the dynamics of the relationship between the ECHR and the EU underwent a dramatic acceleration, as the ECtHR became increasingly confronted with cases brought against EU Member States, involving alleged violations of the Convention committed in the application of EU law. In those cases, the question thus was whether the ECtHR would have jurisdiction, despite the fact that the Member State was acting under an EU law obligation. If the Court would indeed assume jurisdiction, while the Member State was merely acting in line with an EU law obligation, it would indirectly review whether EU law violated the Convention without any direct involvement of the actual defendant i.e. the EU.

However, the EU could be involved indirectly in those procedures. The third-party intervention possibility under Article 36 of the Convention and Rule 44 of the Rules of the ECtHR permits 'any person concerned' (which might include a state, an individual or an organisation) to intervene if it is considered to be 'in the interest of proper administration of justice'. The European Commission could thus intervene on behalf of the EU. Indeed, the Commission has done so in the well-

[8] Ibid. See also T. Lock, *The European Court of Justice and International Courts* (Oxford: Oxford University Press, 2015) 191.
[9] See e.g. *CFDT v European Communities*, App no 8030/77 (EComHR, 10 July 1978). See also H. Schermers, 'Case Note: Matthews' (1999) 36 *Common Market Law Review* 674.
[10] *Cantoni v France*, App no 17862/91 (ECtHR, 11 November 1996); see also *Procola v Luxemburg*, App no 14570/89 (ECtHR, 28 September 1995).
[11] *Cantoni v France* (ECtHR, 11 November 1996) para 30.

known *Bosphorus*[12] case and most recently in *Avotiņš*,[13] both of which concern the relationship between the ECHR and EU law (discussed further below). The policy of the Commission's involvement in the ECtHR cases is to try to influence the decision in Strasbourg, in accordance with EU interests. In *Bosphorus*, the Commission argued that the case should be regarded as a challenge to the EC Regulation rather than the Irish action, since the Irish authorities had no discretion in the application of the relevant decisions.[14] The Commission's strategy was probably to have the case declared inadmissible in Strasbourg, as in some of the previous cases in which the Member State had no discretion. The Strasbourg Court shared the Commission's view, but only to an extent, given the outcome of the case. Interestingly, the EU Commission's request to intervene in *Avotiņš* was submitted on the same day – 18 December 2014 – as the CJEU delivered its negative Opinion 2/13 on the EU's accession to the ECHR.

There have been quite a few cases thus far in which the Strasbourg Court indirectly reviewed EU law and to smoe extent the case law of the CJEU. For the sake of clarity, I discuss each of the decisions and my critique in turn, before returning to the broader discussion.

2.2 Member States' Responsibility under the ECHR for Acts of EU law

2.2.1. *Matthews:* Responsibility for Primary Law

The case of *Matthews v United Kingdom*[15] was the first case in which the ECtHR ruled that an EU Member State was in breach of the Convention for complying with its EU law obligations. Ms Matthews, a British citizen resident in Gibraltar,[16] applied to be registered as a voter in the elections for the European Parliament

[12] *Bosphorus Hava Yollari Turizm v Ireland*, App no 45036/98 (ECtHR, 30 June 2005).
[13] *Avotiņš v Latvia*, App no 17502/07 (ECtHR, 23 May 2016).
[14] Commission of the European Communities: Written Observations in *Bosphorus Airways v Ireland*, 30 June 2004, JURM (2004) 6026.
[15] *Matthews v United Kingdom*, App no 24833/94 (ECtHR, 18 February1999).
[16] Gibraltar is a Crown Colony of the United Kingdom. It is largely self-governing, but it is part of the EU's territory since the UK is responsible for its external relations within the meaning of Article 227 (4) of the EC Treaty. Accordingly, EU legislation forms part of the legislation of Gibraltar, thus directly affecting the applicant.

but was informed that, under the terms of the European Community Act on Direct Elections from 1976, Gibraltar was not included in the franchise for the European Parliament elections. The question before the Strasbourg Court was whether the UK was liable for violating Article 3 Protocol 1 ECHR (the right to free elections) by failing to hold elections for the European Parliament in Gibraltar.

The ECtHR held that the failure to provide for elections did violate Article 3 of Protocol 1, since the very essence of Matthews's right to vote to choose the legislature had been denied. The Court pointed out that Contracting States can transfer their powers to an international organisation, but they remain responsible for ensuring that Convention rights are guaranteed. The Court further stated that the respondent, the UK, could not claim that there was a lack of control over the situation, as it had voluntarily agreed to be bound by the EC Treaty and the 1976 Act on Direct Elections which had been concluded as a treaty between the Member States of the EU. Importantly, the ECtHR noted that, since the 1976 Act is primary EU law, it cannot be challenged before the CJEU.[17] Consequently, there is a gap in judicial protection in the EU legal system and the ECtHR decided to intervene, because otherwise the applicant would perhaps have been left without a remedy. Ensuring that Convention rights are respected in relation to EU primary law lies thus solely with the Member States (and the Strasbourg Court), which, in turn, makes the argument for EU accession to the ECHR even stronger.

2.2.2. *Bosphorus*: Responsibility for Secondary Law

The *Bosphorus*[18] case reaffirmed the standpoint that the ECtHR adopted in *Matthews*, but with a twist. In this case, the Irish authorities seized an aircraft owned by a Yugoslav airline company, but which was leased to Bosphorus, an airline charter company registered in Turkey. Ireland took this action in order to

[17] *Matthews v United Kingdom*, App no 24833/94 (ECtHR, 18 February1999), para 33.
[18] *Bosphorus Hava Yollari Turizm v Ireland*, App no 45036/98 (ECtHR, 30 June 2005). For an analysis, see C. Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 *Human Rights Law Review* 1, 87. For a more recent discussion including subsequent cases see C. Ryngaert, 'Oscillating between embracing and avoiding Bosphorus: the European Court of Human Rights on Member State responsibility for acts of international organisations and the case of the EU' (2015) 39 *European Law Review* 2, 176.

comply with EC Regulation no. 990/93 that had a direct effect in the Irish legal order. The Regulation implemented sanctions by the UN Security Council at the EU level against former Yugoslavia (Serbia and Montenegro) on the basis of Chapter VII of the Charter of the United Nations. Article 8 of the said Regulation provides that '[a]ll vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States'. Bosphorus contested the seizure, arguing that Article 8 of EU Regulation No. 990/93 either did not apply in the circumstances or was contrary to the Bosphorus' fundamental right to property. The case thus involved, as in *Matthews*, the question of responsibility of a Member State under the Convention for legal actions induced by the EU. The difference, however, was that *Matthews* concerned EU primary law, while the alleged infringement in *Bosphorus* had its origin in EU secondary law (i.e. a Regulation). The case was first dealt with in Luxembourg and later on in Strasbourg.

The CJEU ruled that the right to property is not an absolute right and can be restricted if objectively justified. Since the Regulation pursued a general interest of the Union, the interference was not disproportionate and thus the validity of the Regulation under EU law was not affected.[19] Subsequently, the applicant brought the case to the European Commission of Human Rights and the Commission referred it to the European Court of Human Rights. It ended up being a long road to Strasbourg, given that the proceedings commenced in the Irish courts in 1993. The ECtHR re-affirmed what was previously stated in *Matthews*, namely that contracting parties are free to transfer sovereign powers to an international organisation and such an organisation cannot be held responsible under the ECHR as long as it is not a party to it. The states that are parties to the ECHR, on the other hand, are responsible to ensure compliance with the Convention at any time, even when they are acting under international legal obligations. However, the Court limited such responsibility by introducing the so-

[19] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS*, 1996 E.C.R. I-3953.

called 'presumption of equivalent protection (of fundamental rights)'.[20] It reasoned that, as long as an international organisation 'is considered to protect fundamental rights [...] in a manner which can be considered at least equivalent to that for which the Convention provides', the Court would presume that a state has acted in compliance with the Convention, when it had no discretion in implementing the legal obligations following from its membership of the organisation.[21] The presumption of equivalent protection does not absolve Member States of their responsibility, but rather it acts as a conditional immunity and can thus be rebutted if the protection offered is manifestly deficient.[22] This was contrary to the European Commission's argument (submitted in the written observations) that the 'equivalent protection' doctrine should fully immunise EU acts from Strasbourg scrutiny.[23]

The ECtHR ultimately ruled that the protection of fundamental rights by EU law in this case was equivalent (defined as 'comparable but not identical' in the judgment) to that of the Convention system and concluded that the presumption was not rebutted in this case.[24] The *Bosphorus* decision has since been repeatedly confirmed by the Strasbourg Court.

The *Bosphorus* decision was subject to criticism, however.[25] The Strasbourg Court was accused of applying double standards in human rights protection.[26] Indeed, the standard review appears less strict for the EU Member States vis-à-vis non-EU Member States and, conversely, for the EU vis-à-vis other

[20] It was not an entirely new concept however. As mentioned earlier in the chapter, it was first developed by the European Commission of Human Rights in 1990 in *M & Co v. Federal Republic of Germany*. See also *Heinz v Contracting States also Parties to the European Patent Convention* (1994) 76A DR 125; (1994) 18 EHRR 168.
[21] *Bosphorus Hava Yollari Turizm v Ireland* (ECtHR, 30 June 2005), paras 155 and 156.
[22] C. Costello, The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe (2006) 6 *Human Rights Law Review* 1, 87.
[23] Commission of the European Communities: Written Observations in *Bosphorus Airways v Ireland*, 30 June 2004, JURM (2004) 6026, para. 19.
[24] *Bosphorus Hava Yollari Turizm v Ireland* (ECtHR, 30 June 2005), para 166.
[25] S. Peers, 'Bosphorus. European Court of Human Rights. Limited Responsibility of European Union Member States for Actions within the Scope of Community Law. Judgment of 30 June 2005, *Bosphorus Airways v Ireland*, Application No. 45036/98' (2006) *European Constitutional Law Review* 443; C. Costello, The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries
in Europe' (2006) 6 *Human Rights Law Review* 1.
[26] K. Kuhnert, 'Bosphorus – Double standards in European human rights protection?' (2006) 2 *Utrecht Law Review* 2.

international organisations (as it did not give such leeway to the Contracting States when acting under other international law obligations such as WTO law). Another criticism relates to the examination of manifest deficiency in the protection which was dealt with rather superficially. The Court considered the nature of interference, the general interest pursued and the ruling of the CJEU and concluded, in the two paragraphs it had devoted to the analysis, that it was 'clear that there was no dysfunction of the mechanism of control of the observance of the Convention'.[27] Moreover, the criterion for 'manifest deficiency' was left unsettled. It was not clear from the judgment under which conditions a deficiency would be considered to be 'manifest' and – more importantly – why a deficiency should be 'manifest' in order to rebut the presumption. The concurring opinion of Judge Ress provides some clarification as to the conditions, namely that the protection will be considered manifestly deficient when there has been, in procedural terms, no adequate review in the particular case such as: when the CJEU lacks competence; when the CJEU has been too restrictive in its interpretation of individual access to it; or where there has been an obvious misinterpretation or misapplication by the CJEU of the guarantees of the Convention right.[28] However, as is reflected in this and other separate concurring judicial opinions, the criterion 'manifestly deficient' appears to establish a worryingly high threshold, which is markedly different from the supervision generally carried out by the Strasbourg Court. Nevertheless, the *Bosphorus* doctrine continues to regulate the relationship between the ECHR regime and the EU legal order when EU secondary law leaves no discretion for the Member States as to its implementation and the subsequent application is at issue.

2.2.3. *Kokkelvisserij*: Responsibility for Acts of the EU Institutions

The ECtHR extended the *Bosphorus* presumption of equivalent protection to the procedures applied by the EU institutions in the *Kokkelvisserij*[29] case. Kokkelvisserij, an association of individuals and enterprises based in Netherlands

[27] Ibid, para 166.
[28] Concurring Opinion of Judge Ress in *Bosphorus Hava Yollari Turizm v Ireland* (ECtHR, 30 June 2005), para 3.
[29] *PO Kokkelvisserij v The Netherlands*, App no 13645/05 (ECtHR, 20 January 2009).

and engaged in mechanical cockle fishing, lodged a complaint before the ECtHR, arguing that the Dutch Council of State had violated the Convention by relying on a preliminary ruling of the CJEU that breached the right to a fair trial, as enshrined in Article 6 ECHR. The Council of State had requested the preliminary ruling from the Court of Justice concerning the interpretation and application of the Netherlands' Nature Conservation Act in the light of EU law and, in particular, Article 6 of the 'Habitats Directive'.[30]

In the case before the CJEU, the applicant association asked the Court to reopen the oral proceedings after hearing the Advocate General's Opinion, but the Court refused the request. The CJEU found that the applicant had failed to submit precise information which made it appear either useful or necessary to reopen the proceedings pursuant to Rule 61 of the Rules of Procedure. In its judgment, however, the Court followed the reasoning of the Opinion of the Advocate General.

Since the case involved purely procedural matters of the CJEU rather than the implementation of EU law, it was not clear whether the *Bosphorus* doctrine would apply in this case. The ECtHR first established that the violation was imputable to the Netherlands, since the Council of State requested the preliminary ruling and the Netherlands was a party to the proceedings. It held that the *Bosphorus* presumption did apply in this case, given that the obligation to give effect to a preliminary ruling by the CJEU stems from membership in the EU. The Strasbourg Court further considered whether the protection provided in Article 61 of the CJEU's Rules of Procedure was 'manifestly deficient'. The Court ruled that the protection afforded was not 'manifestly deficient' and declared the application manifestly ill-founded and hence inadmissible. *Kokkelvisserij* thus extended the *Bosphorus* presumption of equivalent protection to the procedures applied by EU institutions, *in casu* the CJEU.[31]

[30] Council Directive 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora.
[31] C. Van de Heyning, 'PO Kokkelvisserij vs. The Netherlands, Application no 13645/05, 20 January 2009' (2009) 46 *Common Market Law Review* 2125.

2.2.4. Clarifying *Bosphorus*

The limiting effect was further extended in the *MSS v Belgium*[32] case, which will be discussed in detail later in this book.[33] The case raised the question of compliance of the EU Dublin II Regulation[34] with the Convention rights. The applicant was an Afghan national who entered the European Union through Greece but applied for asylum in Belgium. The Belgian authorities decided to transfer him back to Greece, in accordance with the Dublin rules. The applicant then alleged before the ECtHR that, by sending him to Greece, the Belgian authorities exposed him to a risk of inhuman and degrading treatment and that he was indeed subjected to such a treatment. Even though the act at issue in this case was a Regulation, which, by its nature, is directly applicable in the Member States and does not normally allow discretion to the Member States, the ECtHR still examined whether the Belgian authorities had any discretion when applying the Regulation. Noticing the margin of discretion allowed under Article 3(2) of the Dublin II Regulation,[35] the Strasbourg Court concluded that the presumption of equivalent protection was not applicable to the present case.

The Court used this opportunity to clarify the impact of the presumption of equivalent protection established in *Bosphorus* and the limits of its applicability:

> […] the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity … The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations … State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be

[32] *M.S.S. v Belgium and Greece*, App no 30696/09 (ECtHR, 21 January 2011).
[33] Section 2, Chapter 4.
[34] Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsibility for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25 February 2003).
[35] 'By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility...'

> fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion.[36]

The ECtHR's decision in *Michaud v France*[37] clarified the conditions further under which the presumption of equivalent protection can be applied. In this case, the applicant claimed that an internal regulation, adopted on the basis of the French Monetary and Financial Code, which was an implementing act of EU Directive 2005/60/CE, was in violation of Articles 6, 7, and 8 of the ECHR. The main argument of the defendant (the French government) was that the *Bosphorus* presumption of equivalent protection had to be applied in this case and that the Strasbourg Court should therefore not check the 'proportionality' of the interference. The Court disagreed, however, and explained that there are two crucial differences between *Bosphorus* and the case at hand: first, the *Bosphorus* case dealt with an EU Regulation which, by its nature, does not provide for discretion for the Member States concerning its application, whereas the present case concerned the implementation of a Directive which, by its nature, does give Member States discretion as to its implementation and, secondly, in the *Bosphorus* case the CJEU had already checked whether the Regulation in question was in compliance with the EU fundamental rights standards, while this was not the case in *Michaud* (*Conseil d'Etat* had dismissed all claims and declared that the internal regulation was in accordance with European human rights standards, without referring the question to the CJEU). Accordingly, the presumption of equivalent protection could not be applied and the Court tested the proportionality of the interference. The Court concluded that the challenged provisions did not violate the Convention.

It is evident from *MSS v Belgium and Greece* and *Michaud v France* that the Strasbourg Court intensifies its supervisory role in human rights protection when the EU Member State has discretion in relation to how it carries out its EU obligation. There seems to be two mutually inclusive conditions. The first condition is indeed that the Member State has had a margin of discretion when implementing the contested act. In *Michaud* the contested act was a Directive, an

[36] *M.S.S. v Belgium and Greece,* App no 30696/09 (ECtHR, 21 January 2011), para. 338.
[37] *Michaud v France*, App no 12323/11 (ECtHR, 6 December 2012).

act of EU secondary law which, by its nature leaves a margin of discretion for the Member States as to the way in which it is implemented at the national level, while in *M.S.S.* it was a Regulation which, even though by its nature is directly applicable in the national legal order, had left some discretion for the Member States in this particular case. Similarly, in *Matthews*, the act in question was an act of EU primary law and thus also something that is in the (collective) hands of the Member States of the EU and is, moreover, not subject to annulment by the CJEU. The second condition is the involvement of the CJEU, either directly or through a preliminary ruling procedure.[38] In both *MSS v Belgium and Greece* and *Michaud v France*, the cases went directly from national courts to Strasbourg without any involvement of the CJEU, which meant that one of the conditions for the application of the *Bosphorus* presumption was not fulfilled.

Accordingly, in situations in which Member States do not have any discretion as to how an EU act is implemented and applied and when the CJEU has been involved, such as in the *Bosphorus* case, the ECtHR will defer from full scrutiny and apply the presumption of equivalent protection.

2.2.5. Responsibility for Acts of Another Member State? The Case of *Avotiņš*

The most recent case in which the ECtHR discussed the application of the *Bosphorus* presumption was *Avotiņš v Latvia*.[39] It was also the very first case in which the ECtHR was called upon to examine the guarantees of a fair hearing in the context of mutual recognition in EU law.[40]

The case concerned an alleged violation of Article 6 ECHR by the Latvian courts for the recognition and enforcement of a Cypriot judicial decision, which

[38] In *Kokkelvisserij* the ECtHR clarified that CJEU preliminary rulings also fall within the scope of the Bosphorus presumption because 'the interpretation which the CJEU then gives of Community law is authoritative and cannot be ignored by the domestic court'. See *PO Kokkelvisserij v The Netherlands*, App no 13645/05 (ECtHR, 20 January 2009) p. 20.
[39] *Avotiņš v Latvia*, App no 17502/07 (ECtHR, 23 May 2016).
[40] Ibid, para 98.

was the result of court proceedings that had allegedly disregarded Avotiņš's defence rights.

The ECtHR first examined whether the two conditions for the application of the *Bosphorus* presumption were fulfilled, namely the absence of a margin of discretion on the part of the domestic authorities and the deployment of the supervisory mechanism provided for in EU law.

The Court found that, under the Brussels I Regulation,[41] the courts of the Member States could not exercise any discretion in ordering the enforcement of a judgment given in another Member State, other than the specific grounds provided therein (which did not apply in this case). Accordingly, the Latvian courts were required to order the enforcement of the Cypriot judgment in Latvia. With respect to the second condition, the ECtHR noted that the Latvian Supreme Court did not request a preliminary ruling from the CJEU regarding the interpretation and application of the relevant provisions of the Brussel I Regulation. However, the Court considered that this condition should be applied without 'excessive formalism and taking into account the specific features of the supervisory mechanism in question'.[42] In the Court's view, making the request for a preliminary ruling to the CJEU always and without exception would be disproportionate. The Court added that the applicant did not advance any specific argument concerning the interpretation of the relevant provisions of the Regulation and its compatibility with fundamental rights, such as to warrant a finding that a preliminary ruling should have been requested from the CJEU. Consequently, the Court found the second condition to be fulfilled and the *Bosphorus* presumption to be applicable in this case.[43]

The analysis of the Court concerning the second condition is reminiscent of the *Michaud* case discussed above, where the Court strongly emphasised the importance of the involvement of the CJEU and the fact that *Conseil d'Etat* had refused to make such a reference. The Strasbourg Court distinguished the two

[41] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[42] *Avotiņš v Latvia*, App no 17502/07 (ECtHR, 23 May 2016) para 109.
[43] Ibid, paras 111-112.

cases, however, by stating that the applicant in the case at hand did not submit a request for such a preliminary ruling to the Latvian Supreme Court, while this was the case in *Michaud*.[44]

After having established that the *Bosphorus* presumption was applicable, the Strasbourg Court went on to examine whether the protection afforded by EU law is equivalent to that provided for in the ECHR system. It held that the protection provided for in EU law was not manifestly deficient and, accordingly, there had been no violation of Article 6 of the ECHR by the Latvian courts.

It is interesting to note, however, that the application of the presumption in *Avotiņš* seems to have been done in a somewhat stricter way than in previous cases and that the ECtHR in fact came very close to rebutting it.[45] This is not surprising, given that the case was decided in the aftermath of the CJEU Opinion 2/13, when the future of the *Bosphorus* presumption was unsettled.[46] Even though the Court ultimately found the presumption to be applicable and, moreover, found no violation of the Convention, the Court also made critical remarks concerning the principle of mutual trust and recognition and implicitly suggested a reform of the system. This is a point I will return to in Chapter 4.

2.2.6. The Protection Gap

The cases discussed above are all examples of the efforts of the Strasbourg Court to balance a peaceful co-existence with the Luxembourg Court, while at the same

[44] Ibid, para 111.

[45] See e.g. P. Gragl, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to *Opinion 2/13* in the *Avotiņš* Case' (2017) 13 *European Constitutional Law Review* 551.

[46] The ECtHR President at the time, Dean Spielmann, commented on Opinion 2/13 in unusually strong language, suggesting that the Strasbourg court might toughen its review of EU law. See the ECtHR Annual Report for 2014, available at http://echr.coe.int/Documents/Annual_Report_2014_ENG.pdf [last accessed 11 November 2016]. See also N. Mole, 'Can *Bosphorus* be maintained?' (2015) 16 *ERA Forum* 4, 467; J. Polakiewicz, 'Speech: The Future of Fundamental Rights Protection without Accession', 26 June 2006, available at http://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/the-future-of-fundamental-rights-protection-without-accession?inheritRedirect=false [last accessed 11 November 2016]; J. Morijn, 'After Opinion 2/13: How to Move on in Strasbourg and Brussels?', *EUtopia law*, 5 January 2015, available at https://eutopialaw.com/2015/01/05/after-opinion-213-how-to-move-on-in-strasbourg-and-brussels/ [last accessed 11 November 2016].

time retaining the responsibility of the Member States under the ECHR.[47] In doing so, different variations arise, depending on the nature of the EU act. The first step for the Strasbourg Court is to establish that the Member State(s) has acted and not the EU itself. If the jurisdiction is established, the Court can review the act that is allegedly in violation of the Convention. In that context, the ECtHR will decide whether the *Bosphorus* presumption of equivalent protection is applicable to the case or not. The application of the presumption is subject to two conditions: the absence of any margin of discretion on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law. If the conditions are not fulfilled, the Strasbourg Court will undertake a full scrutiny.[48]

Yet, cases remain where no Member State jurisdiction can be established and where the ECtHR accordingly does not have jurisdiction. An example showing the gap in external protection for individuals is the decision of the ECtHR in *Connolly*.[49] The case was first dealt with in Luxembourg as it involved a labour dispute between Connolly, an EU employee at the time, and the European Commission. The applicant worked for the Commission in an area related to economic and monetary policy. After having taken a leave of absence, Connolly published a book dealing with monetary policy, for which he had not received prior permission.[50] Since this was contrary to the Staff Regulations, Connolly was dismissed. He appealed the decision before the Court of First Instance and subsequently before the CJEU, arguing that Article 17 of the Staff Regulations was unlawful, since it was in breach of the principle of freedom of expression set forth in Article 10 of the ECHR. Both EU Courts dismissed the appeal.[51] Connolly then brought the case to Strasbourg arguing, inter alia, that the denial to submit written observations to the Opinion of the Advocate General before the CJEU constituted a breach of Article 6 of the Convention. Since the EU was (and still is)

[47] C. Van de Heyning, 'PO Kokkelvisserij vs. The Netherlands, Application no 13645/05, 20 January 2009 (2009) 46 *Common Market Law Review* 2125.
[48] See, most recently, *Avotiņš v Latvia*, App no 17502/07 (ECtHR, 23 May 2016), para 105.
[49] *Connolly v 15 Member States of the European Union*, App no 73274/01 (ECtHR, 9 December 2008).
[50] His book *The Rotten Heart of Europe* had criticised the EMU project.
[51] T-163/96 *Connolly v European Commission* [1999] ECLI:EU:T:1999:102; Case C-274/99 P *Connolly v Commission* [2001] ECLI:EU:C:2001:127.

not a contracting party to the Convention, the indicated respondents were all the (then) EU Member States. The ECtHR held that the respondents did not intervene in the proceedings at any time, which meant that the alleged violation did not occur within their jurisdiction and hence the jurisdiction of the Court. The complaint was in fact directed against the EU Courts and thus inadmissible *ratione personae*. The same reasoning can be discerned in a number of other labour disputes where the ECtHR consistently held that 'it had no jurisdiction *ratione personae* to deal with complaints directed against individual decisions given by the competent body of an international organisation in the context of a labour dispute falling entirely within the internal legal order of such an organisation with a legal personality separate from that of its Member States, where those States at no time intervened directly or indirectly in the dispute and no act or omission on their part engaged their responsibility under the Convention'.[52] This reference in the Court's guidelines would no longer apply if the EU would accede to the ECHR and the gap in legal protection indicated in *Connolly* would then be closed.

2.3. Jurisprudential Dialogue Strasbourg-Luxembourg

The cases above all concerned the external (indirect) review of EU acts and acts of the Member States covered by EU law by the ECtHR. The following discussion focuses on cases in which the Strasbourg Court actually used the case law of the CJEU to determine its own interpretation of the ECHR rights. It did so when it was searching for inspiration, reconsidering its case law and sometimes even to help enforce EU law and the CJEU decisions.

2.3.1. Searching for Inspiration…

[52] *Practical Guide on Admissibility Criteria*. Council of Europe/European Court of Human Rights, 2014, para 180. For the relevant case law see: *Boivin v 34 Member States of the Council of Europe*, App no 73250/01 (ECtHR, 9 September 2008); *Beygo v 46 Member States of the Council of Europe*, App no 36099/06 (ECtHR, 16 June 2009); *Rambus Inc. v Germany*, App no 40382/05 (ECtHR, 16 June 2009); *Lopez Cifuentes v Spain*, App no 18754/07 (ECtHR, 7 July 2009).

The ECtHR made a reference to a CJEU judgment as early as 1979, in its landmark judgment in *Marckx v Belgium*,[53] and started invoking the EU Charter as persuasive authority as of 2002, even before the CJEU itself first relied on it.[54] The ECtHR has also endorsed the CJEU's contribution to the substance of fundamental rights and has been gradually using the CJEU's case law for inspiration, especially in the years following the entry into force of the Charter, which obviously contributed to a more comprehensive fundamental rights jurisprudence in Luxembourg. Some of the most prominent cases are discussed below.

The ECtHR's judgment in *Maslov*[55] on exclusion orders serves as an example of a case in Strasbourg that features influences from EU law and the case law of the CJEU. Juri Maslov, a Bulgarian national, lawfully entered Austria at the age of six with his parents and two siblings. After being convicted by the Vienna Juvenile Court for offences committed between the age of 14 and 16, and having served his prison term, the Austrian authorities issued an expulsion order which would be enforceable for a limited duration of ten years. The measure became final when he reached the age of majority at 18, while he was still living with his parents. After being deported to Bulgaria, the complainant argued before the Strasbourg Court that the expulsion order violated his right to respect for private and family life under Article 8 ECHR. The ECtHR clarified that the margin of appreciation, which is normally accorded to states in balancing different interests in this type of case, is considerably narrower when dealing with minors. In this regard, the Strasbourg Court observed that EU law also offers particular protection against expulsion to minors, as provided for in Article 28(3)(b) of Directive 2004/38/EC.[56] This is particularly interesting, since Article 28(3)(b) of Directive 2004/38/EC relates to the rights of EU citizens and their family members to move and reside freely within the territory of the Member States. Further, the ECtHR

[53] *Marckx v Belgium*, App no 6833/74 (ECtHR, 13 June 1979).
[54] *Christine Goodwin v United Kingdom*, App no 28957/95 (ECtHR, 11 July 2002).
[55] *Maslov v Austria*, App no 1638/03 (ECtHR, 23 June 2008).
[56] Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

also referred to the CJEU's decision in *Orfanopoulos and Oliveri*,[57] which concerned expulsion orders issued by the German *Regierungspräsidium* (regional administration) against a Greek and an Italian national on grounds of their prior criminal convictions.[58] Both plaintiffs brought an action before the *Verwaltungsgericht* Stuttgart (Stuttgart Administrative Court) which then decided to refer to the CJEU for a preliminary ruling. The CJEU held that, under EU law, previous criminal convictions cannot in themselves be grounds for expulsion orders. Instead, Member States must take account of the individual's 'personal conduct' which led to the conviction and examine whether the person concerned presents a genuine, present and sufficiently serious threat to public policy, public security or public health. Interestingly, the CJEU had decided the cases of *Orfanopoulos and Oliveri* in the context of Directive 2004/38/EC but also in the context of EU citizenship.[59] It is thus remarkable that the ECtHR relied on a judgment of the CJEU which was decided on the basis of EU citizenship (and not simply in the context of the right to family life) in order to extend the standards of Article 8 ECHR further. It should be noted, however, that the ECtHR also made references to international law instruments in order to support its positon, such as to Article 3 of the United Nations Convention on the Rights of the Child, and that the decisive element in this case was thus the young age at which the applicant had committed the offences and, with one exception, the non-violent nature of the offences.[60] The Strasbourg Court found that the imposition of an expulsion order, even of a limited duration, in this year ten years, was disproportionate to the legitimate aim pursued of preventing disorder or crime, and accordingly was contrary to Article 8. The Court considered that, where expulsion measures against a juvenile offender were concerned, the obligation to take the best interests of the child into account included an obligation to facilitate reintegration and states should not take an easy way out by simply expelling the juvenile.

[57] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Others and Oliveri v Land Baden-Württemberg* [2004] ECLI:EU:C:2004:262.
[58] *Maslov v Austria*, App no 1638/03 (ECtHR, 23 June 2008) para 93.
[59] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Others and Oliveri v Land Baden-Württemberg* [2004] ECLI:EU:C:2004:262, para 62-71.
[60] Ibid, para 81.

Another example is *Sergey Zolotukhin v Russia*,[61] in which the ECtHR interpreted the concept 'idem' from the *ne bis in idem* principle (the prohibition of double jeopardy) in light of the case law of the CJEU. After having struggled with this particular aspect in the interpretation of Article 6 of the Convention, and having interpreted it inconsistently in its previous decisions, the Strasbourg Court made its case law consistent by choosing the interpretation of the concept 'idem' which is in line with the case law of the CJEU.[62] The Strasbourg Court thus used the CJEU's interpration of this particular aspect of the right to a fair trial in order to solve its own dilemma. For further inspiration and support, the Court also referred to the case law of the Inter-American Court of Human Rights.

However, it is important to note that the references to the case law of the CJEU and to other international instruments and courts have not been very frequent and most of them are quite recent. This is not surprising, however, since the Strasbourg Court is a specialised human rights court and has developed its own European human rights *acquis* over the years. Nevertheless, it is interesting to see that, occasionally, a specialised human rights court searches for inspiration in EU law and the case law of the CJEU.

2.3.2. … And Reconsidering its Case Law in Light of EU law and the Case Law of the CJEU

In certain instances, the ECtHR even appears to have reconsidered its jurisprudence in light of the judgments of the CJEU.[63] For many years, the Strasbourg Court was reluctant to recognise a duty for the contracting states to

[61] *Sergey Zolotukhin v Russia*, App no 14939/03 (ECtHR, 10 February 2009).
[62] For contradictions in the previous case law concerning the *ne bis in idem* principle and, in particular, the '*idem*' element, see *Gradinger v Austria*, App no 15963/90 (ECtHR, 23 October 1995); *Oliveira v Switzerland* App no 25711/94 (ECtHR, 30 July 1998); *Franz Fischer v Austria* App no 37950/97 (29 May 2001); *Göktan v France* App no 33402/96 (ECtHR, 2 July 2002). See also the Opinion of AG Colomer in Case C-436/04 *Van Esbroeck* [2006] ECLI:EU:C:2006:165.
[63] F.G. Jacobs, 'The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union accession to the European Convention on Human Rights' in I. Pernice, J. Kokott and C. Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (Baden-Baden: Nomos Verlag, 2006). However, this is not directly evident from the case law. The ECtHR cites several different sources at once, and it does not clearly state that it is changing its approach due to the influence from Luxembourg.

give legal recognition to the new sexual identity of transsexuals, giving the states a wide margin of discretion in this respect.[64] The reason for this was the absence of a European consensus on the issue. In *Goodwin v United Kingdom*,[65] however, the Court unanimously held that the UK's failure to recognise the applicant's new identity in law breached her rights to respect for privacy and the right to marry under the Convention. In doing so, the Court attached great importance to the evidence of a continuing international trend in favour of the social acceptance of transsexuals as well as the legal recognition of the new sexual identity. The Court specifically referred to *P. v S. and the Cornwall County Council*, the case in which the CJEU held that discrimination arising from gender re-assignment constituted discrimination on grounds of sex and, accordingly, Article 5(1) of Directive 76/207/EEC[66] precluded the dismissal of a transsexual for a reason related to gender re-assignment.

A more recent example in which the ECtHR relied on EU legislation in order to support a decision which arguably departs from its previous well-established case law is *Ibrahim v United Kingdom*.[67] The case concerned police 'safety interviews' of four suspects in the 2005 London bombings, Muktar Said Ibrahim, Ramzi Mohammed, Yassin Omar and Ismail Abdurahman, who were initially interviewed without legal assistance and subsequently convicted of conspiracy to murder. The applicants argued before the ECtHR that their right to a fair trial and their rights to legal assistance had been breached because of the temporary delay in providing them with access to a lawyer and the admission of statements made in evidence against them. The ECtHR ruled that there had been no violation of Article 6(1) and (3) of the ECHR in respect of the first three applicants, since the Court was convinced that, at the time of their initial questioning, there had been an urgent need to avoid serious and adverse consequences for public safety, i.e. further suicide attacks. There had therefore been compelling reasons to delay the

[64] See e.g. *Sheffield and Horsham v The United Kingdom*, App no 22985/93 (ECtHR, 30 July 1998).
[65] *Goodwin v United Kingdom*, App no 28957/95 (ECtHR, 11 July 2002).
[66] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
[67] *Ibrahim and Others v the United Kingdom*, App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016).

applicants' access to legal advice.[68] The Court also found that the proceedings, as a whole, in respect of the first three applicants were fair.[69] The position of the fourth applicant was different, however. Unlike the first three applicants, who were arrested immediately, the fourth suspect was approached by the police as a potential witness and was initially interviewed as such, without a lawyer. During the questioning, the police established that he assisted one of the bombers following the failed attack. At that point, he should have been cautioned or informed of his right to legal assistance, but this was not done. After he had made a written witness statement, he was arrested, charged with, and subsequently convicted of assisting one of the bombers and failing to disclose information after the attacks. In his case, the Court was not convinced that there had been compelling reasons for restricting his access to legal assistance and for failing to inform him of his right to remain silent and subsequently the Court found a violation of Article 6(1) and (3)(c).[70] In order to support its decision, which arguably lowered the standard of protection of the right of access to a lawyer established in *Salduz*,[71] the Court referred extensively to the preamble, recitals and several provisions of EU Directive 2013/48/EU on access to a lawyer.[72]

Finally, an example of a true cross-fertilization[73] between Strasbourg and Luxembourg is the case law concerning the UN SC Resolutions and their status in the EU and ECHR legal orders respectively. In *Nada v Switzerland*, the ECtHR addressed the legality of measures implementing sanctions stemming from the

[68] Ibid, paras 275-279
[69] Ibid, paras 280-294.
[70] Ibid, paras 295-311.
[71] In *Salduz*, the ECtHR ruled that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right but that the statements received without access to a lawyer should never be used to convict a person. See *Salduz v Turkey*, App no 36391/02 (ECtHR, 27 November 2008). Further on this point see Joint partly dissenting partly concurring opinion of Judges Sajó and Laffranque in *Ibrahim v United Kingdom*. See also A. Soo, 'Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13th of September 2016)' (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 4, 327.
[72] See, e.g. paras 259, 261, 264, 271.
[73] For the concept of 'cross-fertilization' see F. G. Jacobs, 'Judicial dialogue and the cross-fertilization of legal systems: the European Court of Justice' (2003) 38 *Texas International Law Journal* 547.

UN Security Council Resolutions and, relying on the *Kadi* decision by the CJEU,[74] found a violation of Article 8 of the Convention (the right to respect for private and family life).[75] The ECtHR ruled that, while the applicant's listing by the Sanctions Committee of the UNSC was attributable to the UN, the implementation of the sanctions by Switzerland was attributable to Switzerland within the meaning of Article 1 of the Convention.[76] It is worth noting that, in its earlier *Behrami* decision, the ECtHR held that the actions of the armed forces of states acting pursuant to UN Security Council authorisations are attributable to the UN and not to the states themselves.[77] The Court distinguished the measures at issue in this case, however, since they did not, like *Behrami*, concern missions conducted outside the territory of the Contracting Parties which were directly attributable to the UN, but rather measures implemented at the national level. Moreover, the authorities in Switzerland only had an obligation of result, in the Court's view, and hence had some discretion, albeit limited, as to how they would implement the measures.[78] Nevertheless, the Court could have argued, as it was suggested, inter alia, by the French and the UK governments intervening in the case, that the measures were attributable to the United Nations because, even though they were implemented domestically, Switzerland was acting pursuant to the UNSC Resolution adopted under Chapter VII of the UN Charter, which is binding on all states and which takes precedence over all other international agreements in international law.[79] The ECtHR did not follow this reasoning, however, and found that the acts in this case were attributable to Switzerland itself and that the presumption the UN acts enjoy in the ECHR legal order[80] had been rebutted in this case. In doing so, the ECtHR relied on the CJEU's *Kadi* decision in which the CJEU

[74] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the EC* [2008] ECLI:EU:C:2008:461.
[75] F. Fabbrini and J. Larik, 'Dialoguing for Due Process: Kadi, Nada, and the Accession of The EU to the ECHR' (2013) Leuven Global Governance Working Paper No 125.
[76] *Nada v Switzerland*, App no 10593/08 (ECtHR, 12 September 2012) paras 120-121.
[77] *Behrami and Behrami v France*, App no 71412/01 (ECtHR, 31 May 2007).
[78] *Nada v Switzerland*, App no 10593/08 (ECtHR, 12 September 2012) paras 176-180.
[79] In accordance with Article 103 of the UN Charter which provides that the obligations arising from UN SC resolutions adopted under Chapter VII thereof take precedence over all other international agreements.
[80] The ECtHR generally presumes that that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. This presumption has been established in *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011), para 102.

found that it had jurisdiction to examine the lawfulness of the EU Regulation which implemented the same Security Council's al-Qaeda and Taliban Resolutions that were at issue in this case. More recently, in the *Kadi II* judgment,[81] the CJEU in turn cited the ECtHR reaffirming *Kadi I*.

2.3.3. Helping Enforce EU Law and CJEU Decisions

There have also been several cases in which the ECtHR actually helped to ensure compliance with EU law or enforce a CJEU judgment. In the *Hornsby*[82] case, a British couple requested an authorisation to set up a private language school in Greece. However, the Greek authorities refused, stating that such an authorisation could not be granted to foreigners under the Greek legislation in force, which amounted to discrimination on the basis of nationality and was not allowed. The Greek authorities went as far as to ignore a decision of the Greek Supreme Administrative Court ordering them to grant the requested authorisation. Even infringement proceedings against Greece in Luxembourg, leading to a judgment by the CJEU, did not solve the problem.[83] Eventually, the case ended up in Strasbourg. The ECtHR ruled that Greece violated Article 6 of the ECHR by failing to implement binding judicial decisions of the national court and thus ensuring the applicants' right to an effective remedy. The ECtHR made note of the decision in Luxembourg also, pointing out that Greece had also failed to respect EU law, as interpreted by the CJEU. This gave additional leverage and legitimacy to the earlier judgment of the CJEU, ultimately resulting in the Greek authorities changing the national legislation which was found to be in breach of both EU and ECHR law.

Similarly, in *Dangeville*,[84] the question was whether a state that failed to implement an EU Directive within the assigned time, with the consequence that it imposed taxes that it should not have imposed had the Directive been implemented in a timely manner, was a breach of Article 1 Protocol 1 of the Convention (the right to property). The ECtHR found that the fact that those taxes

[81] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v Kadi* ECLI:EU:C:2013:518.
[82] *Hornsby v Greece*, App no 18357/91 (ECtHR, 19 March 1997).
[83] Case C-147/86*, Commission v Greece* [1988] ECLI:EU:C:1989:611.
[84] *Dangeville v France*, App no 36677/97 (ECtHR, 16 July 2002).

still had to be paid was a breach of the applicant's right to property as protected under the ECHR. In other words, the Strasbourg Court ruled that a failure to implement an EU Directive (also) constituted a violation of the ECHR.

The third line of cases concerns the breach of the ECHR by national courts for failing to make a preliminary reference to the CJEU. One of the first cases in which the Strasbourg Court dealt with this issue was *Ullens de Schooten*.[85] The case concerned a refusal by the French Court of Cassation and *Conseil d'Etat* to refer questions relating to the interpretation of EU law for a preliminary ruling. The Strasbourg Court ruled, referring to the CJEU's *CILFIT* judgment, that the Convention did not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling. However, the ECtHR also stated that Article 6(1) ECHR does impose an obligation on national courts to give reasons for refusing such a reference if there was no other judicial remedy at the national level. This should be done on the basis of the exceptions provided for in the case law of the CJEU, particularly where the applicable law permitted such a refusal only in exceptional circumstances. In the present case, however, the requirement to give reasons had been complied with. The ECtHR thus opted for an interpretation of Article 6 of the ECHR in a way that reinforces a strict interpretation of the duty enshrined in Article 267(3) of the TFEU. The Court upheld this approach most recently in the *Dhahbi*[86] and *Schipani* cases.[87]

2.4. Conclusion

Presently, the EU cannot be held responsible under the ECHR for the acts of its organs and applications brought against it are incompatible *ratione personae* with the Convention. The EU Member States, however, remain responsible under the ECHR for human rights violations originating in the EU. In that sense, the ECtHR

[85] *Ullens de Schooten and Rezabek v Belgium*, App nos 3989/07 and 38353/07 (ECtHR, 20 September 2011).
[86] *Dhahbi v Italy*, App no 17120/09 (ECtHR, 8 April 2014).
[87] *Schipani and Others v Italy*, App no 38369/09 (ECtHR, 21 July 2015).

has jurisdiction to review EU law indirectly as well as a large number of cases decided by the CJEU.

Over the years, the Strasbourg Court has shown that it trusts the level of protection provided for in the EU and enforced by the CJEU. Therefore, in situations in which the Member States do not have any discretion as to how an EU act is applied, the Court will defer from full scrutiny and apply the *Bosphorus* presumption of equivalent protection. This is a compromise offered by the Strasbourg Court: it may accept the jurisdiction but it will not conduct a full review. The Court has struggled along the way trying to find a balance; sometimes it has been willing to assign responsibility to a Member State, while in other cases it has allowed Member States to escape responsibility. In the efforts to accommodate the autonomy of the EU legal order, the ECtHR has restricted its own competence to review national measures to the potential detriment of human rights protection. Regrettably, in the cases that followed, the ECtHR did not follow a robust application of the *Bosphorus* doctrine.[88] Notwithstanding this critique, and as seen in several other cases above, there is still some room left for Strasbourg scrutiny of EU acts in cases in which the presumption is not applicable, which is in the majority of the cases. While the future of the *Bosphorus* doctrine has been debated in the literature[89] and among the Strasbourg judges[90] in the aftermath of the CJEU Opinion 2/13, it continues to be valid case law in Strasbourg.

[88] There have been five cases in total in which the *Bosphorus* presumption has been applied. See *Coopérative des agriculteurs de Mayenne v France*, App no 16931/04 (ECtHR, 10 October 2006); *Biret v 15 States*, App no 13762/04 (ECtHR, 9 December 2008); *Kokkelvisserij v the* Netherlands, App no 13645/05 (ECtHR, 20 January 2009); *Povse v Austria*, App no 3890/11 (ECtHR, 18 June 2013) and, lastly, *Avotiņš v Latvia*, App no 17502/07 (ECtHR, 23 May 2016).

[89] N. Mole, 'Can *Bosphorus* be maintained?' (2015) 16 *ERA Forum* 4, 467; J. Polakiewicz, 'Speech: The Future of Fundamental Rights Protection without Accession', 26 June 2006, available at http://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/the-future-of-fundamental-rights-protection-without-accession?inheritRedirect=false [last accessed 11 November 2016]; J. Morijn, 'After Opinion 2/13: How to Move on in Strasbourg and Brussels?', *EUtopia law*, 5 January 2015, available at https://eutopialaw.com/2015/01/05/after-opinion-213-how-to-move-on-in-strasbourg-and-brussels/ [last accessed 11 November 2016].

[90] G. Butler, 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights' (2015) 31 *Utrecht Journal of International and European Law* 81, 104.

The analysis has also demonstrated that, sometimes, the ECtHR uses EU law and the case law of the CJEU to develop its own interpretation of the Convention rights and sometimes also to depart from its previous interpretations. The latter, however, is not to be welcomed if it serves to help the Strasbourg Court water down some already established standards which have been applied widely by the national courts, as it arguably did in the context of the fair-trial rights. In other cases, the ECtHR even lends a 'helping hand' to the Luxembourg Court.[91] The question then is, of course, why the Strasbourg Court refers. A more general answer that applies to both European courts is that cross-referencing is very important, given the number of cases in which they have overlapping jurisdiction. Cooperation is crucial in order to minimise the risk of divergences, which would otherwise affect their reputation and the authority and legitimacy of their decisions, to which both Courts are vulnerable. This in turn results in greater legal certainty for European citizens.[92] From a more practical and strategic point of view, the ECtHR uses the case law of the CJEU in order to modernise its own interpretation of the ECHR rights and show contemporary consensus in Europe[93] and to substantiate and support some of its controversial decisions that may impinge on the Member States' margin of appreciation or decisions that overturn its previous case law. The latter is particularly notable in fields where the CJEU is known for its extended expertise, such as discrimination law.[94]

3 The View from Luxembourg

[91] C. Van de Heyning and R. Lawson, 'EU law and the European Court of Justice case law as inspiration and challenge to the Europena Court of Human Rights jurisprudence', in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds) *Human rights protection in the European legal order: The interaction between the European and the national courts* (Anwerp: Intersentia, 2011).

[92] C. Timmermans, 'The Relationship between the European Court of Justice and the European Court of Human Rights' in A. Arnull, C. Barnard, M. Dougan and E. Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011).

[93] D. Spielmann, 'The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or How to Remain Good Neighbours After the Opinion 2/13', Speech delivered at FRAME on 27 March 2017 in Brussels, http://www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf [last accessed 9 November 2017].

[94] T. Lock, *The European Court of Justice and International Courts* (Oxford: Oxford University Press, 2015).

3.1 The Status of the ECHR in EU Law

The EU is not a party to the ECHR so, formally speaking, the ECHR is not part of EU law.95 This does not however mean that the ECHR is of no avail in the EU system of fundamental rights protection. Fundamental rights as guaranteed by the ECHR constitute general principles of EU law (Art. 6 (3) TEU). The EU Charter draws heavily on the ECHR and provides that Charter rights corresponding to rights guaranteed by the ECHR shall have the same meaning and scope as those laid down by the said Convention, while the EU is allowed to offer more extensive protection (Art. 52(2) Charter). Lastly, nothing in the Charter can be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by the ECHR (Art. 53 Charter).

3.1.1. Article 6(3) TEU

As early as 1974 the ECHR had become a 'source of inspiration' for the judges in Luxembourg and later on it had acquired 'special significance' among the legal sources to be taken into account when identifying the fundamental rights applicable under EU law.[96] This stance was codified for the first time in the Maastricht Treaty in Article F(2) EU, which is now, after some minor modifications, Article 6(3) TEU:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

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[95] The CJEU has consistently held that, as long as the EU does not accede to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into EU law. See Cases C-617/10 *Åkerberg Fransson* EU:C:2013:105, para 44; C-601/15 PPU, *J. N. v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:84, para 45; Joined Cases C-217/15 and C-350/15 *Orsi and Baldetti* ECLI:EU:C:2017:264, para 15.

[96] The ECHR was mentioned as a 'source of inspiration' since 1974 (for the very first time in Case 4/73 *Nold v Commission* [1974] ECR 491) and it was characterised as having 'special significance' since 1989. On the different stages of the role of the ECHR in the case law of the CJEU see A. Rosas, 'The European Union and Fundamental Rights/Human Rights' in C. Krause and M. Scheinin (eds), *International Protection of Human Rights: A Textbook* (Institute for Human Rights, Abo Academy University, 2009).

This provision gives the ECHR a different position to that given originally by the CJEU as it provides, rather directly and convincingly, that the ECHR rights *are* the general principles of EU law.[97] This then means that the ECHR is part of EU law after all, as a matter of EU law. However, this interpretation has been contested in the literature and the CJEU has given it a different interpretation. Cases in point are *Kamberaj* and *Åkerberg Fransson*.[98]

In *Kamberaj*, the CJEU ruled against the direct application of the ECHR provisions in EU law.[99] The case originated with a reference for preliminary ruling made by the Italian Court of Bolzano which had asked, inter alia, whether, in the case of a conflict between the provision of domestic law and the ECHR, the reference to the latter in Article 6 TEU obliges the national court to apply the provisions of the ECHR – in the present case Article 14 of the ECHR and Article 1 of Protocol No 12 – directly, disapplying the incompatible source of domestic law, without first making a reference to the *Corte Costituzionale*.[100] The referring court thus placed the specific issue of the case in a broader context of the European and national fundamental rights architecture, asking how EU law, national constitutional law and the ECHR relate: is the ECHR part of EU law by virtue of Article 6(3) TEU?

It is important to note here that the *Corte Costituzionale* has qualified the ECHR as '*norma interposta',* implying that it ranks between the constitutional and ordinary Italian law, since a conflict between ordinary Italian law and the ECHR can result in an indirect violation of Article 117 of the Constitution. The ECHR rights should thus be observed when applying national law, but national law cannot be disapplied when it is in conflict with the ECHR. Instead, a reference to the *Corte Costituzionale* should be made. This did not prevent Italian judges from

[97] On this point, see B. De Witte, 'The use of the ECHR and Convention case law by the European Court of Justice', in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds) *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp: Intersentia, 2011) 22.
[98] Cases C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233 and and C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.
[99] Case C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233.
[100] Ibid, para 59.

sometimes disapplying ordinary legislation for an infringement of the ECHR and the debate on the status of the ECHR in Italian law is not yet settled.[101]

In response, the CJEU commenced by saying that Article 6 TEU reflects the settled case law of the Court, according to which fundamental rights form an integral part of the general principles of EU law. The Court held, however, that Article 6(3) TEU 'does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of a conflict between the rights guaranteed by that convention and a provision of national law'.[102] Accordingly, Article 6(3) TEU does not require the national court to apply the ECHR directly and to disapply the provision of national law in the case of a conflict between a provision of national law and the ECHR.[103]

One can see the importance of the question: holding that the ECHR (and the case law of the ECtHR), as such, is part of EU law, based on the doctrine of incorporation, would imply that the compatibility of national law with the ECHR becomes a question of EU law. The CJEU could then be asked to interpret the ECHR, at least when the case comes within the scope of EU law, and it would be bound by the case law of the Strasbourg Court, not as a matter of international law (this would require accession) but as a matter of EU law. Another consequence could be that some national courts would sidestep the CJEU's interpretative monopoly and would ultimately take *control* over EU law and its relationship with national law, by using the ECHR and the Strasbourg case law instead (when interpreting EU general principles that coincide with the ECHR). Nevertheless, one would expect the Court to take a note of the change in the wording of Article 6(3) TEU and to explain more directly and convincingly how, given this new wording, the ECHR is still merely 'a source of inspiration'. In any case, the reference in *Kamberaj* reflects the struggle of a national judge in determining whether the

[101] G. Bianco and G. Martinico, (2013) 'The Poisoned Chalice: An Italian view on the Kamberaj case' Working Paper on European Law and Regional Integration no 18.
[102] Case C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233, para 62.
[103] Ibid, para 63.

Charter applies in a particular case as well as uncertainty regarding the application of general principles of EU law and the role of the ECHR therein.

Many commentators take the same view as the CJEU,[104] considering that the ECHR has not become part of EU law by virtue of Article 6(3); however this view has also been contested.[105] This is not surprising, given that the wording of the provision is clear and convincing – the ECHR rights 'shall constitute general principles of the Union's law'. What comes to mind immediately is the Court's concern for its own autonomy vis-à-vis the judicial authority of other courts and tribunals, which was often expressed over the years and for which the Court has been heavily criticised. The CJEU reaffirmed its stance again in *Åkerberg Fransson* ruling that, since the ECHR has not been formally incorporated into EU law, the domestic effects of the ECHR and the relationship between the ECHR and national law are not governed by EU law.[106]

3.1.2. Article 52(3) of the Charter

In addition to Article 6 TEU, the interpretative principle in Article 52(3) of the EU Charter of Fundamental Rights further enhances the ECHR's importance and position in EU law:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

This provision formulates a duty to interpret Charter rights corresponding to rights in the ECHR in the same way, and it makes the limitation of those corresponding fundamental rights only justifiable if the limitation would also be permissible under

[104] A. Rosas, 'The European Union and Fundamental Rights/Human Rights' in C. Krause and M. Scheinnin (eds), *International Protection of Human Rights: A Textbook* (Institute for Human Rights: Åbo Academy University, 2009) 457-458.
[105] B. De Witte, 'The use of the ECHR and Convention case law by the European Court of Justice', in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds.) *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp, Intersentia, 2011) 21-24.
[106] C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 44.

the ECHR. In that sense, it is designed to avoid conflicting interpretations of the same fundamental rights guaranteed by the two human rights catalogues. As indicated in the Explanation on Article 52 of the Charter, its third paragraph 'is intended to ensure the necessary consistency between the Charter and the ECHR […]'.

It could be argued therefore that Article 52(3) (read in conjunction with Article 6(1) TEU) gives a formal legal status to (at least part of) the ECHR in the EU legal order, *as a matter of EU law*. This would mean that the EU is bound by the ECHR under EU law; the EU primary law imposes this obligation. Clearly, under international law, the EU is not bound by the Convention as it has not yet acceded to it.[107]

Furthermore, since the ECtHR determines the meaning and scope of the Convention rights (pursuant to Article 32 ECHR) it must be assumed that Article 52(3) of the Charter also intends to incorporate the case law of the Strasbourg Court into EU law, where it functions as a minimum standard. This assumption is not unwarranted in my view; Article 52(3) is only meaningful if it commits the CJEU to take account of the Strasbourg case law.

Moreover, the preamble to the Charter and the explanations on Article 52(3)[108] explicitly refer to the case law of the ECtHR, the latter providing that the meaning and the scope of the ECHR rights are determined not only by the text of those instruments, but also by the case law of the ECtHR. The level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR. While the explanations relating to the Charter do not have the same legal status as the Charter, they are an interpretive tool and, in accordance with Article 52(7) of the Charter, 'shall be given due regard by the Courts of the Union and the Member States' when interpreting the Charter.

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[107] De Witte addressed the confusion between the two separate legal questions in his writings. See e.g. B. de Witte, 'The use of the ECHR and Convention case law by the European Court of Justice', in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds) *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp: Intersentia, 2011) 22.

[108] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/20.

This interpretation is in line with the argument of Advocate General Jacobs in the *Bospohorus* case, decided back in 2005, when he argued that, even though the ECHR may not be formally binding upon the EU, 'for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in this Court and in national courts where Community law is in issue'.[109] Initially, the CJEU seemed to suggest the same interpretation. In *J.McB. v L.E.*, the CJEU held that, where Charter rights are the same as those in the ECHR, they must be given the same meaning and the same scope, 'as interpreted by the case-law of the European Court of Human Rights'.[110] In later cases, however, the Court failed to recognise the role of the ECtHR's case law in determining the meaning and scope of corresponding Charter and Convention rights.[111]

The same view was expressed, even more strongly, in Opinion 2/13 on the EU's accession to the ECHR. Interestingly, however, on the same day as publishing Opinion 2/13, the Court adopted two Grand Chamber judgments in the *M'Bodj* and *Abdida* cases, on the rights of refugees, where it based its reasoning on and made a reference to the Strasbourg case law.[112] In the *Abdida* case, the Court explicitly referred to Article 52(3) of the Charter stating that '[i]t is the case law of the European Court of Human Rights, which, in accordance with Article 52(3) of the Charter, must be taken into account 'when interpreting a Charter provision that corresponds to a Convention right'.[113] This is puzzling, since the

[109] Opinion of AG Jacobs in Case C-84/95 *Bosphorus v Ireland* [1996] ECLI:EU:C:1996:179.
[110] Case C-400/10 PPU *JMcB v LE* [2010] ECLI:EU:C:2010:582, para 53.
[111] See e.g. Joined Cases C-402/05 P and 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, para 316; C-571/10, *Kamberaj v IPES* [2012] ECLI:EU:C:2012:233, para 62; C-617/10*, Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 44. For the academic literature that supports the Court's view see T. Lock, *The European Court of Justice and International Courts* (OUP, 2015) 169; J. Kokott and C. Sobotta, ' Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection (2015) *Yearbook of European Law*, 4. For the opposite view see B. De Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice', in P. Popelier C. Van de Heyning and P. Van Nuffel (eds) *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Antwerp: Intersentia, 2011) at 21-22; W. Weiss,'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon' (2011) 7 *European Constitutional Law Review* 1, 64 and 71.
[112] Cases C-542/13 *M'Bodj* ECLI:EU:C:2014:2452, paras 39 and 40 and C-562/*13 Abdida v Centre public d'action sociale d'Ottignies-Louvain-La-Neuve* ECLI:EU:C:2014:2453, paras 47 and 52.
[113] C-562/13, *Abdida v Centre public d'action sociale d'Ottignies-Louvain-La-Neuve* [2014] ECLI:EU:C:2014:2453, para 47.

Court did not make a single reference to or acknowledge in any way Article 52(3) in Opinion 2/13, even though this provision is at the heart of the relationship between the Charter and the Convention.[114]

The judgments in which the Court does refer to the ECHR and/or the ECtHR case law are also sometimes problematic: some decisions contain an extensive analysis of the Strasbourg case law, concluding that the two are in conformity while in other cases the CJEU simply comes to this conculsion without any kind of preceding discussion or analysis and usually does so at the very end of the reasoning. The fact that the CJEU uses the Charter first and foremost in its analysis is not wrong – the Charter is the EU fundamental rights instrument and it is only logical that the Charter is taken as the main source for identifying and interpreting fundamental rights. It may even be a desirable approach, since it may give the opportunity to the CJEU to provide more protection. Having said that, when references are being made to the ECHR, the Court should engage more deeply in explaining how its decision is in conformity with the ECHR and the case law of the ECtHR rather than simply stating that it is.[115] In this context, Weiler criticised the CJEU's 'notoriously telegraphic style', which is 'not designed to inspire confidence'.[116] But Weiler also questioned the appropriateness of references to the ECHR and the case law of the ECtHR more generally, arguing that it is the Strasbourg Court that has the ultimate authority to give a binding interpretation of the provisions of the ECHR and, otherwise, the national (constitutional) courts are better placed than the CJEU to make that judgment.[117] Weiler made a further point questioning the legal duty of national courts in the case of an erroneous interpretation of the Convention by the CJEU, without however providing answers.[118] While these concerns are valid, especially in cases

[114] J. Callewaert, 'Is EU Accession still a good idea?' in Š. Imamović, M. Claes and B. de Witte (eds), 'The EU Fundamental Rights Landscape After Opinion 2/13 Maastricht Faculty of Law Working Paper 2016/3.
[115] See e.g. Case C-465/07 *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECLI:EU:C:2009:94, para 44.
[116] J.H.H. Weiler, 'Editorial: Human Rights: Member State, EU and ECHR Levels of Protection; P.S. Catalonia; Why Does it Take So Long for my Article to Be Published?' (2013) 24 *European Journal of International Law* 2, 471, 473.
[117] J.H.H. Weiler, 'Editorial: Human Rights: Member State, EU and ECHR Levels of Protection; P.S. Catalonia; Why Does it Take So Long for my Article to Be Published?' (2013) 24 *European Journal of International Law* 2, 471.
[118] Ibid.

where the CJEU only states that the interpretation of the Charter rights is in conformity with the ECHR and the case law of the ECtHR without any further explanation, in practical terms and from the perspective of the Member States, the references to the ECHR in the CJEU's case law are relevant since they show that the two systems are complementary (rather than in competition) and mutually-reinforcing. It is especially important that the national courts see that the approach is the same in Luxembourg and Strasbourg, since they have to ensure that their jurisprudence is in compliance with both. In case of doubt, national courts can always ask for a clarification. In my view, therefore, the references are valuable, but the Court should be more systematic and elaborate in this respect, especially in sensitive cases where it may not be so obvious or clear that its interpretation of the Charter is indeed in conformity with (the ECtHR's interpretation of) the ECHR (and hence that Article 52(3) of the Charter has been upheld). Only then does the cross-referencing have real value for all the actors involved.

The CJEU further clarified the interpretation of Article 52(3) in the judgments following Opinion 2/13.[119] In the *J.N.* case, for example, concerning the detention of asylum seekers in the context of their deportation for reasons of public order and safety, the CJEU ruled that it does not consider itself formally bound by the ECHR and the case law of the ECtHR when it interprets EU law. The Court went as far as to state that the validity review of EU secondary law 'must be undertaken solely in the light of the fundamental rights guaranteed by the Charter'.[120] This wording seems stronger than usual: a fundamental rights review *must* be undertaken *solely* in the light of the Charter. The Court also pointed out that Article 52(3) is intended to ensure the consistency between the rights contained in the Charter and the corresponding rights guaranteed by the ECHR, without thereby *adversely affecting the autonomy of EU law and that of the CJEU*.[121] While the latter can be generally regarded as a mere symbolic statement

[119] E.g. C-398/13 P *Inuit Tapiriit Kanatami and Others* v *Commission* [2015] EU:C:2015:535, para 46.
[120] Case C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 46. This case is discussed in detail in Chapter 7.
[121] Ibid, para 47. For the same expression see e.g. Case C-294/16 PPU, *JZ v Prokuratura Rejonowa Łódź — Śródmieście* [2016] ECLI:EU:C:2016:610, para 50.

written down in the Charter Explanations, the Court clearly used it in order to downplay the explicit wording of Article 52(3).[122] At the same time, the Court does follow the ECHR, so it is not entirely clear why it feels the need to emphasise the autonomy of EU law in this way and repeatedly state that it is not bound by the ECHR. Perhaps it is a way for the CJEU to take a stance against Strasbourg and, in this way, reserve the possibility to deviate in future cases. While doing that, however, the Court is also sending a message to the national courts about the separation and divide in European human rights law.

3.2. Jurisprudential Dialogue Luxembourg-Strasbourg

Even though the CJEU never formally recognised the ECHR and the ECtHR case law as binding upon the EU, it has referred to it regularly over the years. The first explicit mention of the case law of the Strasbourg court appeared in 1996 in the *P. v S.* case concerning equal treatment rights of transsexuals.[123] After that, the references to the ECHR and now also to the ECtHR's case law became routine in Luxembourg for many years. This development remains quite remarkable, given that the Luxembourg Court does not often cite the case law of other courts.[124]

The following discussion considers different instances in which the CJEU used the Convention standards, as interpreted and applied by the ECtHR, in order to solve cases in EU law and support and validate its reasoning and arguments. It did so in order to ensure common standards of human rights protection in the EU and to avoid conflicts with the ECtHR's jurisprudence.

3.2.1. Defining and Maintaining Common Standards

[122] See on this point J. Krommendijk, 'The CJEU's reliance on the case law of by the ECtHR since 2015: Opinion 2/13 as a game changer?' in E. Bribosia & I. Rorive (eds) *A Global and Multilayered Approach of Human Rights: Promises and Challenges* (Antwerp: Intersentia, 2018, forthcoming).
[123] Case C-13/94 *P. v S.* [1996] ECLI:EU:C:1996:170, para 16.
[124] F.G. Jacobs, 'The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union accession to the European Convention on Human Rights', in I. Pernice, J. Kokott and C. Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (Baden-Baden: Nomos Verlag, 2006).

An example that illustrates the CJEU's efforts to foster common standards and coherence with Strasbourg can be found in the *Kadi*[125] case. Mr Kadi, a Saudi resident, and the Al Barakaat International Foundation, both established in Sweden, brought actions for the annulment of Council Regulation 881/2002 before the Court of First Instance, claiming that the Council was not competent to adopt the Regulation and that it breached several of their fundamental rights, in particular the right to property and the rights of defence. Council Regulation 881/2002 had implemented the United Nations Security Council Resolutions 1267(1999) and 1390(2002) relating to the freezing of assets of certain persons and entities associated with the Al Qaida network. The Court of First Instance dismissed the case, taking the view that the Member States were required to comply with the Security Council resolutions under the terms of the Charter of the United Nations, which is an international Treaty and which prevails over EU law. Subsequently, Mr Kadi and Al Barakaat lodged appeals against those judgments before the CJEU. The CJEU set aside the judgments of the CFI, pointing out that EU judicial bodies are competent to conduct fundamental rights review of the validity of any act subject to its jurisdiction, regardless of the fact that it is an act implementing UN Security Council Resolutions.

Ultimately, the Court found that the appellants' rights of defence, in particular their right to be heard, as well as their right to property, were not respected. In the light of these breaches, the Court was prompted to annul Regulation 881/2002 to the extent that it concerns Mr Kadi and Al Barakaat. However, taking into account the fact that annulment with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures and that, furthermore, it cannot be ruled out that imposing such measures on the applicants may nonetheless prove to be justified, the Court maintained the effects of the Regulation for a period of three months, in order to allow the Council to remedy the infringements found. In its reasoning, the CJEU made a reference to the ECtHR's *Behrami* decision,[126] pointing out the distinction between the two cases, which ultimately led the two European courts to decide

[125] Case C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461.
[126] *Behrami and Behrami v France*, App no 71412/01 (ECtHR, 31 May 2007).

differently. In the *Behrami* case, the Strasbourg Court was asked to decide whether actions committed by the NATO Kosovo Force (KFOR) and the United Nations Mission in Kosovo (UNMIK) constituted violations of the Troop Contributing Nations' (TCN) obligations under the ECHR. The Court concluded that the alleged human rights violations were not attributable to the individual TCNs but to the United Nations (UN) and, hence, that the Court was not competent *ratione personae* to examine the relevant actions. The applications were declared inadmissible accordingly.

In *Kadi*, the CJEU clarified that the acts and omissions of the UN troops in *Behrami* could only be attributed to the UN because the Security Council retained ultimate control over them. The actions in *Kadi*, however, were not directly attributable to the Security Council and were therefore reviewable. The CJEU thus, being aware of the resemblance of *Behrami* in the *Kadi* case, and the fact that the two judgments may be perceived as conflicting, made an extra effort to explain (dedicating five paragraphs to it) that the two cases are in fact entirely consistent. The Court also made further references to the Strasbourg case law throughout the decision, including to the *Bosphorus* judgment.

In certain instances, the CJEU used the decision by the Strasbourg Court to define the level of protection of human rights in the EU. The *Baustahlgewerbe*[127] case serves as a good example. The European Commission had fined Baustahlgewerbe for breaching Article 101 TFEU, which prohibits restrictive agreements. On appeal to the CJEU Baustahlgewerbe complained that the duration of the proceedings before the Court of First Instance was excessively long and sought compensation. The Luxembourg Court defined the standard for the duration of proceedings according to Article 6 ECHR (the right to a fair trial) and, by analogy, to several Strasbourg decisions on the matter,[128] and subsequently examined in great detail whether the CFI had complied with that standard. The CJEU clearly relied on the Strasbourg case law for guidance and support in what became the decision in which the CJEU found a Community

[127] C-185/95 *Baustahlgewebe GmbH v Commission* [1998] ECLI:EU:C:1998:608.
[128] E.g. *Erkner and Hofauer v Austria*, App no 9616/81 (ECtHR, 23 April 1987), para 66.

violation of fundamental rights for the first time in history.[129] In this case, the ECHR standard concerning the duration of proceedings before the courts became the EU standard.

3.2.2. Avoiding Conflicts

In *Spain v United Kingdom*,[130] the CJEU was faced with an unusual action brought by Spain against the UK on the basis of Article 227 EC. Spain claimed that the UK's European Parliament (Representation) Act 2003 violated the EU's 1976 Act on Direct Elections, as it extended the right to vote in European elections to nationals of non-member countries resident in part of its European territory (Gibraltar). Interestingly, however, the reason the UK passed this Act was to comply with an earlier ECtHR judgment in *Matthews*, which was discussed earlier in this chapter and in which the Strasbourg Court held that the UK had breached Article 3 of Protocol No 1 to the ECHR by failing to organise European Parliament elections in Gibraltar.[131]

The CJEU held that neither the EC Treaty nor the 1976 Act defines precisely who is entitled to vote and to stand as a candidate in elections for the European Parliament. The decision on this matter thus falls within the competence of each Member State, acting in compliance with EU law. Consequently, the CJEU ruled that EU law does not preclude Member States from granting the right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory, especially if such an extension of the right to vote is required to fulfil obligations arising from the ECHR (contrary to the Opinion of the Advocate General Tizzano, who suggested that the Court should uphold Spain's claim about the extension of the right to vote in Gibraltar to 'qualifying Commonwealth citizens' who are not UK citizens).[132] The Court also noted that, while EU citizenship is the fundamental

[129] P. Alston and O. De Schutter, *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart Publishing, 2005).
[130] Case C-145/04 *Spain v United Kingdom* [2006] ECLI:EU:C:2006:543.
[131] This was in fact the very first decision by the ECtHR finding that a Member State of the EU had violated an ECHR right in an action that was a direct result of EU law.
[132] Opinion of AG Tizzano in Case C-145/04 *Spain v United Kingdom* [2006] ECLI:EU:C:2006:231.

status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law, irrespective of their nationality, subject to certain express exceptions, that does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union. Relying, inter alia, on the ECtHR's *Matthews* case, the CJEU concluded that the UK could not be blamed for its reaction to the conviction, and deemed Spain's action inadmissible. The CJEU thus went as far as to follow the ECtHR even when the provision of primary law in question was still in force.

3.3. Conclusion

The ECHR and the case law of the ECtHR have played a crucial role in the development of EU fundamental rights. The CJEU has shown its commitment to having regard for the Convention and to adhering to Strasbourg's interpretation when applying fundamental rights. It used both the Convention itself and the Strasbourg case law to define and further develop unwritten general principles of EU law and, occasionally, to set the standards of human rights protection in the EU. The Court also demonstrated a willingness to engage with the case law of the Strasbourg Court in order to avoid conflicting judgments.

As pointed out earlier, regularly referencing the ECtHR case law has the practical benefit of fostering common standards of human rights protection in Europe. This is especially important for the CJEU, given the well-known allegation that it has not been taking human rights seriously.[133] Following and taking into account the relevant case law from Strasbourg has markedly increased the quality of the judgments in Luxembourg. Moreover, both European Courts occasionally face challenges to their authority, particularly from the Member States, and conflicts between their perspectives only undermine their authority and legitimacy. Sometimes, the CJEU has referred to the ECtHR case law in order to support its own findings in sensitive or controversial cases. These include cases

[133] J. Coppel and A. O' Neill, 'The European Court of Justice: *Taking* Rights Seriously?' (1992) 29 *Common Market Law Review* 4, 669–692.

where the Court needed to strengthen its position vis-à-vis Member State courts or other EU institutions.

This referencing and mutual accommodation have thus been beneficial for avoiding conflicts; however, this practice started to diminish on the part of the CJEU, in particular since the EU Charter became legally binding, which resulted in the relationship between the two European Courts becoming strained and more complicated. The first point that comes to mind in this context is Opinion 2/13 on EU accession to the ECHR, but also the case law of the two Courts in several fields, which shows 'conflicting messages' being sent to the Member States from Strasbourg and Luxembourg, is relevant. This discussion is taken up again in Chapter 3.

4. The Status of EU and ECHR Law in National Law and the Role of National Courts

After having discussed the status of EU law in ECHR law, the status of the ECHR in EU law and the jurisprudential dialogue between the Strasbourg and Luxembourg Courts, this section examines (separately) the status of EU and ECHR law in national law and the national courts' case law. The examination will address selected constitutional experiences. The analysis does not examine the question of how national courts view the relationship between EU and ECHR law. This latter question is considered in Chapters 6 and 7.

4.1. The General Picture

The two traditional theoretical approaches to the relationship between the national and international law are monism and dualism. In countries that are monist, international treaties are automatically integrated into the national legal order. In dualist systems, national and international norms are separate, each regulating their own sphere of competence, and international norms become part of national law through a separate transposition act. Only after this incorporation, can the provisions of international law be relied upon in the national courts. In the EU, for instance, Ireland, Germany, Italy, Sweden, Denmark, and the United Kingdom can be considered dualist states. However, many national constitutions contain

both monist and dualist elements,[134] and this classification does not always correspond to the way international law is given effect in practice, especially with regard to EU and ECHR law.[135] France, for example, is a monist country and, pursuant to Article 55 of the French Constitution, ratified treaties have priority over domestic legislation but, because of the prohibition of the judicial review of statutes that already existed, Article 55 was not applied. On the other hand, the UK and Ireland are dualist countries, but the courts often use and refer to both the national implementing legislation and the ECHR itself in their fundamental rights decisions. Nevertheless, the discussion below will continue to refer to the distinction between monist and dualist systems when explaining the relationships from the national perspective, using a few examples from each group, since the monist and dualist nature of the legal system still largely determines the way in which international treaties are applied domestically.

There are important differences between the Member States as to the status of EU and ECHR law in the national legal order. Some countries reserve a special status for EU law and other countries do so for international human rights treaties, distinguishing them from other international law. Italy, for example, provides for a special status to EU law in Article 117 of the Constitution which states: '[l]egislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations', thus making a distinction between EU law and other international law. There is no similar provision for the ECHR in the Italian Constitution but the *Corte Costituzionale* has ruled that the ECHR is situated somewhere between ordinary laws and the Constitution.[136] Spain (Article 10), Portugal (Article 16) and Romania (Article 20) are among the countries that give constitutional status to human rights treaties in their national legal order. Spain does not have a similar provision for EU law; in fact it only contains a generic transfer of powers clause in Article 93, but the Portuguese and Romanian Constitutions also contain provisions

[134] A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007).
[135] H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2009). More recently, see, P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016).
[136] Italian Constitutional Court, Decisions nos. 348/2007 and 349/2007.

devoted to EU law (Articles 8 and 148 respectively), thus also giving it a special status.

The Netherlands is special in this respect, because both EU law and the ECHR have a special status and primacy over national law, including over national constitutional law. Article 94 of the Dutch Constitution provides that statutory regulations – including Acts of Parliament – shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons. The ECHR and all the ratified Protocols are considered by the courts to be 'binding on all persons' within the meaning of Articles 94 of the Constitution. The same applies to EU law, although more recently the Dutch courts have developed a doctrine according to which EU law was said to have primacy because the EU Treaties require it and not by virtue of the constitutions of the Member States.[137] This is contested by those who argue that, logically, EU law has primacy in the domestic legal order because the Dutch courts recognise such primacy based on the Dutch Constitution and not (only) because the CJEU requires it based on the Treaties.[138] Be that as it may, the Dutch courts are required to interpret and apply national law in light of the international legal obligations and they use different techniques to avoid conflicts; when avoiding conflict is not possible, Dutch courts may disapply and declare non-binding the provision of national law in order to ensure that supremacy is given to the rule of international law. This practice, however, only applies in cases of conflicts with international law, since Article 120 of the *Grondwet* stipulates, somewhat paradoxically, that the constitutionality of Acts of Parliament shall not be reviewed by the courts. Accordingly, Acts of Parliament cannot be reviewed in light of the rights contained in the Constitution, but they can be reviewed in light of the rights found in international treaties.

[137] J. Fleuren, 'The Application of Public International Law by Dutch Courts' (2010) *Netherlands International Law Review* 57, 245; L.F.M. Besselink, 'The Proliferation of Constitutional Law and Constitutional Adjudication, or How America Judicial Review Came to Europe After All' (2013) 9 *Utrecht Law Review* 2, 19.
[138] L.F.M. Besselink, 'The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All' (2013) 9 *Utrecht Law Review* 2, 19.

Belgium is similar in the sense that both EU and ECHR law have a super-legislative rank, but the underlying structure is different.[139]

Dualist countries, such as the UK and Ireland, have a completely different approach to international law. In the UK, international law and treaties have no immediate application domestically, even though they are binding upon the State itself in international law. This is due to its dualist nature and the doctrine of parliamentary sovereignty, according to which a valid Act of Parliament cannot in principle be questioned by the courts. Both EU law and the ECHR have been given effect in national law by an Act of Parliament, the 1972 European Communities Act and the 1998 Human Rights Acts, respectively. Even though they do not operate in the same way, both EU and ECHR law have had an extensive influence on the UK's Constitution and have somewhat diluted the traditional dualist orthodoxy and the parliamentary sovereignty doctrine.[140] In Ireland, the ECHR was incorporated into national law through the Irish ECHR Act only in 2003, given the fact that Ireland has its own Bill of Rights and a strong judicial review of legislation and therefore the incorporation of the ECHR was not considered urgent. Thus, in both the UK and Ireland, the ECHR has been incorporated through an Act of Parliament and thus applies only indirectly. Nevertheless, as will be addressed in Chapter 7, the ECHR is also sometimes directly applied in both the UK and Ireland. Germany and Italy could be said to belong to the same group as the UK and Ireland with regard to the formal status of the ECHR in the domestic legal order, but the constitutional courts in those countries have accorded it a special place in the hierarchy of domestic legal sources in comparison to other international law.[141] Concerning EU law, both Italy and especially Germany have

[139] See e.g. P. Popelier, 'Report on Belgium' in G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws* (Groningen, Europa Law Publishers, 2010) 81–99. For a more recent report in relation to the ECHR specifically see P. Popelier, 'Belgium: Faithful, Obedient, and Just a Little Irritated' in P. Popelier, S. Lambrecht. & K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016) 103-129.

[140] K. S. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Oxford: Hart Publishing, 2015); R. Masterman, 'The United Kingdom' in J. Gerards and J. Fleuren (eds) *Implementation of the European Convention on Human Rights and the judgments of the ECtHR in national case-law* (Antwerp: Intersentia, 2014).

[141] See order 2 BvR no 1481/04 and *Corte Costituzionale*, judgments nos 348 and 349/2007.

set express limits to EU integration and their constitutional courts do not accept unconditional primacy of EU law.[142]

In spite of all the differences outlined above, the national courts[143] in most Member States give a special status to ECHR law either because it is prescribed in the constitution or because of its nature and the way it is embedded in the national legal systems. As for EU law, national courts generally accept the primacy and direct effect of EU law and apply EU law uniformly in all jurisdictions, even though the acceptance of primacy is not unconditional in most states.

4.2. The Status of the ECHR in National Law

4.2.1. The ECHR Perspective

The ECHR does not require any specific mode of incorporation of the Convention into the national legal systems and some states even refused the incorporation of the Convention in the early years of its ratification.[144] Unlike the EU, the ECtHR does not have a doctrine of primacy and direct effect and it has never directly imposed the application of ECHR law on the national courts. Even though Article 13 ECHR provides that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity', the Strasbourg court initially refused to interpret this provision as mandating the direct enforceability of the ECHR or judicial remedies. In the case of *James and Others v United Kingdom* the Court held:

[142] See the *Solange* line of cases of the German Constitutional Court and the contralimiti case law of the Italian Constitutional Court. BVerfGE 37, 271; 336 BVerfGE 73, 339'; 337 BVerfGE 89, 155; 338 BVerfGE 102, 147. For a discussion see, for example, A. von Bogdandy and S. Schill, 'Overcorning Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417.

[143] By national courts, I primarily refer to ordinary national courts as they are responsible for the day-to-day application of EU law, but a reference may also be made, where relevant, to national constitutional courts.

[144] Until the 1980s, the French authorities denied the ECHR any legal status domestically.

> The Convention is not part of the domestic law of the United Kingdom, nor does there exist any constitutional procedure permitting the validity of laws to be challenged for non-observance of fundamental rights. There thus was, and could be, no domestic remedy in respect of the applicants' complaint that the [contested] legislation itself does not measure up to the standards of the Convention and its Protocols. The Court, however, concurs with the Commission that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms.[145]

The Strasbourg system does not provide a clear mandate for the national courts as to their duties under the ECHR: there is no direct effect or primacy doctrine in ECHR law. Nevertheless, the obligation for applicants to exhaust domestic remedies under Article 35(1) ECHR presumes that national courts at all levels are structurally involved in the process. This further follows from Article 53 of the Convention as well from a number of principles and rules of interpretation developed by the ECtHR – in particular the principle of subsidiarity and the margin of appreciation – which reaffirm the key role of the national courts in interpreting and giving effect to the rights guaranteed in the Convention.

However, over the past decade, more of an emphasis has been put on the application of the ECHR by domestic authorities and on making Convention rights effective domestically. In the case of *Wagner and J.M.W.L. v Luxembourg*, the ECtHR imposed a general obligation on national courts to examine alleged violations of Convention rights with 'particular rigour and care' and to ensure their full effect in the domestic legal order.[146] These changes of tone in the Strasbourg case law have implied a shift from an exclusively subsidiary role as 'secondary guarantor of human rights' in individual cases to a more central and crucial position as a constitutional adjudicator.[147] Therefore, even though the ECHR

[145] *James and Others v UK* App no 8793/79 (ECtHR, 21 February 1986), para 85.
[146] See e.g. *Wagner and J.M.W.L. v Luxembourg*, App no 76240/01 (ECtHR 28 June 2007), para 96 and *Fabris v France*, App no 16574/08 (ECtHR, 7 February 2013), para 72.
[147] G. Martinico and O. Pollicino, *The Interaction between Europe's Legal Systems Judicial Dialogue and the Creation of Supranational Laws* (London: Edward Elgar Publishing, 2012), 240.

system does not have a doctrine of direct effect and of primacy, in may have similar effects in practice.[148]

Concerning compliance with the Strasbourg Court's judgment, the Contracting States only have an *obligation de résultat*.[149] For example, a state that has infringed Convention rights can either change the legislation causing the breach or it can simply change the interpretation of the relevant legislation. States are also not required to reopen the proceedings domestically to revise the domestic judgment that was challenged in Strasbourg; a revision is recommended but it is not mandated under the Convention system. In that sense, the Member States have much more leeway as to how they comply with their ECHR obligations in comparison to the EU legal system. Furthermore, there is no preliminary reference procedure as of yet in the ECHR system but Protocol No 16 to the ECHR will offer a similar mechanism when it enters into force on 1 August 2018.[150] Nevertheless, there are some crucial differences between the two mechanisms: the advisory opinion under Protocol No 16 will be available only to the highest courts and tribunals of a Contracting Party; the decision to refer questions to the ECtHR will be entirely voluntary and at the discretion of the national court; and the advisory opinion issued in Strasbourg will not be formally binding on the national authorities.[151] The envisaged procedure thus has a different legal structure from the preliminary reference procedure in EU law and, importantly, it will be up to the national authorities to decide on how to implement the opinions issued in Strasbourg.

At the same time, however, there are also notable gradual changes in the ECtHR's jurisprudence which have resulted in the impact of its judgments in the

[148] This claim is supported in a number of recent comparative studies. See G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen: Europa Law Publishing, 2010); H. Keller and A. Stone Sweet (eds) *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press, 2012).
[149] *Swedish Engine Drivers v Sweden*, App no 5614/72 (ECtHR, 6 February 1976).
[150] The threshold (ten states) has been reached with the French ratification. The states that have ratified the Protocol are: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine.
[151] For a critical assessment of the mechanism see J. Gerards, 'Advisory Opinions, Preliminary Rulings, and the New Protocol No. 16 to the European Convention of Human Rights, a Comparative and Critical Appraisal' (2014) 21 *Maastricht Journal of European and Comparative Law* 4.

domestic legal orders becoming more direct. Several factors of change can be identified.[152] First of all, more recent judgments of the Strasbourg court leave the states with fewer options to remedy the violations, other than amending or annulling the legislation. Furthermore, certain countries have introduced a new procedure before domestic courts that allows the reopening of the case and a revision of the judgment deemed contrary to the Convention by the Strasbourg court. This, again, may have an invalidating effect in practice. Secondly, the mechanisms available for the enforcement of the ECtHR's judgments have changed. Generally, the Committee of Ministers[153] is in charge of monitoring the executing of the Court's judgments and it can use different political means to pressure states in the case of non-compliance. Since the entry into force of Protocol No 14, however, it can also start an infringement procedure against a state for failing to fulfil its obligations under Article 1 of the ECHR.[154] The Strasbourg court has also adopted measures to enhance the enforcement of its decisions, on the recommendation of the Committee of Ministers, such as introducing the so-called pilot judgments. Adopted to combat repetitive claims from a number of Contracting Parties that face structural difficulties in complying with the ECHR, pilot judgments contain specific instructions for the states as to the way in which the violations can be remedied. The change in approach is also evident outside of the pilot judgments: the Court has become much more specific in its decisions, going far beyond the usual declaratory judgments, indicating specific individual and general measures, thereby limiting the choice of means that states usually have to remedy the infringement.[155] The judgments are thus written in a way which implies an *erga omnes* effect, rather than being binding only on the state against which the judgment has been rendered. Indeed, one of the objectives stated in the Action Plan adopted during the Interlaken Conference

[152] S. Besson, 'European human rights, supranational judicial review and democracy. Thinking outside the judicial box', in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds) *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp: Intersentia, 2011).
[153] The executive organ of the Council of Europe.
[154] Protocol No14 to the Convention for the Protection of Human Rights and. Fundamental Freedoms, amending the control system of the Convention, 13 May 2004.
[155] H. Keller and C. Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments (2015) 26 *European Journal of International Law* 4, 829-850.

on the Reform of the Court was to generalise the *erga omnes* effect of all judgments of the Court in all Contracting States.[156]

4.2.2. The National Perspective

The ECHR system is subsidiary to the domestic systems and becomes operational only when all domestic remedies have been exhausted.[157] In this respect, thus, it differs greatly from the EU legal system. Nevertheless, the ECHR is deeply rooted in the legal orders of the EU Member States and important areas of national law have changed as a result of it. This is due to the specificities of the ECHR system, in particular the individual complaint mechanism which allows individuals to bring a complaint against their own state.[158] The status of the ECHR varies between the Contracting Parties but the countries can roughly be put into three groups: (1) countries that accord the ECHR constitutional and even supra-constitutional status; (2) countries in which the ECHR has a quasi-constitutional rank (superior to domestic legislation but below the Constitution); and (3) countries that give the ECHR at least the status of ordinary legislation.

The first group refers mainly to monist countries, such as Belgium, France and the Netherlands, in which the ECHR is superior to national law and national courts are competent to give direct effect to the ECHR provisions.[159] The Netherlands and Belgium give priority to the ECHR even above the Constitution, when necessary to avoid violations of the Convention rights.[160] The Netherlands is probably the most extreme example: the ECHR is a substitute for constitutional

[156] Interlaken Conference on the Reform of the European Court of Human Rights, 19 February 2010.
[157] Article 35 ECHR.
[158] On the national level, similar mechanisms exist in Germany (the *Verfassungsbeschwerde*) and Spain (the *recurso de amparo*).
[159] This, however, may affect the balance and create competition between ordinary courts and the constitutional court. The constitutional legislature in France and Belgium has sought to (re-)establish the superiority of the constitutional court in those countries, by introducing a system of obligatory preliminary reference to the constitutional court, where an alleged breach of fundamental rights concerns at the same time both overlapping human rights bills, the ECHR and the national constitution.
[160] J. Gerards and J. Fleuren (eds) *Implementation of the ECHR and the case law of the European Court of Human Rights in National Case Law. A Comparative Analysis* (Antwerp: Intersentia, 2014).

review of primary legislation, which is explicitly forbidden in the Constitution, and the ECHR outranks national law, including the national Constitution. It is therefore not surprising that Dutch judges seem to be more familiar with ECHR rights than the rights contained in the Dutch Constitution.[161] In Belgium, both the *Hof van Cassatie* (the highest court in civil and criminal matters) and *Raad van State* (the highest court in administrative cases) accept the primacy of EU and ECHR law.[162] The Belgian Constitutional Court takes a more balanced view, considering international treaties as being inferior in rank to the Constitution, since under Article 167 of the Constitution they require legislative approval, which is then subject to constitutional review. Notwithstanding this attitude, the ECHR takes a prominent place in the case law of the Belgian Constitutional Court, even more so than in the case law of *Hof van Cassatie*, for example, and the Constitutional Court devotedly and consistently takes the ECtHR's case law into account. Interestingly, the Belgian Constitutional Court often refers to multiple judgments of the ECtHR in its decisions, at times quoting more than fifteen Strasbourg judgments in one single decision.[163] In France, the Council of State ruled that 'the superiority conferred upon international agreements by Article 55 of the French Constitution does not, in the internal legal order, apply to provisions of a constitutional nature'.[164] The position of the French Court of Cassation is the same.[165] Uniquely, in Austria (which is a dualist country), the ECHR (as well as most of its Protocols) was incorporated into the Federal Constitutional Law already in 1964 through a federal constitutional amendment, which means that it enjoys constitutional status.[166] The Austrian Constitutional Court has stressed, however, that the case

[161] J. Gerards, 'The Netherlands: Political Dynamics, Institutional Robustness' in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016) 327.
[162] Cass. 16 November 2004 [2005] *Chroniques de Droit Public* 610; Cass. 9 November 2006 [2005] *Chroniques de Droit Public* 597.
[163] P. Popelier, 'Belgium: Faithful, Obedient, and Just a Little Irritated', in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 103-129.
[164] CE, ass., 30 October 1998.
[165] *Sarran, Levacher et autres* Cass., Ass. Plen., 2 June 2000.
[166] BVG BGBl Nr 59/1964. For further details see A. Gamper, 'Austria: Endorsing the Convention System, Endorsing the Constitution', in Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 75.

law of the ECtHR could be disregarded if it would be in violation of the Constitution.[167]

Other dualist systems have incorporated the ECHR either through a statute or a decision of a supreme or constitutional court. These are mainly countries that belong to the second group referred to above, such as Germany and Italy. In Germany, a federal law adopted by the German Parliament on 7 August 1952 introduced the ECHR into the domestic legal order.[168] This means that the ECHR has the rank of an ordinary federal law[169] and, as such, has priority over ordinary statute law, but not over constitutional law. Over time, however, the ECHR acquired a quasi-constitutional rank through the case law of the *Bundesverfassungsgericht*. In the *Görgülü* case, the *Bundesverfassungsgericht* held:

> The guarantees of the Convention influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law.[170]

The German Constitutional Court thus ruled that national courts are required to interpret national constitutional rights in conformity with the ECHR and the relevant case law of the ECtHR.[171] At the same time, it also clarified that a Convention right cannot be applied to a case if the application would result in limiting or derogating from the level of protection provided under the Basic Law (and other human rights instruments).[172] Similarly, in Italy the ECHR was considered statutory legislation for a long time, albeit with some exceptions, until

[167] Austrian Constitutional Court, *Miltner*, VfSlg 11500/1987.
[168] Act of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*) BGBl. 1952 Teil II S. 685.
[169] Article 59 (2) of the German Constitution.
[170] BVerfGE 11, 307 *Görgülü*.
[171] BVerfGE 111, 307 (317, 324).
[172] BVerfGE 111, 307 (317); 128, 326 (371); 131, 268 (295). This is also reflected in Article 53 of the ECHR.

the Italian *Corte Costituzionale* decided to revisit its position. In its 2007 landmark decisions,[173] the Italian Constitutional Court held that the ECHR has supra-legislative status (*norma interposta*): it has a privileged position in comparison to ordinary law but it still must abide by all constitutional norms.

The third group of countries refers to those states that have given the ECHR at least a status of ordinary law. This is true for the UK and Ireland and for the Scandinavian countries. In the UK, the Human Rights Act (HRA) provides that primary and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights, and attention has to be given to the case law of the Strasbourg Court.[174] In the pre-incorporation period (1973-2000), the UK's membership in the EU played a role in the reception of the Convention in the UK.[175] If an ECHR right was recognised (by the CJEU) as being part of EU law, it had to be enforced in the UK courts in relation to EU matters. In this way, Convention rights became part of UK law even before the HRA 'through the back door'.[176] In Ireland, Convention rights function as a supplement to its strong constitutional rights tradition and the highly effective domestic system of human rights protection.

National courts in some Member States already see themselves as 'ECHR courts' and have jurisdiction under national law to review the compatibility of national law with the ECHR, and they can set it aside in case of incompatibility (e.g. the Netherlands, Belgium, France). In Germany, as explained above, national courts are required to interpret national constitutional rights in conformity with the ECHR, but ECHR rights cannot be applied to a case if the application would result in limiting or derogating from the level of protection provided under the Basic Law and other international human rights instruments. In the UK, the situation is more complex. National courts are competent to apply provisions of

[173] Italian Constitutional Court, Decisions nos. 348/2007 and 349/2007.
[174] Section 2 HRA provides: '[a] court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights'.
[175] S. Besson, 'The Reception Process in Ireland and the United Kingdom', in H. Keller and A. Stone-Sweet (eds) *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2012).
[176] In the words of Lord Slynn, a former UK judge at the CJEU. See House of Lords Debate, 26 November 1992, col. 1095.

the ECHR and are under a statutory obligation to seek a treaty-consistent interpretation,[177] but they are not permitted to resolve conflicts between primary legislation and the ECHR. In such cases, they may issue a 'declaration of incompatibility' or signal to Parliament that it should consider amending the legislation. Lord Bingham stated in *Ullah* that 'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[178] However, the duty of national courts in the context of the ECHR has also been expressed in different terms by Lord Phillips:

> The requirement to 'take into account' the Strasbourg jurisprudence will normally result in [the Supreme Court] applying principles that are clearly established by the Strasbourg Court. There will however be rare occasions where [the Supreme Court] has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In those circumstances it is open to [the Supreme Court] to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between [the Supreme Court] and the Strasbourg Court.[179]

More recently, however, Lord Mance stated:

> It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.[180]

Generally, the attitude in the UK seems to be that national courts try to ensure consistency with international law and the Human Rights Act is no exception to

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[177] Pursuant to section 2(I) courts and tribunals are required to take into account the jurisprudence of the ECtHR when deciding cases that relate to the rights under the ECHR. Section 3 (I) requires primary and subordinate legislation to be interpreted in a way which is compatible with Convention rights, 'as far as possible'.
[178] *R (Ullah) v Special Adjudicator* [2004] INLR 381.
[179] *R v Horncastle & Others* [2009] UKSC 14. For scholarly literature on this point see e.g. E. Bjorge,' National supreme courts and the development of ECHR rights' (2001) 9 *International Journal of Constitutional Law* 1, 5-31; B. Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 *Human Rights Law Review* 65.
[180] *Chester* [2013] UKSC 63, para 27.

this. They also tend to accept the authority of the Strasbourg court in interpreting the Convention in the majority of the cases.

In conclusion, it could be said that the ECHR has become the law of the land in almost all contracting parties and the level of 'embeddedness'[181] in domestic legal systems is, by and large, especially in the EU Member States, very high, regardless of the system being predominantly monist or dualist – and notwithstanding the fact that it operates, unlike EU law, in the absence of the doctrines of primacy and direct effect. According to Gerards and Fleuren, it is incorrect to think that monist states, such as the Netherlands, France or Belgium, are more compliant with the ECHR than dualist states such as the United Kingdom; the Convention and the judgments of the Strasbourg Court have equal importance for national fundamental rights in dualist states.[182]

4.3. The Status of EU Law in National Law

The status of EU law in national law has been discussed extensively in the literature.[183] The discussion below is therefore brief and concerns only the most important points.

4.3.1. The EU Law Perspective

In contrast to the ECHR system and the approach of the ECtHR, the CJEU developed the doctrine of primacy and direct effect almost from the beginning.[184] Formulated in *Costa v ENEL*,[185] the principle of primacy means that EU law 'cannot

[181] L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *The European Journal of International Law* 1, 125.
[182] J. Gerards and J. Fleuren (eds) *Implementation of the ECHR and the case law of the European Court of Human Rights in National Case Law. A Comparative Analysis* (Antwerp: Intersentia, 2014).
[183] See, among many, M. Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union' (2016) 23 *Maastricht Journal of European and Comparative Law* 1; M. Claes, 'The Primacy of EU Law in European and National Law' in D. Chalmers and A. Arnull, *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015).
[184] For a general introduction to the principles of direct effect and primacy, see e.g. A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Oxford: Hart Publishing, 2018).
[185] Case 6/64, *Costa v ENEL* [1964] ECLI:EU:C:1964:66.

be overridden by domestic legal provisions, however framed'. The Court clarified in *Internationale Handelsgesellschaft* that EU law takes precedence over all forms of national law, including national constitutional law.[186] The principle was further elaborated in the *Simmenthal* case,[187] in which the CJEU concluded that EU law would also take precedence over national legislation which was adopted after the passage of the relevant EU norms. It held that 'every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule'.[188] Naturally, the same principles apply to EU fundamental rights law.

Using the doctrines of direct effect and primacy, the CJEU formulated an EU mandate for national judges.[189] As a part of this mandate, national judges are under an obligation to apply EU law and, after the Treaty of Lisbon, to do so in light of the EU Charter of Fundamental Rights. Sometimes they are required to request a preliminary ruling from the CJEU in accordance with Article 267 TFEU, which 'highlights the role of the national judge as the EU judge'.[190] They are also required to enforce the CJEU decisions. In that sense, as indicated earlier, the relationship between the CJEU and national courts is very different from the relationship between national courts and the ECtHR.

4.3.2. The National Perspective

The primacy and direct effect of EU law has in principle been accepted by the national authorities and courts, but there is still resistance in some countries, especially in the field of EU fundamental rights, which is why it is interesting to consider this question. Some states provide for the unconditional acceptance of EU law in their constitutions (e.g. the Netherlands and Belgium), while other states set explicit limits on their acceptance in cases when certain core elements of the

[186] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114.
[187] Case 106/77*, Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49.
[188] Case 106/77*, Simmenthal SpA* [1978] ECLI:EU:C:1978, para 21.
[189] M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart Publishing, 2006).
[190] A. Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 *Jurisprudence* 4, 1269, 1274.

national constitution are at stake (e.g. Italy, Germany and Ireland).[191] Nevertheless, these limits are reserved for exceptional cases of manifest infringements of fundamental rights or other elements of constitutional identity. Some Member States have adapted their constitutions prior to accession in order to remove any constitutional limits to integration, such as in Ireland.[192] In the UK, the major problem was the perceived irreconcilability of its traditional doctrine of parliamentary sovereignty and the primacy of EU law. Over time, however, the doctrines of the supremacy and direct effect of EU law were gradually recognised as having been incorporated into the UK national law through the European Communities Act 1972.[193]

All national courts are thus EU courts: they are 'the common courts of EU law' and as such are part of the EU judicial system. Article 19 TEU, as amended by the Treaty of Lisbon, reminds us of the role of national courts by instructing the Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. This obligation follows from EU law but also from the case law of the CJEU. In order to become EU courts, national judges have employed a variety of techniques to accommodate the primacy and direct effect of EU law and thus also of the Charter.[194]

While national courts generally do act as EU courts, they also sometimes struggle with the application of EU law, including the Charter. This is particularly

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[191] For Italy see *Frontini v Ministero delle Finanze*, Constitutional Court, Case No. 183/73, 27 December 1973; *Fragd v Amministrazione delle Finanze dello Stato*, Constitutional Court, Case No. 232/1989, 21 April 1989; for Germany see *Wünsche Handelsgesellschaft* (Solange II), Federal Constitutional Court, Case No. 2 BvR 197/83, 22 October 1986; Maastricht Treaty 1992 Constitutionality Case, Federal Constitutional Court, Case Nos 2 BvR 2134 and 2159/92, 12 October 1993; and for Ireland see *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan*, Supreme Court, 19 December 1989, and *Attorney General v X*, 5 March 1992.

[192] The Third Amendment of the Constitution Act, 1972. According to Article 29(4) 'no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Communities or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities, or institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State'

[193] *Factortame Ltd. v Sectary of State for Transport* [1991] 1 AC 603, 658.

[194] Only some Member States accept absolute primacy. In most Member States, constitutional and other highest courts do not fully accept the primacy of EU law and insist on placing the fundamental structures and values of national constitutional orders beyond the reach of European integration. For a discussion see A. Von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417, 1435-1436.

true for Austria, where ordinary courts do not normally deal with fundamental rights questions. If they doubt the compatibility of national law with constitutional rights or the ECHR, ordinary courts have to refer the matter to the Constitutional Court. Now, with the application of the Charter, ordinary courts in Austria have suddenly become human rights courts too, without having had this competence previously, which has led to competition between ordinary courts and the Constitutional Court. The Constitutional Court initially adopted the same approach with regard to incompatibility between national legislation and the EU Charter.[195] But the Charter is also EU law, which means that also ordinary courts are required to apply the Charter. It is not surprising that the CJEU did not accept the distinction made by the Austrian Constitutional Court between EU law and the Charter and, in a rather unusual case of *A v B and Others*,[196] – which dealt, inter alia, with the role (and duty) of the national court when faced with national legislation which seemed incompatible with EU law – it ruled that Article 267 TFEU precludes national law under which ordinary courts, if they consider a national statute to be contrary to the Charter, would not be able to refrain from applying that statute and would have to apply to the Constitutional Court for that statute to be struck down. In other words, an obligation to first make a reference to the Constitutional Court violates EU law since national courts must remain free to disapply a national provision which they consider it to be contrary to EU law and to make a reference to the CJEU in that regard. This has, of course, significantly impacted the way in which the Austrian legal system has always functioned and has caused issues to arise between ordinary courts and the Constitutional Court. It is not entirely clear whether the approach has fully changed in the practice of

[195] *Verfassungsgerichtshof* Judgment U 466/11 of 14 March 2012. The Austrian Constitutional Court went as far as to say that, in situations in which a right guaranteed by the Austrian Constitution has the same scope as a right guaranteed by the Charter, it is not necessary to make a request for a preliminary ruling under Article 267 TFEU, because the interpretation of the Charter would not be relevant for the purposes of ruling on an application for a statute to be struck down, that being a decision which may be given on the basis of rights guaranteed by the Austrian Constitution.

[196] C-112/13 *A v B and Others* [2014] ECLI:EU:C:2014:2195. The referring court – *Oberlandesgericht Wien* (Higher Regional Court, Vienna) asked whether EU law and, in particular, Article 267 TFEU precludes rules of national law, such as those at issue in the main proceedings, under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they find that a national statute is contrary to Article 47 of the Charter, to apply, in the course of the proceedings, to the constitutional court for that statute to be generally struck down and may not simply refrain from applying that statute in the case before them.

Austrian courts following the judgment of the CJEU, but it illustrates the struggle in some countries at least with the application of EU law and – perhaps especially – the Charter. In most countries, however, the Charter is viewed as EU law and there are no particular issues in that respect.

5. Final Conclusion

The relationship between EU and ECHR law and the two European Courts is much more closely knit than the relationship between other sources of international law or international courts.[197] The first part of the analysis has shown that the ECtHR already has jurisdiction to review a large portion of EU law and the cases decided by the CJEU. The only cases that are not admissible in Strasbourg are those involving direct actions by the EU institutions, as seen in *Connolly*. The Strasbourg Court has, however, limited its own competence to review EU law by introducing the *Bosphorus* presumption of equivalent protection. It has done so in cases that involve directly applicable acts of EU law that leave no discretion for the Member States and where the enforcement mechanism through the CJEU can be employed, thus showing confidence in and trust towards EU fundamental rights standards and the CJEU as its guarantor.

The CJEU and the ECtHR have been engaging in various types of judicial dialogue over the years, most notably by citing each other's case law. The case law analysis has demonstrated the mutual influence and the tendency, on both sides, to avoid conflicts in the form of divergent interpretations in application of fundamental rights. While the Courts have done a good job overall, the risk of divergences continues to exist because of the lack of a formal mechanism between the Strasbourg and Luxembourg Courts, and the more recent developments have borne this out (discussed in the next chapter).

At the same time, EU fundamental rights law and the ECHR, as well as the case law of the two European Courts, play an important role in the national legal systems and protection of fundamental rights domestically. The legal rank of the

[197] For the comparison between the relationship CJEU-ECtHR and CJEU and other international courts see T. Lock, *The European Court of Justice and International Courts* (Oxford: Oxford University Press, 2015).

two supranational sources of fundamental rights may be different in different Member States, but most, if not all, EU States and their courts pay due regard to the case law of the CJEU and ECtHR and interpret domestic fundamental rights in light of it in order to guarantee respect for their supranational obligations and avoid conflicts.

The relationship between national courts and the CJEU on the one hand and national courts and the ECtHR on the other has been very different, however. The former relationship is characterised by obligations imposed on the national courts as to their duties in the context of EU law, while the latter is characterised by the subsidiary nature of the system. The CJEU developed an EU mandate for national courts based on the doctrines of direct effect and primacy, which directly involves them in the application and enforcement of EU law. The national courts engage in direct dialogue with the CJEU, given that there is a specific procedure for this, although this is not the case for all courts in all Member States and for courts at all levels. Some courts are more willing to engage and refer questions for a preliminary ruling, while other national courts are more hesitant or even make a conscious decision not to. By contrast, the ECtHR does not (yet) have a mechanism in place for a direct dialogue with national courts. It also does not impose obligations on national courts directly but rather on the Contracting States. Fairly recently, however, the Strasbourg Court started to intervene more in domestic systems, gradually developing what could be called an ECHR mandate for national courts. But it has also made efforts to build the relationship with domestic courts indirectly.[198] Notwithstanding the obvious differences in the relationships, the national courts have become involved with both EU and ECHR law and apply them regularly, sometimes even routinely. But, as pointed out earlier, EU law and the ECHR may not always require the same level of fundamental rights protection and national authorities, and in particular national courts, might find themselves caught in the middle. Understanding how national courts perceive their obligations vis-à-vis EU law and the ECHR allows us to

[198] This is for example exemplified in yearly judicial seminars. The focus of the seminar in 2012 was on the greater involvement of national courts in the Convention system and in 2014 on shared judicial responsibility. The mission is very much on the involvement of national courts.

understand better why and how they get caught between the different – and sometimes also conflicting – obligations.

Chapter 3: Convergence and Conflicts in European Fundamental Rights Standards

1 Introduction

The ECtHR and the CJEU do not perform the same role in their respective systems. The ECtHR has always been a specialised court concerned only with compliance with the common minimum standard of human rights protection, while this has been very different for the CJEU, whose role as a human rights adjudicator developed over time.[1] The ECtHR is also not embedded in a polity in the way the CJEU is. The CJEU is part of a much more sophisticated institutional environment operating both in the vertical context of the EU and the Member States and horizontally between the EU institutions. The ECtHR is an external supervisor, placed completely outside the relationships of the various legal orders.[2] This is also the explanation, at least in part, for the structural differences in the approaches, tools and methods adopted by the Strasbourg and Luxembourg Courts.

But while the EU was always about market integration, the internal market legislation was never only concerned with market objectives.[3] Moreover, the landscape in the EU has been changing over the past years and so has the role of the CJEU therein. It could even be argued that, along the way, economic integration became the means to achieve greater objectives and protect European

[1] B. De Witte, 'The Past and Future Role of the European Court of justice in the protection of Human Rights', in Alston Philip, M. Bustelo and J. Heenan (eds), *The EU and Human Rights* (Oxford, Oxford University Press, 1999), 859; J. Gerards, 'Who Decides on Fundamental Rights Issues in Europe? Towards a Mechanism to Coordinate the Roles and the National Courts, the ECJ and the ECtHR', in S. de Vries, U. Bernitz and S. Weatherill, *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing, 2015) 47.

[2] The ECtHR has sometimes been referred to as the court of the people. See e.g. M. Goldhaber, *A People's History of the European Court of Human Rights* (New Brunswick, NJ: Rutgers University Press, 2009).

[3] B. De Witte, 'A Competence to Protect: The Pursuit of Non-market Aims through Internal Market Legislation' in P. Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: Cambridge University Press, 2011). See also V. Kosta, *Fundamental Rights in EU Internal Market Legislation* (Oxford: Hart Publishing, 2015).

values, including fundamental rights. In that sense, the CJEU has also become a fundamental rights court, although this is obviously not its only or even primary function.[4]

Given the increasing involvement of the EU and hence the CJEU in fundamental rights, and the fact that all EU Member States are also parties to the ECHR and therefore under the duty to secure Convention rights within their jurisdictions, one could say that divergences and conflicts are inherent in the European fundamental rights landscape. While there are many examples of convergence between Strasbourg and Luxembourg, as seen in Chapter 2, there are also examples of divergent and sometimes also conflicting decisions.

It is important to emphasise again that divergences (both conceptual and explicit) in the protection of fundamental rights by the CJEU and the ECtHR are not always problematic and will not necessarily result in a conflict; on the contrary, they can be a source of mutual influence, enrichment and cross-fertilization.[5] However, if the EU standard of fundamental rights protection would fall below the ECHR minimum standard, as interpreted in the case law of the ECtHR, Member States would be facing conflicting treaty obligations, since they would be required to comply with their EU law obligations and, at the same time, to ensure that the ECHR minimum standards, as determined by the ECtHR, are respected.

From the general perspective of coherence, valued for its connection to legal certainty and equal treatment of all legal subjects, divergences may not be

[4] G. De Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?' (2013) *Maastricht Journal of European and Comparative Law* 168; T. Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 *Cambridge Yearbook of European Legal Studies* 361. For a contrasting view, see D. Spielmann, The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or how to remain good neighbours after the Opinion 2/13', Speech delivered at FRAME on 27 March 2017 in Brussels http://www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf [last accessed 11 December 2017].

[5] There are a number of areas in which the levels of protection differ, but it cannot be said that standards provided under EU law have fallen below the ECHR minimum standards. This would be the case for example in the context of workers' rights; see e.g. P. Foubert and Š. Imamović, (2015) 'The pregnant workers directive: must do better: lessons to be learned from Strasbourg?' 37 *Journal of Social Welfare and Family Law* 3, 309-320.

desirable, but it is the reality of fundamental rights law and it is accepted both in Strasbourg and in the EU. What matters is that the ECHR minimum standards are always preserved, while the states can always go higher and provide more protection. In practical terms, this means that Charter rights that correspond to Convention rights should never be interpreted in such a way as to go below the Convention standards, which are determined by the Strasbourg Court.

The changes in the Lisbon Treaty aimed, inter alia, at solving the problem of divergences between EU and ECHR law. Indeed, the new Article 6 of the TEU not only makes the EU Charter of Fundamental Rights legally binding, but it also provides that fundamental rights, as guaranteed by the ECHR 'shall constitute general principles of the Union's law' and that the EU 'shall accede to the ECHR'. However, the priorities of the CJEU post-Lisbon have not reflected that change: the protection of autonomy of EU law and its own exclusive jurisdiction still seem to be the guiding principles in Luxembourg. As a consequence, the European fundamental rights landscape has not developed quite as expected and today the two European systems seem to be further apart than ever before.

This chapter is divided into two main parts. The first part discusses the early case law of the two European courts, pointing out instances in which the two courts diverged in their interpretation of fundamental rights. It builds on the case law analysis conducted in Chapter 2, concerning the relationship between the Strasbourg and Luxembourg courts and concludes that the pre-Lisbon period is generally characterised by compromise and mutual accommodation between the two European Courts. The second part is dedicated to the more recent post-Lisbon developments and changes in the relationships. This part takes a more systematic approach in examining the changes before going into the substantive rulings and conclusions of the two European Courts in Chapters 4 and 5. It will be argued that, while the pre-Lisbon period is generally characterised by comity and cooperation between the two European Courts, the CJEU's almost exclusive focus on the Charter, coupled with the sharp decline in references to the ECHR since the entry into force of the Lisbon Treaty, as well as the largely unwarranted rejection of the EU's accession to the ECHR, are cause for concern.

2 Pre-Lisbon: Comity and Cooperation

There is ample evidence for close interactions that have taken place in the case law between the Strasbourg and Luxembourg Courts in the pre-Lisbon period. For decades, the CJEU has referred to the ECHR when dealing with human rights cases, which over the years acquired 'special significance'.[6] The development of fundamental rights protection has not been a one way street from Luxembourg to Strasbourg: both Courts have influenced and endorsed each other's case law over the years and have shown a marked desire to avoid open conflicts.[7] However, the CJEU has never considered itself formally bound by the ECHR or the case law of the ECtHR, which means that the problem of divergences was never resolved[8] and recent events bore witness to this.

Before discussing the more recent trends and embarking on an exposé of the most recent case law of the two European Courts, it seems appropriate to briefly examine the most pertinent decisions from the past. The potential for different interpretations and divergent standards in the case law of the two Courts was evident even in the early years, and the most classical examples concern the interpretation and the scope of application of Articles 6 and 8 of the ECHR.[9]

2.1. Article 6 ECHR

Article 6 gives everyone the right to a fair trial and lists a number of minimum requirements to be respected in that context. In a number of competition law

[6] See e.g. Cases C-29/69 *Stauder* [1969] ECLI:EU:C:1969:57 para 7; Case C–274/99, *Connolly v Commission* [2001] ECLI:EU:C:2001:127 para 37; C-283/05 *ASML* [2005] ECLI:EU:C:2006:787 para 26; C-305/05 *Orde des barreaux francophones et germanophone and Others* [2007] ECLI:EU:C:2007:383 para 29.

[7] This is not necessarily different today; however, as it will be discussed in the second part of this chapter and in later chapters, there are certain developments in the jurisprudence of the CJEU which make the question of divergences more complex and more problematic. For a further discussion, see Section 3 of this chapter.

[8] For the pre-Lisbon period see J. Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) 6 *European Human Rights Law Review* 768; D. Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities' in P. Alston, M. Bustelo and J. Heenan (eds) *The EU and Human Rights* (Oxford: Oxford University Press, 1999).

[9] Article 6 ECHR concerns the right to a fair trial and Article 8 ECHR is on the right to respect for private and family life.

cases, notably in *Orkem*[10] and *Solvay*[11] and *Société Générale*,[12] the CJEU ruled that Article 6 of the ECHR does not include the right not to give evidence against oneself. It held that the Commission is entitled to compel an undertaking to provide all the necessary information and documents in its possession, even if they may be used to establish an infringement of competition law by the undertaking.

The CJEU's rulings have been contested after the ECtHR's decision in the case of *Funke*.[13] In that case, the Strasbourg Court held that any measure intended to compel a natural or legal person who is the subject of an investigation procedure to incriminate himself or itself by positive action infringes Article 6(1) of the ECHR, regardless of what is laid down by the provision of national law relied upon by the authority conducting the investigation.

The Court of First Instance (CFI) revisited this question, first in *Société Générale*[14] and subsequently in *Mannesmann*,[15] which also concerned cartel proceedings. In the latter case, the applicant argued, relying on *Funke*, that the Commission's measures (request for information) were incompatible with his human rights as recognised and guaranteed by the Convention. The CFI drew a distinction between requests for purely factual information and the production of documents already in existence which are non-incriminating and those that do not concern exclusively factual information, which may compel the applicant to admit its anti-competitive practice. The Court held that only the latter infringes the applicant's rights to silence. In constructing its arguments, the CFI pointed out that the level of protection provided is equivalent to that guaranteed by Article 6 of the Convention, without however substantiating this statement or referring to the ECtHR's decision in *Funke*, which is a major flaw in its reasoning.[16] In *Saunders*,[17] the ECtHR clarified that the distinction between incriminating and

[10] Case C-374/87 *Orkem v Commission* [1989] ECLI:EU:C:1989:387.
[11] Case 27/88 *Solvay v Commission* [1989] ECLI:EU:C:1989:388.
[12] Case T-34/93 *Société Générale v Commission* [1995] ECLI:EU:T:1995:46.
[13] *Funke v France*, App no 1082/84 (ECtHR, 25 February 1993).
[14] Case T-34/93 *Société Générale v Commission* [1995] ECLI:EU:T:1995:46.
[15] Case T-112/98 *Mannesmannröhren-Werke AG v Commission* [2001] ECLI:EU:T:2001:61.
[16] T. Lock, *The European Court of Justice and International Courts* (Oxford, Oxford University Press, 2015).
[17] *Saunders v United Kingdom*, App no 19187/91 (ECtHR, 17 December 1996), para 71.

non-incriminating requests was not acceptable. It explicitly held that the right not to incriminate oneself was applicable to all statements, without any distinction being made according to the type of information requested.

In *Limburgse Vinyl Maatschappij*,[18] the CJEU recognised the importance of the ECtHR case law on this particular aspect of the right to a fair trial, but it ruled that the ECtHR required the exercise of coercion against the suspect in order for there to be a breach of the privilege against self-incrimination which could not be established in this case. Whether the ECtHR would have reached the same conclusion is questionable, however. While it is true that the decision in *Saunders* concerned the use of statements made under compulsion, the Strasbourg Court did not say that its findings are limited to it. Rather, the ECtHR emphasised that the right to silence and not to contribute to incriminating oneself lie at the heart of a fair procedure under Article 6 and apply to all types of criminal proceedings.[19] If the CJEU indeed misinterpreted the ECtHR's case law, the protection granted by EU courts fell below the standard of protection provided in Strasbourg. Be that as it may, the evolution of the case law concerning the right to a fair trial shows an ongoing dialogue between the two European Courts and willingness, on the part of the CJEU, to avoid conflicts or at least not to (openly) contradict the ECtHR.

The ECtHR has also shown willingness to avoid conflicts with the case law of the CJEU. This is not surprising as it is also in the interest of the Strasbourg Court to avoid such conflicts, which could potentially challenge and undermine its authority and legitimacy. The often–quoted example in this category concerns the lack of a possibility to respond to Opinions rendered by the CJEU's Advocates General. In *Emesa Sugar*,[20] the applicant argued that the lack of an opportunity to reply to the Advocate General's Opinion constituted a violation of the right to fair trial provided for in Article 6(1) of the ECHR. In order to support his application, the applicant relied on the *Vermeulen* case,[21] in which the ECtHR held that a lack of opportunity to respond to the submissions of the *Procureur Général*

[18] Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij v Commission* [2002] ECLI:EU:C:2002:582.
[19] Ibid, para 68.
[20] Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* [2000] ECLI:EU:C:2000:69.
[21] *Vermeulen v Belgium*, App no 19075/91 (ECtHR, 20 February 1996).

before the Belgian Court of Cassation, whose role in the Belgian judicial system is comparable to the role of the Advocates General at the CJEU, is a breach of Article 6(1) of the Convention. The CJEU however ruled that the role of an Advocate General differs from the role of a *Procureur Général* in several key aspects and that no breach of fundamental rights arose from the absence of the possibility to comment on the findings of Advocates General. Some commentators regarded the distinction made by the CJEU to be hardly convincing.[22]A subsequent ruling in the *Kress*[23] case in Strasbourg seemed to suggest that the case law of the ECtHR could indeed apply to Advocates General of the CJEU. In this case, the ECtHR held that the independence and impartiality of the French *commissaire du gouvernement* in administrative proceedings before the *Conseil d'Etat* was insufficient to justify the lack of an opportunity to respond to his submissions. It is also interesting to note in this context that the Advocate General's role is in fact modelled upon the French *commissaire du gouvernement*.[24] Unsurprisingly, this argument was brought before the CJEU in the later case of *Kaba*.[25] The CJEU, however, decided not to consider it and gave its decision on different grounds. Interestingly, when *Emesa Sugar* brought the case against the Netherlands to Strasbourg, claiming violation of the right to adversarial trial by the CJEU in light of its recent case law, the ECtHR declared the application inadmissible *ratione materiae*, stating that the facts of the case fall outside the scope of Article 6 of the Convention.[26]

The story does not end here. In *Kokkelvisserij*,[27] the ECtHR accepted the distinction between the Advocate General's role from that of the French *commissaire du gouvernement*, drawn by the CJEU, and the matter was settled in this way. It should be noted, however, that the Strasbourg Court did not conduct a thorough assessment of the CJEU's distinction, since it only had to consider

[22] H.C. Krüger and J. Polakiewicz, 'Proposals for a Coherent Human Rights Protection in Europe' (2001) 22 *Human Rights Law Journal* 7.
[23] *Kress v France*, App no 39594/98 (ECtHR, 11 June 2001).
[24] H.C. Krüger and J. Polakiewicz, 'Proposals for a Coherent Human Rights Protection in Europe' (2001) 22 *Human Rights Law Journal* 7.
[25] Case C-466/00 *Kaba v Home Secretary* [2003] ECLI:EU:C:2003:127.
[26] *Emesa Sugar v The Netherlands*, App no 62023/00 (ECtHR, 13 January 2005).
[27] *PO Kokkelvisserij v The Netherlands,* App no 13645/05 (ECtHR, 20 January 2009). For a more detailed discussion on this case, see Chapter 2.

whether the violation was 'manifestly deficient', as it was applying the *Bosphorus* presumption.

2.2. Article 8 ECHR

In the 1989 *Hoechst*[28] decision, the CJEU held, after having noted that there are considerable differences in the protection provided to corporate rights in the Member States, that Article 8(1) of the ECHR, which protects the right to respect for private and family life, home and correspondence, applies only to the private residences of natural persons and not to the business premises of undertakings. The Court insisted 'the protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises'.[29] The Court thus explicitly refused to extend the scope of protection of the right to inviolability of the home to a company's business premises, although companies (as well as individuals) were entitled to protection against arbitrary interference by public authorities under the general principles of EU law.[30] The Court ultimately found that there had been no such breach in this case.

The ECtHR, however, interpreted the words 'private life' and 'home' in *Niemietz v Germany*,[31] as including certain professional or business activities or premises, 'since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world'[32]– a view supported by the fact that 'it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which not'.[33] The Court concluded that interpreting the words 'private life' and 'home' more broadly 'would be consonant

[28] Joined Cases 46/87 and 227/88, *Hoechst AG v Commission* [1989] ECLI:EU:C:1989:337.
[29] Joined Cases 46/87 and 227/88, *Hoechst AG v Commission* [1989] ECLI:EU:C:1989:337, 18.
[30] Joined Cases 46/87 and 227/88, *Hoechst AG v Commission* [1989] ECLI:EU:C:1989:337, 19.
[31] *Niemietz v Germany*, App no 13710/88 (ECtHR, 16 December 1992).
[32] *Niemietz v Germany*, App no 13710/88 (ECtHR, 16 December 1992) para 29.
[33] Ibid.

with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities'.[34]

Admittedly, the CJEU decided the *Hoechst* case before the ECtHR had the opportunity to rule in *Niemietz v Germany*, so there was no explicit guidance in Strasbourg as to the interpretation of this aspect of Article 8 ECHR. This was also expressly stated in *Hoechst*.[35] However, it should be noted that six months before the CJEU's decision in *Hoechst*, the ECtHR handed down a decision in the *Chappell*,[36] a case that concerned a search and seizure of videos and documents from premises comprising two floors with offices and one floor with an office, a bedroom and another room for processing videos. The Strasbourg Court found such a premise to fall within Article 8 ECHR. While the judgment does not clearly state that business premises also fall within Article 8 ECHR, it could have led the CJEU to decide differently in *Hoechst*, had the Court decided to consider it. The CJEU was indeed criticised for not having done so.[37] After *Niemietz*, however, the CJEU decided to change its position in *Roquette Frères*.[38] It found that, for the purposes of determining the scope of the right to inviolability of the home, regard had to be given to the Strasbourg case law subsequent to *Hoechst*.[39] The CJEU thus adjusted its viewpoint in order to bring its case law in line with the ECtHR's interpretation. The ECtHR confirmed its position further in the *Crémieux and Miailhe* cases,[40] ruling that France had violated Article 8 by carrying out searches both in private homes and in commercial establishments in the context of the French authorities' investigation on possible infringements of law governing financial transactions with third countries.

[34] *Niemietz v Germany*, App no 13710/88 (ECtHR,16 December 1992) para 31.
[35] *Hoechst AG v Commission* [1989] ECR 1290, para 18.
[36] *Chappell v The United Kingdom*, App no 10461/83 (ECtHR, 30 March 1989).
[37] R. Lawson, 'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in RA Lawson & M de Blois (eds.) *The Dynamics of the Protection of Human Rights in Europe - Essays in Honour of Professor Henry G. Schermers vol. III* (Martinus Nijhoff Publishers, 1994) 23.
[38] Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603.
[39] Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603, para 29.
[40] *Crémieux and Miailhe v France*, App nos 11471/85 and 12661/87 (ECtHR, 25 February 1993).

2.3. Conclusion

This brief summary analysis of the early case law of both European Courts has demonstrated the potential for divergences but also strong judicial comity and cooperation. Even though there have been instances in which the two Courts adopted conflicting decisions, both Courts have shown willingness to engage in a dialogue. The CJEU has adapted its case law in order to ensure consistency with the Strasbourg system, and the ECtHR, for its part, has put in effort to avoid or lessen the possibility of conflict with its counterpart in Luxembourg. This kind of relationship between the two Courts has helped to maintain consistency over the years but it functions on a voluntary basis, which is why it does not fully – or satisfactorily – resolve the potential for divergent standards of human rights protection in the EU and in Europe.

It is important to reiterate that not all divergences and inconsistencies are problematic and will necessarily result in a conflict; however, divergences which result in the standard of protection in Luxembourg falling below the standard of protection provided in Strasbourg are problematic, especially from the perspective of the Member States. This became clear in the post-Lisbon case law of the two European courts when the enduring reciprocal deference and jurisprudential accommodation took a different turn.

3 Post-Lisbon Developments: Division and Tension

3.1 Changes in the Landscape

Following the entry into force of the Lisbon Treaty in late 2009, the European fundamental rights landscape changed significantly. Several factors of change can be identified.

More than ever before, and this is illustrated in Chapter 1, the EU portrays itself as an organisation that is committed to human rights and that requires the respect of those rights not only of itself and its Member States but also of its partners in the international arena. In this respect, the EU sees itself as a human rights organisation and puts the protection of fundamental rights at the core of its

values. The EU today also acts in fields which go beyond market integration and which directly impact peoples' lives, such as in the field of criminal law, immigration and family matters. As a consequence, the EU as a whole is confronted more often with fundamental rights issues, when drafting legislation and making policy choices, and hence so is the CJEU. Further, the available tools have changed: while in the early days the Court had to operate on the basis of general principles, constitutional traditions and indirectly the ECHR, the heart of EU fundamental rights law today is the Charter, the EU's own bill of rights, which however is closely tied in with the ECHR and national constitutions. Other changes include the amendment in the former Article 68 of the EC Treaty, which has repealed the constraints regarding preliminary references to the CJEU in the area of freedom, security and justice; strengthening the application of the accelerated procedure and the urgent preliminary ruling procedure for cases in which a person is in custody; and by including the acts of EU agencies such as FRONTEX and the Asylum Support Office within the scrutiny powers of the CJEU.[41] The Court has picked up on the increased human rights salience of EU law and has placed the Charter at the heart of its fundamental rights adjudication. As a result, it has asserted a primary role for itself in interpreting the Charter and in determining the appropriate level of fundamental rights protection in the EU.[42]

The ECtHR, in turn, is overburdened and its legitimacy has been challenged from several corners, notably from the UK, Russia and the Netherlands.[43] The criticism relates to both the Court's existence and to its

[41] S. Carrera, M. De Somer and B. Petkova, 'The Court of Justice of the European Union as a Fundamental
Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom,
Security and Justice' (2012) Justice and Home Affairs Liberty and Security in Europe Papers No 49.

[42] See e.g. Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107 and C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:280.

[43] The criticism in the Netherlands was very much present in the period 2010-2012, in both political and academic circles, and relating to the far-reaching character of the ECtHR's judgments and its inherently undemocratic character. See for instance G. Boogaard and J. Uzman. 'Wie zijn zij, dat zij dit mogen doen? Over de legitimatie van Straatsburgse rechtspraak' (2012) *Preadvies voor de Staatsrechtdag voor jonge juristen*. For the recent account of that period as well as subsequent years see J. Gerards, 'The Netherlands: Political Dynamics, Institutional Robustness' in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 327. For the UK, it

functioning.[44] In order to remedy the latter criticism, the Strasbourg Court has undergone a reform recently, which focuses, inter alia, on the role of national institutions, including national courts, in the protection of the ECHR rights.

3.2 Charter Centrism and Limited References to the ECHR

The Court of Justice has played a key role in the post-Lisbon fundamental rights narrative too, developing its own human rights *acquis*. In doing so, the Court has used, almost exclusively, the newly legally binding Charter as the reference text and the starting point for its assessment of fundamental rights. While this development in itself is not problematic (quite the opposite in fact; it would seem beneficial that the EU has its own bill of rights for the sake of both legal certainty and transparency and it may allow the CJEU to provide more protection)[45] and the ECHR is meant to be subsidiary, several other changes in the Court's case law, coupled with the exclusive focus on the Charter, seem to be cause for concern.

One of those changes is the sharp decline in references to the ECHR and the ECtHR's case law over the past few years. According to Gráinne de Búrca, who conducted a study on the number of references to the Charter of Fundamental Rights by the Court of Justice since it gained binding legal force in December 2009 until the end of 2012, there has been a remarkable lack of reference on the part of the Court to other relevant sources of human rights law and jurisprudence in that period, notably to the ECHR and the ECtHR case law.[46] She determined that out of 122 cases in which the Charter was mentioned, the CJEU referred to a Convention provision in only 20 cases. Furthermore, the Court referred to the case

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could be said that the debate is still ongoing. See e.g. R. Masterman, 'The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?' in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 449.

[44] K. Lemmens, 'Criticising the European Court of Human Rights or Misunderstanding the Dynamics of Human Rights Protection?' in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 23.

[45] Some authors see Charter centrism as immediately problematic. See G. de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?' (2013) *Maastricht Journal of European and Comparative Law* 168.

[46] G. de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?' (2013) *Maastricht Journal of European and Comparative Law* 168.

law of the ECtHR in only 10 out of 27 cases, in which the CJEU engaged substantively with the Charter in that period.[47] Moreover, any references to other international human rights treaties and to the common constitutional traditions of the Member States have been basically absent from the CJEU's case law.[48] Indeed, this trend can be observed in some of the important Grand Chamber judgments from that period of time, such as *Åkerberg Fransson*,[49] *Sky Österreich*,[50] *Google Spain*,[51] and *Zoran Spasic*,[52] none of which explicitly mentions ECHR standards.[53]

This is quite remarkable considering that a study of the number of references by the CJEU to the ECHR before the Charter became legally binding (from 1998 to 2005) revealed that the references to the ECHR have been increasing constantly throughout those years and that the ECHR had in fact become the main rights instrument in the CJEU's jurisprudence.[54]

The decline in references continued in the period after 2012, as noted by Lambrecht and Rauchegger, who looked into the references to the case law of the ECtHR in the period between 1 January 2014 and 1 April 2015.[55] In that period, the Court referred to the ECtHR's case law in only 8 of the 43 judgments in which the Charter played a substantive role. Interestingly, looking at 2017, the outlook

[47] It should be noted that, even though the CJEU did refer to the Charter in all 122 cases, it engaged in a substantive analysis of the Charter rights in 27 cases.
[48] An exception is the Geneva Convention Relating to the status of Refugees of 1951, which has been cited quite often, and the Convention on the Rights of the Child in cases dealing with expulsion for child sexual offences. See also A. Rosas, 'Five Years of Charter Case Law: Some Observations', in S. de Vries, U. Bernitz and S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing, 2015).
[49] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.
[50] Case C-283/11 *Sky Österreich* [2013] ECLI:EU:C:2013:28.
[51] Case C-131/12 *Google Spain* [2014] ECLI:EU:C:2014:317.
[52] Case C-129/14 PPU *Zoran Spasic* [2014] ECLI:EU:C:2014:586.
[53] Instead, in *Åkerberg Fransson*, for example, the Court held that the ECHR does not constitute, as long as the EU has not acceded to it, a legal instrument which has been formally incorporated into EU law and consequently EU law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of a conflict between the rights guaranteed by the ECHR and a rule of national law.
[54] L. Scheeck, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks', Garnet Working Paper 23/07 (2007).
[55] S. Lambrecht and C. Rauchegger, 'European Union: The EU's Attitude to the ECHR' in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016).

is comparable to that of the period examined by de Búrca.[56] In the period between 1 January and 31 December 2017, the CJEU referred to the case law of the ECtHR in 10 judgments out of 27, in which it engaged with the Charter rights substantively. While this means that there is a slight increase in references in comparison to the period recorded in 2014 and early 2015, the numbers still remain low in comparison to the pre-Charter period.

The references to the ECHR and ECtHR case law thus continue to be limited and without a discernible pattern. The CJEU still refers to the ECHR and the Strasbourg case law occasionally and often in important decisions, but there are also examples where it is obvious that it should refer, especially when national courts refer to it (as well as the Advocates General) but the Court does not mention it.[57] While this sort of number crunching may not tell the full story, it is an important indication that the CJEU is making its human rights jurisprudence more autonomous. This carries the risk of divergent human rights standards in Europe and potentially conflicting decisions in Strasbourg and Luxembourg. Moreover, by disregarding other human rights mechanisms, the CJEU is missing the opportunity to develop its expertise in the field of human rights further and to strengthen the legitimacy of its decisions in the eyes of European citizens.[58] Interestingly, in Strasbourg, the number of references to the EU Charter has only increased in the post-Lisbon period.[59] In particular, in the period after the publication of Opinion 2/13, the relevant figures show that references to the Charter, EU law and the CJEU's case law do not appear to be decreasing in Strasbourg.[60]

[56] My research is thus limited to the year 2017. The search terms used in order to identify the relevant cases are as follows: 'ECHR'; 'European Convention on Human Rights and Fundamental Freedoms'; and 'European Court of Human Rights'.
[57] In this context, see also L. Glas and J. Krommendijk, 'From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' (2017) 17 *Human Rights Law Review* 2.
[58] G. de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?' (2013) *Maastricht Journal of European and Comparative Law* 168.
[59] P. Gragl, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to *Opinion 2/13* in the *Avotiņš* Case' (2017) 13 *European Constitutional Law Review* 551.
[60] L. Glas and J. Krommendijk, 'From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' (2017) 17 *Human Rights Law Review* 2, 11.

While compliance with the ECHR is not measured by the number of references to it, it is important to prevent that a sharp decline in references, as noted in the years following the entry into force of the Charter, would lead to a perception of fragmented and divided fundamental rights protection in Europe. This is exactly what the Lisbon Treaty drafters aimed to prevent by introducing the interpretative principle in Article 52(3) in the Charter as well as Article 6(2) TEU.

3.3 Is the ECHR Part of EU law (as a Matter of EU Law)?[61]

Although the strong focus on the Charter is not surprising, such a sharp decline in references to the ECHR is quite striking. After all, the two catalogues of human rights can hardly be seen in isolation from each other since Article 52(3) of the Charter establishes a close link between the two documents in providing that Charter rights which 'correspond to' rights guaranteed by the Convention shall be given the same meaning and scope as the relevant Convention rights. This provision gives a special status to (at least part of) the ECHR in EU law, as a matter of EU law.[62] Furthermore, since the ECtHR determines the meaning and scope of the ECHR rights pursuant to Article 32 ECHR, it must be assumed that Article 52(3) of the Charter intends to give the same status to the case law of the Strasbourg Court in EU law, where it functions as a minimum standard.[63] The assumption is not unwarranted in my view; Article 52(3) is only meaningful if it

[61] For the preliminary analysis see Section 3.1.2., Chapter 2.

[62] See e.g. K. Lenaerts and E. De Smijter, 'The Charter and the role of the European courts' (2001) 8 *Maastricht Journal of European and Comparative Law* 1, 90; W. Weiss, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon' (2011) 7 *European Constitutional Law Review* 64, 81. For a different perspective see T. Lock, *The European Court of Justice and International Courts* (Oxford, Oxford University Press, 2015), 180-184.

[63] Note that this is a contentious point, because the CJEU has held that both the ECHR and the case law of the ECtHR are not part of EU law, since the EU has not acceded to the ECHR. See the CJEU's decisions in *Kamberaj* (C-571/10, EU:C:2012:233, para 62) and *Åkerberg Fransson* (C-617/10, EU:C:2013:105, para 44). The prevailing legal literature tends to take the same view. However, some scholars adopt a more nuanced view; see e.g. X. Groussot and E. Grill-Pedro, 'Old and new human rights in Europe: the scope of EU rights versus that of ECHR rights', in E. Brems and J. Gerards, *Shaping rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2013) 232. See also Opinion of AG Jacobs in C-84/95 *Bosphorus* [1996] ECLI:EU:C:1996:312, para 53 and Opinion of AG Trstenjak in C-411/10 *NS* [2011] ECLI:EU:C:2011:611, para 146.

commits the CJEU to take account of the Strasbourg case law. Moreover, the Explanation on Article 52(3)[64] explicitly refers to the case law of the ECtHR stating that the meaning and scope of the ECHR rights are determined not only by the text of those instruments, but also by the case law of the ECtHR. While the Explanations relating to the Charter do not have the same legal status as the Charter, they are an interpretive tool meant to help in interpreting the Charter rights which, in accordance with Article 52(7) of the Charter, 'shall be given due regard by the Courts of the Union and the Member States' when interpreting the Charter'. Finally, the preamble of the Charter also explicitly refers to the case law of the Strasbourg Court.

The CJEU, however, has interpreted Article 52(3) of the Charter differently.[65] It held that while Article 52(3) of the Charter indeed provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope, the ECHR does not constitute a legal instrument which has been formally incorporated into EU law as long as the EU has not acceded to it. An examination of the validity of EU law must therefore be undertaken 'solely in the light of the fundamental rights guaranteed by the Charter'.[66] Even so, the Charter should be interpreted in line with the ECHR, but the Court of Justice fails to state that. As for the Explanations, the Court acknowledged that the Explanations relating to Article 52 of the Charter indicate that paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR, but it insisted that the consistency should be achieved 'without thereby adversely affecting the autonomy of Union law and [...] that of the Court of Justice of the European Union'.[67] The CJEU thus – yet again – used the autonomy argument to protect its own jurisdiction.

[64] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/20.
[65] One of the few cases where the CJEU explicitly addressed Article 52(3) of the Charter and the Explanations to the Charter is C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84.
[66] C-601/15 PPU *J.N. v. Staatssecretaris voor Veiligheid en Justitie* ECLI:EU:C:2016:84, para 45. See also Cases C-571/10 *Kamberaj* ECLI:EU:C:2012:233 and C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105.
[67] C-601/15 PPU *J.N. v. Staatssecretaris voor Veiligheid en Justitie* ECLI:EU:C:2016:84, para 47.

Recently, however, the CJEU adopted a different approach in the case of *C.K. v Republika Slovenija*.[68] In that case, the Court referred extensively to Article 3 of the ECHR and the ECtHR case law on this Article, pointing out that Article 3 corresponds to Article 4 of the Charter and, to that extent, their meaning and scope shall be the same, in accordance with Article 52(3) of the Charter. It should be noted, however, that the change in approach arose in the context of the legislative change in the Dublin III Regulation which now explicitly states that 'with respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights'.[69] This is probably what had influenced the Court to change its approach in this specific case and more generally in the context of the Dublin III Regulation. Ironically, however, the legislative change is only symbolic because the same outcome could have been established by a simple reliance on Article 52(3), but due to the fact that the CJEU had interpreted this provision differently, and because of the divergent standards of protection in the case law of the Luxembourg and Strasbourg Courts in this field, the Member States must have felt the need to include the explicit reference to the ECtHR case law in the Regulation itself.

It is true that the fact that the CJEU does not refer to the ECHR or the ECtHR's case law does not necessarily mean that the Court does not take it into account. However, it may be difficult to ascertain to what extent the CJEU lives up to its obligation under Article 52(3) if it does not engage with the ECHR and the Strasbourg case law. More importantly, the CJEU is one of the two European courts that sets standards of human rights protection at the European level, and the effects of its case law (and its approach therein) goes far beyond the Court itself.[70] It would be important both for the Member States and their courts, as well

[68] Case C-578/16 PPU *C.K. and Others v. Republika Slovenija* [2017] ECLI:EU:C:2017:127. This case is discussed in detail below.
[69] Recital 32 of the EU Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
[70] J. Callewaert, The accession of the European Union to the European Convention on Human Rights (Strasbourg: Council of Europe Publishing, 2014).

as for individuals and legal certainty in general to see that the Court strives for coherence. Cross-referencing is thus a value in and of itself.

4 Opinion 2/13 on the EU's Accession to the ECHR

The CJEU's Opinion 2/13 is possibly one of the most extreme examples of the Court's 'legal parochialism' in recent years.[71] In the Opinion, the Court (in contrast to all other parties that have submitted observations in the proceedings)[72] ruled that the Draft Accession Agreement (DAA)[73] is incompatible with the autonomy and the specific characteristics of EU law. It firmly rejected the DAA for five main reasons. Some of them are rather technical and other more substantial. The technical objections mainly relate to the arrangements made in the DAA in respect of Article 344 TFEU and arrangements concerning the co-respondent mechanism and the CJEU's prior involvement. These should not be too difficult to remedy,

[71] Most authors have been very critical of the CJEU's approach in Opinion 2/13. See, to name just a few, E. Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 Maastricht Journal of European and Comparative Law 35; S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', (2015) 16 German Law Journal 213; B. De Witte and Š. Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 European Law Review 5, 683-705; P. Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR' in W. Benedek, WK Benoit Rohmer and M. Nowak (eds) European Yearbook on Human Rights 2015 (Vienna: Neuer Wissenschaftlicher Verlag, 2015). See also the blog posts written in the days following the Opinion: T. Lock, 'Oops! We did it Again—the CJEU's Opinion on EU Accession to the ECHR' (18 December, 2014) http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/#; A. O'Neill, 'Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty' (18 December 2014) https://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/; L. Besselink, 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' (23 December, 2014) http://www.verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213/#.VJk9aP8k0; S. Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice' (24 December, 2014) http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european- [all last accessed 19 November 2017]. For a more nuanced (and exceptional) view of the Opinion see: D. Halberstam, ''It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights' (2015) 16 German Law Journal 105; and C. Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' (2015) 16 German Law Journal 147.

[72] This includes the European Commission, the Council of Ministers and the Parliament, as well as 24 EU Member States.

[73] For a discussion of the DAA see P. Gragl, 'A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights' (2014) 51 Common Market Law Review 1, 13–58.

although it may take time before consensual solutions are worked out between the different actors, even for these more technical objections.

By contrast, the objection relating to the principle of mutual trust and recognition, and the presumption underlying it, is more substantial and more difficult to remedy. The views expressed in the context of the meaning and role of the principle of mutual trust and recognition in EU law affect the core of the Convention system and go to the heart of the very notion of fundamental rights. Other more substantial objections concern the relationship between Articles 53 of the Charter and the ECHR, the ECHR Protocol No 16 and, perhaps most controversially, the EU's Common Foreign and Security Policy (CFSP).[74]

Opinion 2/13 is not only problematic for its outcome but also for its language and underlying tone. In the Opinion, the CJEU depicts the EU legal order as normatively self-sufficient and does not give any recognition to the ECHR legal system.[75] Article 6(2) of the TEU, which illustrates the aspirations of the Member States to join the ECHR and, more importantly, make accession to the ECHR a legal obligation, is barely mentioned in the Opinion. Article 52(3) of the Charter – the key provision explaining the relationship between the Charter and the Convention – is not mentioned once.

This section starts with the preliminary consideration that the CJEU included in the Opinion followed by an elaborate discussion on the Court's view on the principle of mutual trust, which is explicitly addressed in the first objection and which is central in the discussion on the relationship between the CJEU and the ECtHR. For the sake of completeness, a brief overview of other objections is also included.[76]

[74] For the sake of clarity, all objections are considered in turn below. For the analysis of the CFSP objection in particular see G. Butler, 'The Ultimate Stumbling Block? The Common Foreign and Security Policy, and Accession of the European Union to the European Convention on Human Rights' (2016) 39 *Dublin University Law Journal* 1, 229.

[75] L. Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection - On Opinion 2/13 on EU Accession to the ECHR' (2015) 15 *Human Rights Law Review* 485, 521.

[76] For my detailed analysis of the objections that are not discussed extensively in this book see B. De Witte and Š. Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 *European Law Review* 5, 683-705.

4.1 Preliminary Considerations

Before starting the assessment of the DAA the Court reiterated, in its preliminary considerations, the essentials of EU constitutional law: the principle of conferral of powers, the institutional structure laid down in Articles 13 to 19 TEU, the Charter of Rights, the principles of primacy and direct effect, the EU's objectives in Article 3 TEU, the principle of sincere co-operation, and the preliminary reference mechanism. In this way, the Court directly presented its own understanding of the nature of the EU legal order, its autonomy and specificity.

Subsequently, the Court started an analysis of the DAA:

> Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), *respect for those rights being a condition of the lawfulness of EU acts*, so that measures incompatible with those rights are not acceptable in the EU.[77] (emphasis added)

This indeed is not new; it is a statement that goes back to the oldest decisions and judgments.[78] It is, however, immediately qualified as follows:

> The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU.[79]

What the CJEU seems to imply here is that the protection of fundamental rights in the EU will be ensured to the extent that it permits certain objectives to be achieved, which seems rather odd. If this is indeed the case, then the condition of lawfulness of EU acts is not credible, as it can apparently be limited by other less fundamental considerations.[80] It is of course legitimate for the Member States to aspire to achieving a number of objectives – it is after all the EU's *raison d'être*.

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[77] Opinion 2/13, para 169.
[78] Cases C-260/89 *ERT* EU:C:1991:254, para 41; C-112/00 *Schmidberger* [2003] EU:C:2003:333, para 73; *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paras 283 and 284.
[79] Opinion 2/13, para 170.
[80] See in this context J. Callewaert, 'Is EU Accession still a good idea?' in Š. Imamović, M. Claes and B. De Witte (eds), 'The EU Fundamental Rights Landscape After Opinion 2/13' Maastricht Faculty of Law Working Paper 2016/3.

The question is, however, how much the need to achieve these objectives can impact its stated values.[81]

4.2 The Specific Characteristics and the Autonomy of EU Law

4.2.1 Article(s) 53

The first point the CJEU brought up was the coordination between Article 53 of the Charter and Article 53 of the ECHR. Article 53 of the Charter suggests that the protection provided in the Charter shall not restrict or adversely affect the rights contained in the national constitutions, EU law and in the international human rights instruments, including the ECHR. Similarly, Article 53 of the ECHR states that the Convention rights shall not derogate from or restrict the rights and freedoms stipulated in other human rights instruments. The coordination between the two provisions was considered necessary by the Court in order to secure its own interpretation of Article 53 of the Charter which, in light of *Melloni*,[82] limits the application of higher national fundamental rights standards if it affects the effectiveness, uniformity and autonomy of EU law. The CJEU considered that somehow Article 53 of the Convention would have an impact on the limits determined in the context of Article 53 of the Charter. However, this argument seems to be flawed, because Article 53 of the Convention is not a conflict rule; it simply states that Contracting States can provide more protection if they wish to do so, but applicants cannot rely on this provision to claim that their rights under national or international law have been violated.[83] Thus, the ECtHR only determines the floor, the minimum level of protection, but not the ceiling. Moreover, the ECtHR has referred to this provision only exceptionally, so it is not clear where the fears of the CJEU are coming from.[84] Nevertheless, this objection,

[81] See e.g. the Preamble to the TEU; Articles 2 and 3 TEU; Council of the European Union, 'The EU Strategic Framework on Human Rights and Democracy' (Luxembourg, 25 June 2012) 11855/12.
[82] For a discussion on *Melloni* see Section 4.1.7., Chapter 1.
[83] See, for example, *Markopoulou v Greece*, App. No.20665/92 (ECtHR, April 6 1994), 4; *EM v Greece* App no 22225/93 (ECtHR, 1 December 1993), 4.
[84] *Open Door Counselling v Ireland* App no 14234/88 (ECtHR, 29 October 1992). See also C. Van de Heyning, 'No Place Like Home: Discretionary Space for the Domestic Protection of Fundamental Rights' in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds), *Human*

albeit a puzzling one, is not as problematic as some other objections discussed further below.

4.2.2 Mutual Trust

The principle of mutual trust and recognition is one of the most difficult points – if not the most difficult one – in the Opinion. The Court gives the Opinion a constitutional ranking and observes that it is of 'fundamental importance' for the EU, as it allows for the creation and the maintenance of an area without internal borders.[85] Drawing on its previous rulings in *NS* and *Abdullahi*, the Court stressed that the principle of mutual trust requires EU Member States to presume that fundamental rights have been observed by other states, save for 'exceptional circumstances'.[86] It stated as follows:

> Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, *they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU*.[87] (emphasis added).

The Court then continues:

> In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States,

Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts (Antwerp: Intersentia, 2011) 73.
[85] Opinion 2/13, paras 191-195.
[86] Opinion 2/13, paras 191 and 192.
[87] Opinion 2/13, para 192.

> accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.[88]

Accordingly, therefore, national authorities, in order to preserve the autonomy of EU law and the principle of mutual trust, are under a duty not to perform a fundamental rights scrutiny, or to limit such scrutiny to the most extreme of violations. But how valid is this argument in the context of the ECHR rights, which virtually all European states have in common?[89] Interestingly, the Opinion was released only a few weeks after the ECtHR's *Tarakhel* ruling,[90] in which the Strasbourg Court condemned the automatic application of the Dublin rules, holding that a real risk of ill-treatment in the receiving state precludes the removal of the asylum-seeker, irrespective of the source of the risk being systemic or individualised. This may have been a reaction to the CJEU's *N.S.* and *Abdullahi* decisions, in which the Luxembourg court ruled that an asylum seeker could only challenge the decision by pleading systemic deficiencies in the asylum procedure and reception conditions in the Member State deemed responsible for the asylum application. Be that as it may, the decisions illustrate very well the structural differences in the approaches of the two European courts: the Luxembourg Court permits the evaluation only in exceptional circumstances while the Strasbourg Court requires national authorities to check every time there is evidence indicating violations of the Convention (on this point see further Chapter 4). Although the CJEU does not refer to the *Tarakhel* case in Opinion 2/13, some commentators have indeed suggested that *Tarakhel* has played a role in the Court's reasoning.[91]

While the Opinion contains several objections to the DAA that will be difficult to overcome, the mutual trust objection is particularly challenging. Imposed mutual trust does not sit well with the ECHR system, which takes the perspective of the individual and requires the ECHR Contracting Parties to ensure

[88] Opinion 2/13, para 194.
[89] See also J. Callewaert, 'Is EU Accession still a good idea?' in Š. Imamović, M. Claes and B. de Witte (eds), 'The EU Fundamental Rights Landscape After Opinion 2/13' Maastricht Faculty of Law Working Paper 2016/3.
[90] *Tarakhel v Switzerland*, App no 29217/12 (ECtHR, 4 November 2014).
[91] S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', (2015) 16 *German Law Journal* 213; L. Halleskov Storgaard, EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR' 15 *Human Rights Law Review* 485.

that the Convention rights are respected rather than relying on or trusting other states to comply with fundamental rights.[92] One has to wonder if it would even be possible to accommodate the principle of mutual trust and mutual recognition as interpreted and applied by the CJEU within the Strasbourg system, without affecting the core of the Convention system.

This mutual trust is also highly problematic from a general human rights perspective, because it has the effect of removing the minimum standard of fundamental rights protection provided for in the ECHR in the fields of EU law which are prone to human rights violations and in which measures are adopted against the weakest and most marginalised individuals. [93]

Such a one-sided interpretation of the principle by the CJEU is also problematic from the EU law perspective, but not for the reasons indicated by the CJEU. The respect for fundamental rights is a founding principle of the Union and an indispensable prerequisite for its legitimacy.[94] It is also a core principle of the national legal systems. Mutual trust and recognition, on the other hand, are merely principles used to facilitate judicial cooperation among the Member States. This is not to say that fundamental rights are absolute or cannot be balanced, but the way the Court has approached it in Opinion 2/13, and in some of its fundamental rights cases, points to the Court's misunderstanding and misconception of the role and place of fundamental rights in the EU.

4.2.3 Protocol No 16 ECHR

The CJEU considered Protocol No 16 problematic because it would allow national supreme courts to engage in a dialogue with the ECtHR, possibly also in relation

[92] This is the Soering line of cases. See *Soering v United Kingdom*, App no 14038/88 (ECtHR, 7 July 1989). However, the Court has made exceptions too, e.g. *Povse v Austria*, App no 3890/11 (ECtHR, 18 June 2013).
[93] E. Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law* 35; B. De Witte and Š. Imamović**,** 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 *European Law Review* 5, 683-705.
[94] As emphasised during Cologne European Council (3-4 June 1999), Presidency Conclusions, Annex IV.

to EU law matters, and thus circumvent the preliminary reference procedure in EU law. While this may indeed materialise once the Protocol is in force,[95] it is in no way the responsibility of the ECtHR and is not a consequence of accession. If national supreme courts would indeed decide to refer their questions and concerns to Strasbourg, rather than Luxembourg while there is a legal obligation under EU law to refer questions of EU law to the CJEU, then the problem would lie in the relationship between the CJEU and the domestic courts, and it should not be addressed and remedied in the Accession Agreement. In fact, national supreme courts of the Member States which have ratified Protocol No 16 can engage in a dialogue with Strasbourg concerning the ECHR rights as of 1 August 2018 (which is when the Protocol entered into force), thus having the same effect and consequence even without accession (in the EU states that have ratified it).

4.3 Article 344 TFEU

In accordance with Article 344 TFEU, the CJEU has exclusive jurisdiction to decide all disputes between EU Member States and between the EU and the Member State(s) in so far as they concern EU law, thus excluding any other means of dispute settlement in such cases. In this context, the CJEU considered it necessary that a provision is included in the DAA which would exclude the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU within the scope of EU law as regards the application of the ECHR. Interestingly, Advocate General Kokott, who signaled the same problem, found that there was no need for such an extreme change in the agreement, as it did not appear to be strictly necessary for the practical effectiveness of Article 344 and it is not common practice in international agreements. Indeed, it is not common in international treaty law to include a provision in an accession agreement which excludes the jurisdiction of the relevant court in the application of the instrument to which a party is acceding (*in casu* the ECtHR and the ECHR) in disputes involving other contracting parties relating to

[95] Protocol No. 16 to the ECHR entered into force on 1 August 2018. The threshold (ten states) was reached with the French ratification. The states that ratified the Protocol are: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine.

specific content. This is another example of a matter that should have been regulated further internally, since it is not likely that such a provision would be accepted in Strasbourg.

4.4 Co-Respondent Mechanism

One of the key features of the DAA is the co-respondent mechanism. Outlined in Article 3 of the DAA, the co-respondent mechanism was considered necessary to accommodate the specific situation of the EU as a non-state entity with an autonomous legal system that is becoming a party to the Convention alongside its own Member States. It is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its Member States and, conversely, that provisions of the EU founding treaties agreed upon by its Member States may be implemented by institutions, bodies, offices, or agencies of the EU. With the accession of the EU, a unique situation could arise in the Convention system in which a legal act is enacted by one High Contracting Party and implemented by another. The mechanism was thus tabled in order to remedy the scenario where a complaint is brought against a Member State, which could have been avoided only by disregarding an obligation under EU law. Similarly, a complaint may be brought against one of the EU institutions for implementing provisions of the EU Treaties, which are in fact agreed upon by the Member States. Therefore, the EU should be able to join as a co-respondent in the proceedings against one or more Member States and, conversely, the EU Member States should be able to become co-respondents to proceedings instituted against the EU.[96] If the ECtHR would to find a violation of the Convention in such a case, the respondent and the co-respondent would be bound jointly by the judgment under Article 36(4) of the Convention, unless the Strasbourg Court decides that only the respondent or only co-respondent are responsible for a given violation. The Court

[96] Article 3 (6) of the final version of the Draft Agreements states: In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

would be able to make such a decision only on the basis of the reasons provided by the respondent and the co-respondent and having sought the view of the applicant.

Article 3 (2) and (3) of the Accession Agreement refer to the two scenarios that trigger the co-respondent mechanism if certain conditions are fulfilled. The first scenario refers to the situation in which an alleged violation of the Convention concerns a provision of EU law which is directly applicable in the national legal order and is directed against one or more EU Member States but not against the EU itself.[97] This would be a situation in which one or more Member States could avoid the alleged violation only by disregarding an obligation under EU law (e.g. by applying a Regulation that does not leave a margin of discretion as to its implementation). The second scenario concerns the situation in which an alleged violation of the Convention concerns EU primary law and is directed against the EU and not against one or more EU Member States.[98] This would be the case when a Treaty provision is at stake and the EU is indicated as a respondent, while it is the Member States in fact that are ultimately the creators of EU primary law. In both scenarios, the other party would be able to become a co-respondent.

The EU or its Member States can become co-respondents at their own request if the aforementioned conditions are fulfilled and if the request is reasoned and well-founded.[99] The Strasbourg Court ultimately decides whether the request will be granted but it cannot force such a request. The Court may, however, invite either the EU or one (or more) EU Member States to participate as a co-respondent if such a request has not been made, if it considers that the conditions, as stated in Article 3 (2) and (3) of the Accession Agreement, are fulfilled. The invited party may decide to accept the invitation made by the Court or not, but no contracting party may be forced to become a co-respondent.[100]

[97] Article 1 (1) of the Accession Agreement indicates that the EU shall accede to the Convention but also to the Protocol to the Convention (commonly referred to as Protocol No 1) and Protocol No 6 to the Convention.
[98] Article 3 (3) Accession Agreement.
[99] Draft Explanatory Report, para 52.
[100] Ibid, para 53.

The CJEU essentially has three main problems with the mechanisms developed by the negotiators: (1) the ECtHR's decision on whether a co-respondent can or cannot join the proceedings would involve an assessment of the division of competences under EU law as well as the criteria for the attribution of their acts and omissions, which could encroach upon the autonomy of EU law; (2) the principle of joint responsibility could result in a situation in which a Member State may be held responsible, together with the EU, for the violation of a provision of the ECHR to which that particular Member State has made a reservation under Article 57 ECHR; (3) the ECtHR decision on whether the Member State(s) is solely responsible or jointly with the EU would involve an assessment of the division of competences in the EU and would consequently impinge on the autonomy of EU law and the CJEU as its final interpreter. While the second argument is uncalled for, since it presumes that the ECtHR is incapable of accounting for reservations if they are made by the Member States in the ECHR system, the other two seem more legitimate.

4.5 Prior-Involvement Procedure

Article 3(6) of the DAA introduces another procedural novelty: the possibility of the involvement of the CJEU in proceedings before the ECtHR in cases in which the EU is joined as a co-respondent. The rationale for introducing this possibility for the CJEU is the fact that, in cases where an EU Member State is designated as a respondent and the case concerns an EU act, the situation may be that the EU joins the proceedings as a co-respondent, while the condition of the exhaustion of domestic remedies at the EU level has not been fulfilled, i.e., if the CJEU has not been involved through the preliminary reference procedure.[101] This would be in situations in which the highest national courts give final decisions concerning (implementing) acts of EU law without making the reference to the CJEU.[102] The

[101] On the prior-involvement procedure see R. Baratta, 'Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism' (2013) 50 *Common Market Law Review* 5, 1305–32, 1310.

[102] Making the preliminary reference to the CJEU is in principle obligatory for national courts of last instance (under Article 267 TFEU) but it is subject to exceptions, i.e. if the question raised is irrelevant to the outcome of the case, when the EU law provision has already been

Court found this mechanism also to be problematic from the perspective of EU law. First, the CJEU insisted that, under the DAA, the question of whether it had already given a ruling on the same question of law as that at issue in the proceedings in Strasbourg required an interpretation of the case law of the CJEU, which could only be determined 'by the competent EU institution' whose decision should bind the ECtHR.[103] Similarly, Advocate General Kokott argued that it would be incompatible with the autonomy of EU law if the decision regarding the necessity of the prior involvement of the Court of Justice 'were to be left to the ECtHR alone'.[104] Second, the Court found the scope of Article 3(6) DAA, or rather the explanation provided in the explanatory report, too limited, as it provides that the CJEU's prior assessment of the compatibility of EU law with the Convention shall mean ruling on the interpretation of primary EU law and the validity of secondary EU law and thus omits the 'interpretation' of secondary EU law. As with the co-respondent mechanism, objections relating to the prior-involvement procedure are clearly less problematic to remedy – although they show great distrust towards the competences of the ECtHR – and the Commission has already engaged in finding the appropriate solutions.

4.6 CFSP

In addition to the mutual trust, the objection concerning the Common Foreign Security Policy (CFSP) is another highly controversial point in the Opinion, which will be difficult to remedy.[105] The CJEU has limited jurisdiction in this field and has therefore decided that the ECtHR should not have the jurisdiction if the Court itself does not have it. In other words, if the Member States want to give review powers

interpreted by the CJEU (*acte éclairé*) or when the correct application of EU law is so obvious that it does not leave scope for any reasonable doubt (*acte clair*).

[103] Opinion 2/13, para 241

[104] Opinion 2/13 Opinion of AG Kokott, para 183.

[105] For a discussion on the CFSP objection see G. Butler, 'The Ultimate Stumbling Block? The Common Foreign and Security Policy, and Accession of the European Union to the European Convention on Human Rights' (2016) 39 *Dublin University Law Journal* 1, 229. More generally on the CFSP and the CJEU see C. Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford: Hart Publishing, 2014) 47–70.

to the Strasbourg Court, they should first give such competence to the CJEU. This is obviously problematic, because the Member States have made a conscious choice to exclude (for the most part) the jurisdiction of the CJEU in this particular field. Yet, the only way to overcome it seems to be to give the jurisdiction also to the CJEU and in this sense the CJEU has already taken steps in that direction on its own initiative.[106]

4.7 A Drop in Temperature

Opinion 2/13 exudes distrust towards the ECtHR, so it is not surprising that it was not well received in Strasbourg. The ECtHR President at the time, Dean Spielmann, commented on Opinion 2/13 in unusually strong language, pointing out that 'the principal victims will be those citizens whom this [*Opinion 2/13*] deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each Member State. More than ever, therefore, the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation'.[107] Additionally, during the opening of the judicial year in Strasbourg, President Spielmann stated:

> For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution. Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations.[108]

Opinion 2/13 was thus perceived as a hostile move in Strasbourg and has brought about tension in the relationship between the two European Courts. An important

[106] See e.g. C-72/15 *Rosneft* [2017] ECLI:EU:C:2017:236. For a discussion and further references see G. Butler, 'The Coming Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 *European Constitutional Law Review* 673-703.
[107] ECtHR Annual Report 2014, available at http://echr.coe.int/Documents/Annual_Report_2014_ENG.pdf.
[108] D. Spielmann, 'Solemn hearing for the opening of the judicial year of the European Court of Human Rights' Strasbourg, 30 January 2015, available at http://echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf.

question in that context was the future of the *Bosphorus* presumption after Opinion 2/13.[109] In *Avotiņš v Latvia*,[110] a case decided shortly after the CJEU's Opinion 2/13, the ECtHR decided on the future of *Bosphorus* and it also expressed its first thoughts on the principle of mutual trust and recognition. The case concerned the application of the Brussels I Regulation, which mandates the recognition and enforcement of judicial decisions between national courts of the Member States (with a few exceptions provided in the Regulation) based on the mutual trust principle. The ECtHR held, applying the presumption of equivalent protection, that there had been no violation of Article 6(1) of the Convention (right to a fair hearing).

Although the decision may seem EU and CJEU-friendly at first sight, given that the Court found the *Bosphorus* presumption to be applicable and found no manifest deficiency in the protection provided, a careful reading reveals hidden messages and a somewhat stricter application of the presumption. In particular, the ECtHR's assessment of the principle of mutual trust and recognition is worth noting.

The Strasbourg Court commenced by stating that it is mindful of the importance of the mutual recognition mechanism for the construction of the AFSJ and of the mutual trust it requires. The Court thus considers, *in principle*, the means necessary for the creation of the AFSJ to be legitimate.[111] It is apparent to the Court, however, that effectiveness pursued by some of those means results in a 'tightly regulated or even limited' review of the observance of fundamental rights.[112] Here the Court referred to paragraph 192 of Opinion 2/13, quoted above, and noted that such an interpretation of mutual trust could, in practice, 'run counter to the requirement posed by the Convention according to which the court

[109] N. Mole, 'Can Bosphorus be maintained?' (2015) 16 ERA Forum 467–480; L. Glas and J. Krommendijk, 'From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' (2017) 17 *Human Rights Law Review* 2; X. Groussot et al., 'The Paradox of Human Rights Protection in Europe: Two Courts, One Goal?', in O.M. Arnardóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection* (London: Routledge 2016).
[110] *Avotiņš v Latvia*, App no 17502/07 (ECtHR, 23 May 2016). For the background information and discussion on other aspects of the decision (other than the mutual trust aspect) see Section 2.2.5, Chapter 2.
[111] *Avotiņš v Latvia*, App no 17502/07 (ECtHR, 23 May 2016), para 113.
[112] *Avotiņš v Latvia*, para 114.

in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient'.[113]

The ECtHR warned that the application of the *Bosphorus* presumption in the case of *Avotiņš*, and in similar cases, leads to a paradoxical situation in which national courts are precluded from a fundamental rights review due to the principle of mutual trust (as interpreted by the CJEU in Opinion 2/13) and the ECtHR is precluded from conducting a thorough assessment due to the applicability of the (self-imposed) presumption of equivalent protection.[114]

The Court ended its appraisal referring to national courts and their duty under the Convention. It developed a test to be applied in the context of the mutual recognition instruments: if (1) a serious and substantiated complaint is raised before national courts with the effect that the protection of a Convention right has been manifestly deficient and (2) this situation cannot be remedied by EU law, national courts cannot refrain from examining that complaint on the sole ground that they are applying EU law and hence cannot rely on the *Bosphorus* presumption in those cases.[115] While *Avotiņš* does not clarify further how the manifest deficiency test is to be applied, it can be argued that the *Soering* test should be applied by analogy. In its 1989 *Soering* ruling, the Court held as follows:

> […] the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country […]. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has a direct consequence the exposure of an individual to proscribed ill-treatment.[116]

[113] Ibid.
[114] *Avotiņš v Latvia*, para 115.
[115] *Avotiņš v Latvia*, para 116.
[116] *Soering v United Kingdom* App np 14038/88 (ECtHR, 7 July 1989), para 91.

The question is of course whether the manifest deficiency test by the ECtHR will coincide with the CJEU's exceptional circumstances test – a category that still needs to be developed in future cases.

In essence, the ECtHR seems to be calling for a revision of the idea behind the mutual recognition mechanism and, in any case, a departure from its automatic application, now also in civil matters. In criminal matters, this has already been done to an extent, with the CJEU's ruling *in Aranyosi and Căldăraru*.[117] While the ECtHR may have decided to continue applying the *Bosphorus* presumption, its rebuttal no longer seems improbable. It remains to be seen if and when the ECtHR will be ready to take such a step.

5 Conclusion

The discussion in this chapter has revealed the potential for divergences in the case law of the CJEU and the ECtHR. The pre-Lisbon period is generally characterised by a willingness to avoid conflicts, which was more obvious in the CJEU's attempts to bring its case law in line with Strasbourg but which was also present in the ECtHR's judgments.

The Treaty of Lisbon was a turning point for the relationship between EU and ECHR law. The new Article 6 TEU not only makes the Charter of Fundamental Rights legally binding, it also provides that the EU shall accede to the ECHR. The second turning point was Opinion 2/13.

The post-Lisbon period is characterised by a number of trends in the case law of the CJEU that have had an impact on the relationship between the two European Courts, causing tension and providing grounds for more divergence. The CJEU has been putting emphasis on an autonomous EU approach to the interpretation of the Charter and has been distancing itself from the ECHR and the Strasbourg case law. While the focus on the Charter is not surprising, and compliance with the ECHR is not measured by the number of references to it, such developments may lead to a perception of a fragmented and divided fundamental rights protection in Europe and may also bring more disparity between the

[117] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

approaches of the two Courts. This is precisely what the Treaty drafters aimed to prevent by introducing Article 6 TEU and, more importantly, Article 52(3) of the Charter. The latter provision binds the two instruments together and, I suggest, limits the ability of the CJEU to provide a fully autonomous interpretation of EU fundamental rights.

Opinion 2/13 is probably the most extreme example of the autonomous approach to fundamental rights in Luxembourg. The CJEU rejected the DAA and, ultimately, the EU's accession to the ECHR, without giving any indication as to how the objections could be overcome. The then-President of the ECtHR has expressed 'great disappointment'[118] as regards the Opinion and has warned about its negative effects. The ECtHR has also been very critical of the mutual trust principle in *Avotiņš v Latvia*, decided shortly after the Opinion was released, finding that mutual trust, as interpreted by the CJEU, may conflict with the requirement under the ECHR, according to which domestic courts in the state in question must be enabled to conduct a review of any serious allegation of a violation of fundamental rights in the state of origin. In that context, the Strasbourg Court warned about the paradoxical situation which may arise from a simultaneous application of the *Bosphorus* presumption by the ECtHR and the principle of mutual trust by the national courts.

Having in mind the changes introduced in the Treaty of Lisbon and the worrying trends in the case law of the CJEU ever since, as well as the failed attempt to achieve the accession of the EU to the ECHR, it is important to examine whether the coexistence of the two supranational courts, each involved in the application (and necessarily the interpretation) of fundamental rights as provided in the ECHR and the Charter, leads to any new complications.

The most recent points of tension can best be observed in the Area of Freedom Security and Justice – a highly sensitive area from a human rights perspective and an area in which mutual trust and mutual recognition come into play, as well in the field of social rights. These areas are considered separately in

[118] European Court of Human Rights, 2014 Annual Report, Foreword by President Spielmann, p 6.

the following two chapters whereby the substantive rulings and conclusions of both European Courts are scrutinised.

Chapter 4: Fundamental Rights in the Area of Freedom Security and Justice: (In)Sufficient Level of Protection?

1 Introduction

This chapter will examine how fundamental rights are protected in the context of the Area of Freedom Security and Justice (AFSJ) – a highly sensitive area from a human rights perspective – and the extent to which the level of protection provided in EU legislation meets the minimum requirements imposed by the ECHR. Special attention is paid to the principles of mutual trust and mutual recognition, as they play an important role in this area and the divergences in Strasbourg and Luxembourg have been closely linked to it.

As it was noted in the previous chapter, the principles of mutual trust and mutual recognition have gained importance in EU law in recent years and have even been characterised as constitutional principles by the CJEU. The principle of mutual recognition has its origins in the internal market but it has become particularly important in the AFSJ. Essentially, the principle of mutual recognition, which presupposes mutual trust, requires Member States to trust, inter alia, each other's fundamental rights protection. This however does not sit well with the ECHR system, since the ECHR Contracting Parties are required to ensure that Convention rights are respected rather than relying on or trusting other states to comply with the ECHR standards.[1]

The chapter will debate the interplay between the principles of mutual trust and mutual recognition and fundamental rights and the way in which the balance has been struck between them. It will commence with the definition of the principles of mutual trust and mutual recognition, pointing out that, in contrast to mutual recognition, mutual trust is not mentioned in the Treaties and is in fact a construction of the Court of Justice. Against this background, the specific pieces of EU legislation that have generated the most impact will be discussed. The first

[1] This is the *Soering* line of cases. See *Soering v United Kingdom*, App no 14038/88 (ECtHR, 7 July 1989).

section will discuss the interpretation and application of the Brussels II *bis* Regulation on matrimonial matters and parental responsibility in cross-border divorces, including international child abduction. The concern here lies with the two competing values namely, the right to family life of parents and child and the best interest and rights of the child, combined with the practically automatic application of mutual recognition of judicial decisions from other Member States in such cases.

The second section examines the Dublin system on asylum claims. The analysis will demonstrate that the ECtHR has exerted great influence on the CJEU in this field but that its judgments are arguably still not in line with Strasbourg. This, inter alia, has led the EU legislature to revise the Dublin Regulation, which now explicitly makes the case law of the ECtHR binding on the states in the application of the Regulation.

The third section will review the relationship between mutual trust and fundamental rights in the context of the European Arrest Warrant (EAW) Framework Decision, which appears to be the most problematic from the perspective of national courts. In the EAW cases, national courts may face directly conflicting obligations because ensuring the protection of fundamental rights, as required under the ECHR, may mean a failure to execute a EAW.

2 Mutual Trust and Recognition in the AFSJ

The origins of the principle of mutual recognition in the EU can be found in the internal market context. It emerged in the CJEU 1979 *Cassis de Dijon* judgment,[2] as a solution to the obstacles to the free movement of goods. The Court held: 'there is […] no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State' and that 'Obstacles to movement within the Community resulting from disparities between the national laws relating to

[2] Case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* (known as *Cassis de Dijon*) [1979] ECLI:EU:C:1979:42. See also White Paper from the Commission to the European Council - Completing the Internal Market, COM (1985) 310, p 17.

the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer'.[3] Since the mutual recognition argument was not put forward by the parties to this case, and it was not included in the treaties at the time, it could be said that it was truly an invention of the Luxembourg Court.

While the Court first introduced the principle of mutual trust in the context of the internal market, it has gained major importance more recently in AFSJ. Shortly after the Treaty of Amsterdam entered into force, formulating the ambitious aim of transforming the Union into an AFSJ, the European Council recognised the need to enhance the ability of national legal systems to work closely together and asked the Council to determine the scope for greater mutual recognition of judicial decisions. As part of the Vienna Action Plan of the Commission and the Council on this topic, the European Council was asked to initiate a process that would facilitate the mutual recognition of decisions and the enforcement of judgments in both civil and criminal matters within the Union.[4] Subsequently, at a meeting in Tampere on 15–16 October 1999, the European Council endorsed the principle of mutual recognition and declared that it should become 'the cornerstone of judicial cooperation within the Union'.[5] At this point, mutual recognition was not explicitly linked to a requirement of mutual trust and the latter was in fact not even mentioned in the Tampere Conclusions. Many policy documents followed in which the principle of mutual recognition maintained the central position.

It was not long before mutual trust came into the picture, as a prerequisite for a successful application of the principle of mutual recognition. The European Commission provided a definition in its Communication of 26 July 2000:

[3] Case C-120/78 *Cassis de Dijon* [1979] ECR 649, para 14.
[4] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, text adopted by the JHA Council of 3 December 1998, OJ C 1999, 19/01.
[5] Tampere European Council Presidency Conclusions, 15 and 16 October 1999, para 33.

> MR is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partners rules, but also trust that these rules are correctly applied. Based on this idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case. Recognising a foreign decision in criminal matters could be understood as giving it effect outside of the state in which it has been rendered, be it by according it the legal effects foreseen for it by the foreign criminal law, or be it by taking it into account in order to make it have the effects foreseen by the criminal law of the recognising state.[6]

Today, the principle of mutual recognition is explicitly recognised in the Treaty of Lisbon;[7] however, the Treaty does not mention mutual trust. Nevertheless, the European Council noted in the Hague Program in 2005 that, in order for the principle of mutual recognition to become effective, mutual trust must first be strengthened 'by progressively developing a European judicial culture based on the diversity of legal systems and unity through European law'.[8] In essence, mutual trust could be described as the reciprocal trust between the Member States in the legality and quality of each other's legal systems, while mutual recognition refers to the products of these systems.[9] The two concepts have been used interchangeably,[10] but mostly the former is seen as a precondition (for the effective operation) of the latter.[11]

[6] COM (2000) 495, 26 July 2000.
[7] It is expressly mentioned in Articles 67 TFEU, 70 TFEU, 81 TFEU, and 82 TFEU.
[8] The Hague Programme: Strengthening Freedom, Security, and Justice in the EU [2005] OJ C53/01, 3.2.
[9] E. Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 *Utrecht Law Review* 1.
[10] Opinion of AG Sharpston in C-467/04 *Gasparini and Others* [2006] ECR I-9199 fn 87.
[11] K. Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, available at https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf [last accessed 20 May 2016].

The CJEU, for its part, introduced the duty of the mutual recognition of judicial decisions in the AFSJ in the *Gözütok* and *Brügge* case.[12] The formulation of the duty of mutual recognition indicated a broad scope of application: competent authorities are not only required to recognise decisions of courts from other Member States but also their (substantive and procedural) criminal law provisions and policy.[13] At the same time, however, the subject matter of most of the AFSJ is politically very sensitive: issues such as criminal law, immigration and asylum law and family law are all very close to national identity and sovereignty and indeed very important from a fundamental rights perspective.

The lack of reference to the principle of mutual trust in the Treaties has left considerable room for the CJEU to determine its meaning and scope of application. In some of its recent decisions, the Court adopted a strong position concerning the importance of mutual trust, giving it the rank of a constitutional principle and extending its effects beyond the field of judicial cooperation in the AFSJ.[14]

According to the CJEU, the principle of mutual trust requires Member States to trust each other's compliance with EU law and, in particular, with EU fundamental rights. That trust is grounded on their shared commitment to the principles of freedoms, democracy and respect for human rights, fundamental freedoms and the rule of law, as provided in Article 2 TEU. The premise that those values will be recognised implies and justifies, in eyes of the Court, mutual trust between the states.[15]

However, the automatic application of the principle of mutual recognition has proven difficult, and an important reason for this was a lack of or at least insufficient mutual trust between the Member States. In response, different trust-

[12] Joined Cases C-187/01 *Hüseyin Gözütok* and C-385/01 *Klaus Brügge* [2003] ECLI:EU:C:2003:87. In these landmark cases, the Court ruled that the *ne bis in idem* principle precludes criminal proceedings in a Member State where prosecution is sought on the same facts that had been discontinued in another Member State.
[13] C. Janssens*, The Principle of Mutual Recognition in EU Law* (Oxford: Oxford University Press, 2013).
[14] See e.g. Case C-195/08 *Rinau* [2008] EU:C:2008:406 relating to the interpretation of the Brussels II *bis* Regulation.
[15] Opinion 2/13, para 168.

building measures have been adopted,[16] which in fact confirmed the lack of trust. Notwithstanding this contradiction, over time the principle of mutual trust became strongly embedded in EU law.[17]

The principles of mutual trust and mutual recognition are employed in the three fields of the AFSJ, namely in criminal matters (the EAW FD), civil matters (Brussels II *bis* Regulation including provisions on child abduction) and asylum law (Dublin III Regulation).[18] The following sections examine the way in which automaticity and trust have been interpreted in the case law of the CJEU, and they explore the interaction between the CJEU and the ECtHR in this field. At the heart of the analysis is the question of the relationship between mutual trust and fundamental rights.

3 Brussels II *bis* Regulation

3.1 Definition and Purpose

Automaticity in the enforcement of judicial decisions from other Member States based on the principle of mutual recognition has been particularly pronounced in the application of the Brussels II *bis* Regulation (hereinafter, Brussels II or Regulation),[19] which regulates matrimonial matters and matters of parental responsibility in cases of cross-border divorces. The majority of the cases concern child abductions.

[16] E.g Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01). The Roadmap formulated strategic guidelines for developing the AFSJ. More specifically, it stated that EU action is needed in the field of procedural rights for the purpose of enhancing mutual trust between the EU states.

[17] See C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: Oxford University Press, 2013); A. Willems, 'Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character' (2016) 9 *European Journal of Legal Studies* 1, 211-249.

[18] It is should be noted that the Dublin system is not a system of mutual recognition but it does function on the basis of mutual trust.

[19] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ [2003] L 338/1, which had a more limited scope.

The Regulation strengthened the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter, the Hague Convention) by drastically reducing the possibility of blocking an enforceable judgment. In force since 2001, the Regulation is directly applicable in all EU Member States except for Denmark, which has opted out. Its main objective is to determine the national court which enjoys jurisdiction in matrimonial matters and matters of parental responsibility in cases of cross-border divorces, in order to prevent parallel litigation and contradictory rulings. In such cases, different fundamental rights are at stake: the right to family life of parents and the child as well as the best interest and rights of the child.

Dealing with the implementation of the European standards on custody decisions, abduction, and the right to family life, both the CJEU and the ECtHR have dealt with the cross-border conflicts between parents (and subsequently between national courts). The right to family life for parents and the child is protected in Article 7 of the Charter and corresponding Article 8 of the Convention, which in accordance with Article 52(3) of the Charter have the same meaning and scope. More specifically, for the child, Article 24(3) of the Charter includes the right to maintain a personal relationship and direct contact with both parents, unless that is contrary to the child's interests. In ensuring these rights, national courts have the difficult task to find a balance between swift procedures and an in-depth examination of the cases at hand.

The Brussels II *bis* Regulation operates on the basis of mutual trust and recognition and is one of the fields where the application of this principle is automatic. In matters concerning international child abductions falling under the Regulation, the courts of the requested state are denied the competence to assess whether the child's return could give rise to a breach of his fundamental rights. To date, the case law of the CJEU has primarily focused on the provisions of the Regulation that lay down rules on jurisdiction concerning matters of parental responsibility, although there have also been cases on matrimonial matters.

The Court of Justice operates on the basis of four guiding principles, namely: the interpretation of Brussels II must enhance mutual trust and facilitate the recognition of court judgments; it must be interpreted in light of the principle

of legal certainty; it should be interpreted in conformity with the multilateral Conventions containing conflict-of-jurisdiction rules to which Member States are parties and which predate the Regulation, in particular the Hague Convention, unless these are incompatible with the objectives of the Union; and, finally, it must be interpreted in accordance with EU primary law, which also includes the EU Charter of Fundamental Rights.[20]

3.2 The *Povse* Case

The *Povse* case[21] is a highly complex and controversial case in the context of the Brussels II *bis* Regulation that has reached both the Luxembourg and Strasbourg Courts. The facts may be summarised as follows. From 2006 to January 2008, Ms Povse, an Austrian national, and Mr Alpago, an Italian national, lived together as an unmarried couple in Italy. In December 2006 Ms Povse gave birth to daughter Sofia and, in accordance with Italian law, they had joint custody of her.

In February 2008, Ms Povse and her daughter left Italy to stay permanently in Austria. This was in breach of a provisional decision of the Venice Youth Court, which on the request of Mr Alpago issued a travel ban prohibiting Ms Povse from leaving Italy with Sofia without his consent. However, in May 2008, the same Court revoked its previous decision and adopted a new decision allowing Sofia to stay in Austria, having regard to her young age and close relationship with her mother. Mr Alpago was granted access rights twice a month in a neutral location, noting that the meetings should alternate between Italy and Austria.

In June 2008, Mr Alpago decided that he would not visit Sofia anymore and requested her return under the Hague Convention. From this moment onwards several decisions have been issued by the Leoben District and Regional Court, ultimately dismissing the request for return, as it would constitute a grave

[20] K. Lenaerts, 'The Best Interests of the Child always come first: the Brussels II bis Regulation and the European Court of Justice' (2013) 20 *Jurisprudencija/Jurisprudence* 4, 1302-1328.
[21] *Povse v Austria* App no 3990/11 (ECtHR, 18 June 2013).

risk for the child within the meaning of Article 13(b) of the Hague Convention, due to her young age and close ties with her mother.

Meanwhile, Ms Povse brought proceedings before the Judenburg District Court requesting to be awarded sole custody of Sofia. The Judenburg District Court held that, in accordance with Article 15 of the Brussels II *bis* Regulation, it enjoyed jurisdiction and in March 2010 granted sole custody to Ms Povse, referring to Sofia's close link with Austria and a danger to her well-being upon a possible return to Italy.

Subsequently, Mr Alpago made an application to the Venice Youth Court for the return of Sofia to Italy pursuant to Article 11(8) of the Brussels II *bis* Regulation. In July 2009, the Venice Youth Court ordered Sofia's return to Italy where she should stay with her mother if Ms Povse would return with her and otherwise she would stay with Mr Alpago. The Venice Youth Court found that it remained competent to deal with the case, as the Judenburg District Court had wrongly determined its jurisdiction under Article 15(5) of the Regulation. It noted that its previous decision from May 2008 had been designed as a temporary measure in order to re-establish contact between Sofia and her father through access rights as a basis for the decision on custody. In September 2009, Mr Alpago requested the enforcement of the return order, but the Leoben District Court dismissed his request. In January 2010 the Leoben Regional Court quashed that decision and granted the enforcement of the Venice Youth Court's order to return the child. The Regional Court found that the Austrian courts had to recognise and enforce the judgment from Italy, in accordance with Article 42 of the Regulation.

Ms Povse lodged an appeal before the Supreme Court. The Supreme Court decided to request a preliminary ruling by the CJEU, asking whether the provisional decision of the Venice Youth Court from May 2008, could be considered as 'a judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of the Brussels II *bis* Regulation. The CJEU held that a provisional measure adopted by the courts of the Member State where the child was habitually resident immediately before the wrongful removal could not be considered as 'a judgment on custody that does not entail the return of the child',

as provided in Article 10(b)(iv) of the Regulation. On the contrary, the application of the exception to the retention of jurisdiction laid down in Article 10(b)(iv) was limited to final judgments issued by the courts of the Member State of origin, thus confirming the jurisdiction of the Italian courts in the case at hand and the enforceability of the Venice Youth Court's judgment.[22]

The CJEU reasoned that, since the system set up by the EU legislature rests on the premise that wrongful removal or retention is detrimental to the best interests of the child, the longer the separation between the child and the father or the mother suffering from the wrongful removal or retention lasts, the more adversely affected the fundamental rights of the child will be.[23]

After the judgment of the CJEU, several other court proceedings and appeals followed in Austria. After a long and tortuous process, the Austrian courts ended up ordering the child's return to Italy, considering that the enforcement system without exequatur introduced by the Dublin Regulation prevented them from doing anything different.

The next step for Ms Povse was a complaint against Austria in Strasbourg. Ms Povse and her daughter Sofia contended that the Austrian courts had violated their right to respect for their family life under Article 8 of the Convention, since they disregarded that Sofia's return to Italy would constitute a serious danger to her well-being and lead to a permanent separation from her mother. They acknowledged that the position taken by the Austrian courts corresponded to the legal view expressed by the CJEU in its preliminary ruling but asserted that the Austrian courts' failure to examine their arguments against the enforcement of the return order had nevertheless violated Article 8 of the Convention.

The main argument of the Austrian Government against the complaint was that the Austrian courts were not entitled to examine the merits of the return order to be enforced and had merely complied with their obligations under the Brussels II *bis* Regulation. In this context, the Austrian Government referred to the *Bosphorus* case, where the ECtHR held that when an EU Member State has

[22] Case C-211/10 PPU *Povse* [2010] ECLI:EU:C:2010:400.
[23] Case C-211/10 PPU *Povse* [2010] ECLI:EU:C:2010:400, para 64.

merely complied with its obligation arising from its status as a Member State of the EU, it will presume that it did not violate its obligations under the Convention, since the protection of fundamental rights provided by the EU is equivalent to that provided by the Convention, with special regard to the role of the CJEU in controlling the compliance.

Surprisingly, perhaps, the ECtHR accepted this argument and declared the application inadmissible.[24] Indeed, one would expect the ECtHR to reiterate that ECHR Contracting Parties are required to ensure that the Convention rights are respected rather than relying on or trusting other states to comply with fundamental rights. This would be consistent with the *Soering* line of cases and other principles deeply embedded in the ECHR jurisprudence.[25] However, the ECtHR decided that the fact that the Italian authorities would provide protection of the Convention rights was sufficient in this case. The Court ruled that there was an interference with the right to respect for family life and that such an interference is in violation of Article 8, unless it is 'in accordance with the law', 'pursues legitimate aims' and is 'necessary in a democratic society'.[26] Applying the test, the Court concluded that the enforcement order issued by the Austrian courts was in accordance with the law as it was based on Article 42 of the Brussels IIa Regulation and that it pursued a legitimate aim of reuniting Sofia with her father. As for the condition of the necessity of interference, the Court applied the *Bosphorus* presumption and ruled that Austria must be presumed to have complied with the requirements of the Convention, since the protection of fundamental rights by the EU was 'equivalent' to the protection provided by the ECHR, and the Austrian courts only implemented the legal obligations flowing from Austria's membership of the EU, without exercising any discretion. Lastly, after a

[24] *Povse v Austria* App no 3890/11 (ECtHR, 18 June 2013), paras 69-89.
[25] *Soering v United Kingdom* App np 14038/88 (ECtHR, 7 July 1989). In the *Soering* line of cases, liability is incurred by an action of the respondent state concerning a person while he or she is on its territory and within its jurisdiction. For the follow-up cases see, inter alia, *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005); *Al-Saadoon and Mufdhi v United Kingdom* App no 61498/08 (ECtHR, 4 October 2010); *Othman (Abu Qatada) v United Kingdom* App no 8139/09 (ECtHR, 9 May 2012).
[26] *Povse v Austria* App no 3890/11 (ECtHR, 18 June 2013), para 71.

brief examination, the Court concluded that the presumption of equivalent protection was not rebutted.[27]

Interestingly, however, in the Grand Chamber ruling in *Neulinger v Switzerland*,[28] which was factually very similar to *Povse*, the ECtHR held that enforcing the order for the return of the child would amount to a violation of the mother's right to family life and would not be in the best interest of the child, since the child had already settled in Switzerland and had no ties to Israel except for the father, who he had not seen or been in touch with for several years. Moreover, the mother could not accompany the child to Israel, since she faced the risk of criminal sanctions. Similarly, in *Povse*, the child had already settled in Austria and had no ties to Italy other than her father, who she had not seen or been in touch with for several years. Ms Povse could not accompany the child since she too was facing the risk of criminal sanctions in Italy. Yet, the outcome in the two cases is completely different, which shows a considerable deference in Strasbourg towards the EU. Some commentators have argued that the *Povse* decision leaves a gap in the protection of fundamental rights.[29]

In *M.A. v Austria*,[30] Mr Alpago (the father of Sofia) brought a complaint against Austria for breaching his right to family life by initially resisting the enforcement of the order. The ECtHR held that, by failing to act swiftly in the first set of proceedings in order to ensure the enforcement of his daughter's return to Italy, Austria had violated his rights under Article 8 of the ECHR.[31]

The CJEU has maintained the rigid application of the principle of mutual trust and recognition in cases of child abductions. In the *Aguirre Zarraga* case,[32] the referring German court asked whether it could oppose the enforcement of a judgment ordering the return of a child in cases of serious violations of fundamental rights, notably Article 24 of the Charter. The CJEU held, in essence,

[27] *Povse v Austria* App no 3890/11 (ECtHR, 18 June 2013) paras 78-87.
[28] *Neulinger v Switzerland* App no 41615/07 (ECtHR, 6 July 2010).
[29] M. Hazelhorst, 'The ECtHR's decision in *Povse*: guidance for the future of the abolition of exequatur for civil judgments in the European Union' (2014) *Nederlands Internationaal Privaatrecht* 1, 27-33.
[30] *M.A. v* Austria, App no 4097/13 (ECTHR, 15 January 2015).
[31] *M.A. v Austria* App no 4097/13 (ECtHR, 15 January 2015), paras 137-138.
[32] Case C-491/10 PPU *Aguirre Zarraga* [2010] ECLI:EU:C:2010:828.

that the referring court cannot oppose the enforcement of the order, since the recognition of a judgment certified pursuant to the requirements laid down in Article 42(2) of the Brussels II Regulation is automatic. This does not mean, in the view of the Luxembourg Court, that the fundamental rights of the child concerned are deprived of judicial protection as they are protected by the courts of the Member State of origin.

The CJEU and the ECtHR have thus taken different approaches in similar child abduction cases. While the former gives much weight to the recognition of foreign judgments in this context (and hence to the principle of mutual trust between the judges),[33] trusting that the national courts in the state of habitual residence have made sure that the child's well-being and best interest is taken into account, the latter is concerned with assessing what is in the best interest of the child at the moment of its decision, requiring the national court to conduct an in-depth individualised assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child.[34] The ECtHR clearly noticed the potential conflict and decided to avoid it by applying the *Bosphorus* presumption, ultimately finding no manifest deficiency in the protection provided by EU law. While the Strasbourg Court decided to show considerable deference in this case, because the cases concerned EU law (and more specifically an EU Regulation which is directly applicable in the Member States and leaves no discretion as to its implementation) it does not mean that it will continue doing so. Lenaerts has suggested that the *Povse* decision (as well as the ECtHR's decision in *Avotiņš* discussed elsewhere in this book)[35] acknowledges the importance of the principle of mutual trust in the EU legal order and contributes to its strengthening.[36] However, this argument appears largely

[33] This is of course not the case only in the context of the child abduction cases. See e.g. Case C-116/02 *Gasser* ECLI:EU:C:2003:657, para 72.
[34] *Neulinger v Switzerland* App no 41615/07 (ECtHR, 6 July 2010), para 139. *X v Latvia,* paras 72-73.
[35] See Section 4.7., Chapter 3.
[36] K. Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, p. available at https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf [last accessed 14 January 2017]. More recently see, K. Lenaerts, La vie après l'avis: Exploring the principle of mutual (yet not blind) trust (2017) 54 *Common Market Law Review* 3.

unfounded, because the former President of the ECtHR (and now Judge at the General Court of the EU) Spielmann has said, in reference to the interpretation of the *Povse* decision by Lenaerts, that, while the Strasbourg Court is indeed sensitive to the concept of mutual trust in EU law, the effective protection of fundamental rights remains first and foremost the priority of the Strasbourg Court.[37] The ECtHR's decision in *Avotiņš*, concerning the Brussels I Regulation which mandatesthe recognition and enforcement of judicial decisions between national courts of the Member States in civil and commercial matters, is interesting in this context because there the ECtHR has been very critical of the automatic application of the principle of mutual trust.[38] It reasoned that the application of the *Bosphorus* presumption in cases where mutual trust comes into play leads to a paradoxical situation in which national courts are precluded from fundamental rights review due to the principle of mutual trust and the ECtHR is precluded from conducting a thorough assessment due to the applicability of the (self-imposed) presumption of equivalent protection.[39] The Strasbourg Court further stressed that national courts cannot refrain from examining a complaint on the sole ground that they are applying EU law if there is a serious and substantiated complaint before them which cannot be remedied by EU law.[40]

While it is true that the Strasbourg Court has shown deference towards the EU and the CJEU, this does not directly translate into recognising or strenghtening the principle of mutual trust. The ECtHR has actually warned about the negative effects of its automatic application and the problematic situations national courts may find themselves in, all of which has materialised in the meantime. In my view, the ECtHR, together with national courts, should continue to put pressure on the CJEU and question its choices, especially in cases in which mutual trust and recognition come into play. Checks and balances between European and national courts are necessary to maintain a desired balance between different aspects of European integration. Furthermore, automatic

[37] D. Spielmann, 'Opinion 2/13 and other matters', Trinity College, University of Cambridge, 14 March 2015, recording of the lecture is available on https://www.law.cam.ac.uk/press/news/2015/03/echr-president-dean-spielmann-speaks-accession-eu-echr/3009 [last accessed 25 May 2017].
[38] *Avotiņš v Latvia* (ECtHR, App no 17502/07, 23 May 2016).
[39] Ibid, para 115.
[40] Ibid, para 116.

mutual trust and recognition is untenable and the possibility for exceptions must exist – and it must be one that goes beyond 'exceptional circumstances' in relation to Article 4 of the Charter.

Moreover, the presumption of equivalent protection is only applicable in cases in which there is no discretion for the national courts, such as when they apply a Regulation. However, when there is discretion for the national courts, the presumption will no longer apply. This type of situation is well illustrated in the following section.

4 The Dublin System

4.1 Definition and Purpose

The Dublin system[41] was designed to coordinate asylum applications and allocate responsibility for asylum seekers between the Member States.[42] Its main purpose was to create a mechanism that quickly assigns the responsibility for processing an individual asylum application to a single Member State, in order to ensure quick access for those in need, but also to avoid abuses of the system where individuals would submit asylum applications in several countries. The responsibility for a particular asylum seeker is allocated on the basis of criteria guiding a Member State's decision on where individuals should have their application examined. The criterion used by states is the 'first point of entry' – the Member State responsible for examining an individual's asylum application is the one that he or she first entered.[43]

[41] The Dublin system was initially based on the Dublin Convention, negotiated by the (then) European Community in 1990. The Dublin Regulation (known as the Dublin II Regulation) replaced the Convention in 2003 and remained in force until 2013. After the revisions, the new Dublin Regulation 604/2013 (known as the Dublin III Regulation) entered into force on 19 July 2013 with effect from 1 January 2014.

[42] The Regulation applies to all 28 EU Member States and 4 non-EU countries (Norway, Iceland, Switzerland, and Liechtenstein), bound by its provisions on the basis of bilateral agreements.

[43] For a detailed report on the Dublin System see S. Fratzke, '*Not Adding Up: The Fading Promise of Europe's Dublin System*' EU Asylum: Towards 2020 Project (Migration Policy Institute Europe, 2015).

While the Dublin system is not a system of mutual recognition, it does operate on the principle of mutual trust, i.e. on the presumption that all states respect the rights of asylum seekers in accordance with European and international law. This presumption relates in particular to the examination of the request for asylum by the responsible Member State and the treatment of the asylum seeker during this examination. The Dublin system is underpinned by the idea of equivalence of Member States' asylum systems, thus presuming that asylum seekers would not benefit from having their application examined in a specific country. In reality, it is a system designed to avoid forum shopping by the asylum seekers. Mutual trust between the states is additionally based on the presumption that all Member States respect the principle of *non-refoulement* and can thus be considered safe countries for third-country nationals.[44]

This presumption does not explicitly feature in the Regulation, except for the brief mention in Recital 22,[45] but the CJEU has consistently held that it must be assumed that all participating states observe and comply with fundamental rights, including the rights based on the Charter of Fundamental Rights, the Geneva Convention and the ECHR.[46] For quite some time, the EU Member States

[44] Preamble Dublin II Regulation, recital 2. Preamble Dublin III Regulation, recital 3.

[45] Recital 22 of Dublin III Regulation: A process for early warning, preparedness and management of asylum crises, serving to prevent a deterioration in, or the collapse of, asylum systems, with EASO playing a key role, using its powers under Regulation (EU) No 439/2010, should be established in order to ensure robust cooperation within the framework of this Regulation and to develop mutual trust among Member States with respect to asylum policy. Such a process should ensure that the Union is alerted as soon as possible when there is a concern that the smooth functioning of the system set up by this Regulation is being jeopardised as a result of particular pressure on, and/or deficiencies in, the asylum systems of one or more Member States. Such a process would allow the Union to promote preventive measures at an early stage and pay the appropriate political attention to such situations. Solidarity, which is a pivotal element in the CEAS, goes hand in hand with mutual trust. By enhancing such trust, the process for early warning, preparedness and management of asylum crises could improve the steering of concrete measures of genuine and practical solidarity towards Member States, in order to assist the affected Member States in general and the applicants in particular. In accordance with Article 80 TFEU, Union acts should, whenever necessary, contain appropriate measures to give effect to the principle of solidarity, and the process should be accompanied by such measures. The conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows, adopted by the Council on 8 March 2012, provide for a 'tool box' of existing and potential new measures, which should be taken into account in the context of a mechanism for early warning, preparedness and crisis management.

[46] Joined Cases C-411/10 *N. S. v Secretary of State for the Home Department* and C-493/10 *M. E., A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] ECLI:EU:C:2011:865, para 80.

have been invoking the principle of mutual trust as a justification for the Dublin transfers of asylum seekers to EU states with questionable records of human rights compliance.[47] Recently, however, this presumption of fundamental rights compliance has come under strain, initially from Strasbourg and later on from the national courts also.

4.2 *MSS v Belgium and Greece*

The first time the ECtHR ruled on the matter of transferring asylum seekers on the basis of the Dublin system was in *MSS v Belgium and Greece*,[48] delivered by the Grand Chamber in January 2011. The case concerned the expulsion of an Afghan asylum seeker to Greece by Belgium in the application of the Dublin II Regulation.

The ECtHR reiterated that Dublin transfers are subject to review by the Strasbourg Court and that the *Bosphorus* presumption[49] is not applicable in this case, since those transfers are never mandated and domestic authorities enjoy a margin of discretion under the 'sovereignty clause' contained respectively in Article 3(2) of the Dublin II Regulation and Article 17(1) of its recast.

The ECtHR acknowledged, in principle, the relevance of the principle of mutual trust in the context of the Dublin Regulation, but it determined that its application is not unconditional. The presumption could be rebutted if there were substantial grounds for believing that a person whose return is being ordered would face a real risk of treatment contrary to the Convention in the receiving country.[50]

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[47] In the Netherlands, e.g., the authorities have relied strongly on the presumption of fundamental rights compliance by other EU Member States in the context of the Dublin transfers. They had decided to suspend returns to Greece only pending the outcome in the *MSS* case. See conclusions of the International Commission of Jurists, 'Workshop on Migration and Human Rights in Europe' (July 2011), http://www.icj.org/wp-content/uploads/2012/06/Non-refoulement-Europe-summary-of-the-workshop-event-2011-.pdf [last accessed 24 October 2016].

[48] *M.S.S. v Belgium and Greece*, App no 30696/09 (ECtHR, 21 January 2011).

[49] *Bosphorus v Ireland*, App no 45036/98 (ECtHR, 30 June 2005).

[50] *M.S.S. v Belgium and Greece,* App no 30696/09 (ECtHR, 21 January 2011) paras 344-369.

The ECtHR found Greece to be in breach of Article 3 ECHR both in terms of the risk of return to Afghanistan and the poor detention and living conditions. The evidence of these violations was found in numerous reports by NGOs and international bodies. In addition, the Court ruled that Belgium, by transferring the applicant asylum seeker to Greece, had violated the *non-refoulement* principle in Article 3 of the ECHR because of the poor living conditions in Greece. In the Court's view, the Belgian authorities at the time of the transfer 'knew or ought to have known' the deficiencies of the asylum procedure in Greece.[51] Accordingly, the assumption that Member States' asylum systems can be considered equivalent and that automatic transfer of asylum seekers absolves a sending state of responsibility for the procedure applied and the living conditions in the receiving state turned out to be misconceived. The judgment interrupted the system of transfers under the Dublin II Regulation, by ruling that Belgium's decision to apply the Regulation was unlawful and to request Greece to take MSS back and consider his application.

4.3 The *NS* Judgment

The CJEU seemingly followed suit in the *N.S.* case,[52] involving the Dublin II Regulation returns of asylum seekers to Greece, the Member State responsible for examining their applications pursuant to the Regulation, in a case originating in the UK. The applicants claimed that they risked being subjected to inhuman and degrading treatment in Greece within the meaning of Article 4 of the Charter of Fundamental Rights.

The Court of Justice commenced by stating that the Common European Asylum System is based on mutual confidence and a presumption of compliance with fundamental rights. However, the Court also accepted that such a presumption is not conclusive: 'it is not […] inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when

[51] *M.S.S. v Belgium and Greece* (ECtHR, 21 January 2011) para 358.
[52] Joined Cases *N. S.* (C-411/10) *v Secretary of State for the Home Department* and *M. E. and Others* (C-493/10) *v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECLI:EU:C:2011:865.

transferred to that Member State, be treated in a manner incompatible with their fundamental rights'. However, the Court further added '[…], it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003'.[53] Consequently, Member States may be required not only to presume compliance, but they may have to avoid checking in certain cases whether fundamental rights guaranteed by the EU have actually been observed and carry on with the transfer.[54]

The CJEU did recognise, reiterating the wording of the ECtHR in the *MSS* judgment that, if there are 'substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision'.[55] Nevertheless, the CJEU was careful not to condemn the Dublin system as a whole and made it clear that this should remain an exceptional case – making the threshold of incompatibility with fundamental rights very high. This has worrying implications in practice, given that it allows transfers to countries with poor legal and reception standards.

4.4 *Puid* and *Abdullahi*

The CJEU further clarified its position in the *Puid* and *Abdullahi* judgments,[56] both delivered late in 2013. In *Abdullahi*, the Court ruled that the *only* way in which the applicant for asylum can call into question the criterion determining the Member State responsible for examining an asylum application is by "pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum […] which provide substantial grounds for

[53] Ibid, para 82.
[54] See e.g. J.P. Gauci, M. Giuffré and E. Tsourdi (eds) *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Leiden: Brill Nijhoff, 2015).
[55] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P. and E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865, para 86.
[56] Cases C-4/11 *Puid* EU:C:2013:740 and C-394/12 *Abdullahi* EU:C:2013:813.

believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter."[57] Yet, while clarifying that aspect of the *NS* judgment, the Court left the interpretation of the term 'systemic deficiencies' open. It remains unclear if it is a synonym for the 'Greek' systemic deficiencies or if other (less grave) deficiencies in the asylum system of a Member State can be considered 'systemic'. It should be noted, however, that the CJEU has not yet been compelled to clarify this point since all the cases (i.e. *NS and Others*, *Puid* and *Abdullahi*) related to a Dublin transfer of asylum seekers to Greece. The judgments are also missed opportunities for the Court to bring its case law in line with that of the ECtHR.

The UK Supreme Court, after having examined the CJEU's *NS* ruling, concluded that proving 'systemic deficiencies' is but one route to establishing a real risk of ill-treatment, rather than 'a hurdle to be surmounted'.[58] The Supreme Court stated that CJEU did not intend to make 'systemic deficiencies' a necessary condition to stop a Dublin return and, accordingly, ruled that asylum seekers who appeal against their removal to another Member State under the Dublin II Regulation do not need to prove 'systemic deficiencies' in the asylum system of the destination state in order to prevent removal successfully. Interestingly, however, the Supreme Court based its decision entirely on the *NS* case without taking into account the *Abdullahi* judgment, even though it had been rendered two months earlier. Ultimately, the Supreme Court sided with the ECtHR providing an ECHR conform interpretation of the CJEU's *NS* ruling.[59] While the CJEU refrained from stating that *only* risks stemming from systemic deficiencies could preclude a transfer in the *NS* judgment, it clearly stated this in the *Abdullahi* decision.[60]

The Court's 'systemic deficiencies' test was consolidated in the Dublin III Regulation, which is applicable as of January 2014. Article 3(2) now states that

[57] C-394/12 *Abdullahi* EU:C:2013:813, para 60. See also Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P. and E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865, paras 94 and 106.
[58] *EM (Eritrea) v. Secretary of State for the Home Department* [2012] EWCA Civ 1336, para 63.
[59] For a further discussion of this case see Section 2.1., Chapter 7.
[60] C-394/12 *Shamso Abdullahi v. Bundesasylamt* [2013] EU:C:2013:813, para 60.

'where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible'.

4.5 Increasing the Standard of Protection in Strasbourg? The Case of *Tarakhel*

In November 2014, the ECtHR increased its standard of protection in the *Tarakhel* judgment, requiring that countries undertake a 'thorough and individualised examination of the situation of the person concerned' in the context of transfers under the Dublin II Regulation, if there is evidence indicating violations of the ECHR.[61] The case concerned an Afghan couple with six children, the youngest being born in 2012, after the family had arrived in Switzerland. They had entered the Dublin system at the Italian border in July 2011, where they were registered and placed in a reception facility. Due to poor living conditions in particular, they left the centre traveling first to Austria and subsequently to Switzerland. The Swiss authorities rejected their application and ordered their return to Italy.

The Strasbourg Court decided not to examine the complaints under Article 8 but rather focussed on Article 3 of the ECHR, which protects individuals from inhuman and degrading treatment. Not surprisingly, therefore, the principal issue was to ascertain whether the circumstances of the case met the minimum threshold of severity required.

In this regard, the Court recalled that the child's vulnerability, in prior case law, had been considered to be a decisive factor, even if the children are accompanied by their parents.[62] Further, examining the applicants' particular situation, the

[61] *Tarakhel v Switzerland,* App no 29217/12 (ECtHR, 4 November 2014) para 104.
[62] Ibid, para 99.

Court emphasised that asylum seekers are part of a 'particularly underprivileged and vulnerable' population group and, as such, needed special protection under Article 3. This led the Court to accept that the applicants' fears of poor living conditions, especially concerns about being placed in facilities incompatible with the children's needs and the risk of being separated, were not unfounded.

The Court concluded that the circumstances of the case required the Swiss authorities to obtain specific assurances from their Italian counterparts that, on arrival, the family would not be separated and would be received in facilities adapted to the children's age. The removal in the absence of such assurances would violate Article 3.

The real risk of ill-treatment in the receiving state thus precludes the removal of the individual, irrespective of the source of risk being systemic or individualised. In future Dublin cases, therefore, the national authorities are required to examine all the facts of the case carefully, including any individual characteristics that might make an asylum seeker more vulnerable. The case has been read as an example in which the ECtHR is more protective of applicants in asylum cases than the Court of Justice, which only makes a derogation from mutual trust when 'systemic flaws' Exist.

4.6 Abandoning the 'Systemic Flaws' Requirement? The Case of *C.K. and Others*

In 2017, the CJEU was given the opportunity to interpret the new version of the provision which regulates remedies available to asylum seekers in the context of their transfer decisions, Article 27(1) of the Dublin III Regulation, as resulting from the legislative reform in 2013.

In *C.K. and Others*,[63] the CJEU further qualified its approach concerning the systemic deficiencies requirement. The reference was made in the proceedings between C. K., H. F. and their child A. S. and the Republic of Slovenia, represented by its Ministry of the Interior, concerning their transfer to Croatia,

[63] Case C-578/16 PPU *C.K. and Others v. Republika Slovenija* ECLI:EU:C:2017:127.

the Member State responsible for examining their application for international protection in accordance with the provisions of the Dublin III Regulation. This is the first case in which the Court was given the opportunity to comment on the relationship between the new versions of Article 3(2) and Article 17(1) of the Dublin III Regulation. Article 3(2) now enshrines in the legislation a derogation from the duty to transfer asylum seekers among Member States where 'there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in [the Member State primarily designated], resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights'. This derogation is inspired by the ruling of the CJEU in the *N.S. and Others*,[64] according to which the Member States had to use the discretion provided for by the former so-called 'sovereignty clause' – which has now become a distinct provision and appears in Article 17(1) of the Dublin III Regulation – in case of such systemic flaws. The facts of the case are as follows.

Ms C. K., a Syrian national who was six months pregnant, and her husband, Mr H. F., an Egyptian national, entered the territory of the Member States via Croatia on 16 August 2015. They were in possession of tourist visas issued by Croatia. The following day, Ms C. K. and Mr H. F. entered Slovenia with false Greek identity papers and lodged an application for international protection. Following the application, the Slovenian authorities submitted a request to Croatia, the Member State responsible pursuant to the Dublin III Regulation, to take over the responsibility for examining the applications.

In the meantime, Ms C. K. gave birth to a son, A. S, and lodged an application for international protection on his behalf. In January 2016, the Slovenian authorities received the medical records of the applicants, which described Ms C. K.'s high-risk pregnancy and her difficulties following childbirth, providing that she and her newborn son should remain at the reception centre in Slovenia, because they were in need of care. Further psychiatric assessments

[64] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P. and E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865.

indicated that Ms C. K. had suffered depression and periodic suicidal tendencies, attributable to the uncertainty surrounding her status.

Due to the critical circumstances in the case, the Slovenian authorities sought assurances from their Croatian counterparts concerning the appropriate reception conditions for the applicants and the Croatian authorities confirmed that the applicants would be provided with accommodation, appropriate care and the necessary medical treatment. Consequently, the Slovenian authorities requested the transfer of the applicants to Croatia.

In a judgment of 1 June 2016, the Administrative Court in Slovenia annulled the transfer decision and suspended its enforcement, pending the adoption of a final decision in the administrative proceedings. Subsequently, the Supreme Court set aside the judgment of the Administrative Court, holding that the second subparagraph of Article 3(2) of the Dublin III Regulation was not applicable, since the existence of systemic flaws in the asylum procedure and reception conditions in Croatia had not been established. On the contrary, a report by the United Nations High Commissioner for Refugees (UNHCR) makes it clear that the situation in Croatia is good, the access to care is guaranteed and emergency situations are accounted for. This was especially true for the Kutina Centre in Croatia, which is intended for vulnerable groups of asylum seekers and which is the centre that the applicants would be transferred to.

The last step for the appellants was a constitutional complaint before the Constitutional Court in Slovenia. On 28 September 2016, the Constitutional Court set aside the Supreme Court's judgment and referred the case back to that court. While the Constitutional Court agreed that the second subparagraph of Article 3(2) of the Dublin III Regulation was not applicable, since there are no systemic flaws in the asylum procedure and in the reception conditions in Croatia which might result in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, it considered that that the applicants could not be transferred to Croatia before the Slovenian authorities had examined all the relevant circumstances, including the personal situation and state of health of the applicants. In the Constitutional Court's view, the transfer itself could be injurious to the state of health of Ms C.K. and her son and this was something the Slovenian

authorities needed to examine before executing the transfer. In construing its argument, the Court referred to recital 32 of the Dublin III Regulation, which states that Member States must respect the requirements of Article 33(1) of the Geneva Convention as well as to Article 3 of the ECHR and the relevant case law of the Strasbourg Court, pointing out that the criterion for an examination under those provisions is wider than that of 'systemic flaws' provided in Article 3(2) of the Dublin III Regulation. Interestingly, the Constitutional Court did not make a reference to the EU Charter of Fundamental Rights.

Following the judgment of the Constitutional Court, the Supreme Court decided to stay the proceedings and refer four questions to the Court of Justice in Luxembourg. The main question related to whether Article 4 of the Charter must be interpreted as meaning that, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment within the meaning of that Article. If the answer to the latter question would be affirmative, the referring court also asked whether it would be required to apply the 'discretionary clause' (Article 17(1)) and examine the asylum application itself.

In his Opinion, Advocate General Tanchev concluded that only systemic flaws in the responsible state could require the prevention of a Dublin transfer. The AG based his reasoning on the *NS* and *Abdullahi* judgments of the CJEU, as well as on the importance of the principle of mutual trust between Member States and the need to ensure the effectiveness of the CEAS. As for the ECHR standards, AG Tanchev acknowledged that his position did not meet the ECHR standards,[65] but he insisted that the CJEU is not required to follow the approach taken by the ECtHR and 'it would therefore be wrong to regard the case-law of the European

[65] AG Tanchev pointed out that the Court Justice requires 'systemic' flaws in the Member State responsible in order to prohibit the transfer of an applicant to that Member State; the ECtHR merely requires existence of flaws which affect the applicant's individual situation (para 47).

Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter'.[66]

The CJEU, however, decided not to follow the approach suggested by the Advocate General. The Court ruled that the transfer of the asylum seeker should be suspended if the particular medical condition of the applicant is so serious as to provide 'substantial grounds for believing' that the transfer would result in 'a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter'.[67] National courts should determine if this is indeed the case and, if so, suspend the transfer until the health of the applicant permits it.[68]

In this case, there was no evidence that there are substantial grounds for believing that there are 'systemic flaws' in the asylum procedure and the conditions for the reception of asylum seekers in Croatia; on the contrary, it was clear from the assurances obtained that the appellants in the proceedings would receive accommodation, the necessary medical treatment and appropriate care.[69]

Nevertheless, the Court emphasised that it cannot be ruled out that the *transfer itself*, irrespective of the reception conditions in Croatia, could result in a real risk of inhuman and degrading treatment for the person concerned due to her particularly serious state of health.[70] Accordingly, the authorities of the Member State concerned were under an obligation to assess the risk of such consequences before deciding on the transfer.[71]

The Court argued that the change in its case law, whereby it now allows for a derogation from the duty to transfer, in addition to that found in Article 3(2) on 'systemic flaws', stems from the increased standard of fundamental rights protection in the Dublin III Regulation in comparison to Dublin II.[72] At same time,

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[66] Opinion of AG Tanchev in C-578/16 PPU *C.K. and Others v. Republika Slovenija* ECLI:EU:C:2017:108, para. 53.
[67] Case C-578/16 PPU *C.K. and Others v. Republika Slovenija* ECLI:EU:C:2017:127, para. 90.
[68] Ibid.
[69] Ibid, para 71.This was also acknowledged in the decisions of both the Supreme Court and the Constitutional Court.
[70] Ibid, paras 65-66 and 73.
[71] Ibid, para 75.
[72] Ibid, paras 62-63 and 94.

however, the Court's solution is closely linked to the very exceptional situation of an asylum seeker whose state of health is particularly serious.[73] Moreover, this interpretation was held to fully respect the principle of mutual trust 'since it ensures that the exceptional situations are duly taken into account by the Member State [requesting the transfer]'[74].

As for the Member States' responsibility under the discretionary clause contained in Article 17(1) of the Dublin III Regulation, the Court held that the Member State in question has the possibility to examine the asylum application itself if the state of health of the asylum seeker was not expected to improve. The Court emphasised, however, that this provision does not oblige a Member State to examine any application lodged with it, even when read in the light of Article 4 of the Charter.[75]

4.7 Conclusion

The CJEU's approach in the Dublin cases discussed above (as well as cases on the European Arrest Warrant discussed below) show that the Court is struggling in fundamental rights cases in this particular field. While the principle of mutual trust plays an important role in the AFSJ, the underlying assumption that all EU Member States ensure respect for human rights is simply not realistic. In 2015 alone, the ECtHR found a violation of one of the most fundamental human rights (the prohibition of torture and inhuman and degrading treatment)[76] 71 times by EU Member States.[77]

Yet, the problem is not so much the Court's insistence on the principle of mutual trust, or the underlying presumption of compliance with human rights, but rather the fact that it does not seem to accept that such a presumption should be able to be rebuttable on a case-by-case basis. This undermines the very nature of

[73] Ibid, para 74.
[74] Ibid, paras 88 and 95.
[75] Ibid, para 88.
[76] Article 3 ECHR and Article 4 EU Charter of Fundamental Rights.
[77] See violations by Article and Respondent State 2015 at http://www.echr.coe.int/Documents/Stats_violation_2015_ENG.pdf [last accessed 24 October 2016].

fundamental rights as individual rights and is inconsistent with the case law of the ECtHR.

The Court has demonstrated its willingness to adapt the case law, however, and the *C.K. and Others* judgment is a step in the right direction.[78] The Court seems to have departed from its prior case law, ruling that, not only risks stemming from systemic flaws, but also flaws affecting the individual situation of an asylum seeker can preclude the transfer under the Dublin system in exceptional circumstances.[79] It is still not clear, however, how exceptional those exceptional circumstances should be and, more importantly, to what extent this judgment changes the Court's approach to mutual trust. In fact, concerning the latter, the situation in *C.K. and Others* seems not to affect the principle of mutual trust at all. The obligation to ensure that Article 4 of the Charter is respected lies solely with the Slovenian authorities having requested the Dublin transfer, since they are required to ensure that the transfer itself would not result in inhuman and degrading treatment of the applicants and thus does not raise questions of mutual trust between Slovenia and Croatia. The Slovenian court may decide to postpone the transfer because the *transfer itself* could result in inhuman and degrading treatment of the persons concerned, not because the Slovenian authorities do not trust the Croatian authorities' compliance with fundamental rights. In fact, the transfer could have been to any other country.

It remains to be seen, given the Court's general reluctance to limit the application of the principle of mutual trust,[80] to what extent and under which circumstances the Court will be willing to permit derogations, such as those granted in *C.K. and Others*, in cases where it is not the transfer itself that could lead to violation of Article 4 of the Charter but rather the asylum procedure and

[78] Some commentators have been very positive about this judgment. See, for example, C. Rizcallah 'The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection', *EU Law Analysis*, available at http://eulawanalysis.blogspot.nl/2017/02/the-dublin-system-ecj-squares-circle.html [last accessed 13 June 2017]. For a more cautious analysis and approach see Š. Imamović and E. Muir, 'The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?' (2017) *European Papers*, Insight of 9 September 2017.
[79] See C-394/12 *Shamso Abdullahi v Bundesasylamt* EU:C:2013:813, para 60.
[80] See, inter alia, Case C-396/11 *Radu* EU:C:2013:39.; C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107; and also Opinion 2/13.

reception conditions in the Member State responsible, where no systemic flaws have been established in those respects.[81] It is also not clear whether this judgment brings the CJEU's case law in line with that of the ECtHR and in particular with the *Tarakhel* judgment. Arguably, *Tarakhel* suggests a more flexible account of 'exceptional circumstances' and hence a wider exception to mutual trust than the that provided in *C.K. and Others*, which remains case-specific and narrow. If this proves to be the case, the standard of protection provided in Luxembourg would still be narrower (and arguably lower) than the standard provided by the ECtHR.

5 The European Arrest Warrant

A similar development can be tracked in the application of other EU instruments based on the principles of mutual trust and mutual recognition, such as the European Arrest Warrant (EAW). The EAW was established by the Council Framework Decision 2002/584/JHA of 13 June 2002 (Framework Decision or FD), following the terrorist attacks in the United States on 11 September 2001, and it became operational in 2004.[82] It is based on the idea that all the countries involved respect the same fair trial rights, in particular those required by the ECHR, and that the requested persons can therefore be extradited safely. Generally, the courts of the Member States have accepted this premise and have been willing to place high levels of trust in each other's criminal justice systems.[83] The practice has shown, however, that this confidence is not always well founded.

[81] The Court also made this distinction in paragraph 94 of the judgment, stating that the outcome in this case differs from the outcome in *Abdullahi*, since the latter judgment involved a national who had not claimed that his transfer would, in itself, be contrary to Article 4 of the Charter.

[82] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 190 18/07/2002.

[83] See e.g. P. Albers, P. Beauvais, J-F. Bohnert, M. Böse, P. Langbroek, A. Renier, and T. Wahl, 'Towards a Common Evaluation Framework to Assess Mutual Trust in the Field of EU Judicial Cooperation in Criminal Matters' (March 2013) available at https://www.government.nl/documents/reports/2013/09/27/final-report-towards-a-common-evaluation-framework-to-assess-mutual-trust-in-the-field-of-eu-judicial-cooperation-in-criminal-m [last accessed 17 November 2016].

The analysis of the cases below focuses on the important aspects of identifying incompatibilities in the case law of the Strasbourg and Luxembourg Courts and omits a detailed discussion of other aspects, given that the cases have already been discussed extensively in the academic literature in the aftermath of the Court's judgments.[84]

5.1 Definition and Purpose

An arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender of a requested person by another Member State, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[85] A warrant may be issued when the person whose return is sought is accused of an offence for which the law establishes a maximum period of the penalty of at least one year in prison or when the person has already been sentenced to a prison term of at least four months.[86] The EAW is described as 'the first and most symbolic measure applying the principle of mutual recognition', which implies that Member State courts will abstain from second-guessing decisions issued by judicial authorities of other Member States and execute the warrants.

Generally, the EAW has been considered to be a successful mutual recognition instrument in the area of judicial cooperation in criminal matters with

[84] See, e.g., A. Tinsley, 'The Reference in Case C-396/11 Radu: When does the Protection of Fundamental Rights Require Non-execution of a European Arrest Warrant?' (2012) 2 *European Criminal Law Review* 3; A. Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue' (2014) 10 *European Constitutional Law Review*, 2; G. Anagnostaras, 'Mutual confidence is not blind trust! Fundamental Rights protection and the execution of the European Arrest Warrant: *Aranyosi and Căldăraru*' (2016) 53 *Common Market Law Review* 165; S. Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 *European Journal of Crime, Criminal Law and Criminal Justice* 2-3; P. Gragl, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to *Opinion 2/13* in the *Avotiņš* Case' (2017) 13 *European Constitutional Law Review* 551.

[85] As provided in Article 1(1) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 190 18/07/2002.

[86] Article 2(1) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 190 18/07/2002.

significant advantages compared to the traditional extradition system.[87] However, in spite of its initial success, it became controversial from a human rights perspective. There are several reasons for the controversy. Initially, the Framework Decision was criticised because of its partial abolishment of the double criminality requirement with respect to 32 crimes.[88] In international extradition law, double criminality requires that the acts for which an extradition is requested constitute a criminal offence in the criminal laws of both the issuing and the executing state. However, the double criminality requirement, as curtailed under the new EAW regime, removes the possibility of examining double criminality for the 32 enumerated offenses.[89] More recently, problems have arisen in relation to the adequate protection of the fundamental rights of individuals who are subject to a warrant, in particular the right to a fair trial, the right to liberty and the prohibition of inhuman and degrading treatment, as well as the national courts' possibility – or rather lack thereof – to choose not to execute a warrant in cases where there is a risk that the requested person's human rights may be violated in the issuing state.[90] Pursuant to the FD, the refusal is only permissible under circumstances provided for in Articles 3 and 4, under which courts of the executing

[87] Most notably, the EAW system is faster and more efficient. See reports by the Commission and the Council concerning the implementation of the EAW: COM (2005) 63 and SEC (2005) 267, dated 23 February 2005; COM (2007) 407 and SEC (2007) 979, dated 11 July 2007; COM (2011) 175 final and SEC (2011) 430 final, dated 11 April 2011; Council, Final report on the fourth round of mutual evaluations, Doc. No. 8302/4/09, 28 May 2009. These reports are primarily based on their analysis of national laws giving effect to the EAW and the response to questionnaires addressed to the Member States.

[88] In the EAW, the verification of double criminality is abolished for a list of 32 offences corresponding to a prison sentence of a maximum of three years. This was problematic in some Member States, because not all Member States construe the list in the same way. For example, Belgium excluded acts of abortion and euthanasia from the offence of 'murder or grievous bodily harm' in the listed offences, while there are circumstances where such acts may be unlawful which raises difficult fundamental rights questions.

[89] Examples are participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, corruption, and fraud. For the full list see Article 2(2) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 190 18/07/2002.

[90] M. Fichera, *The implementation of the European Arrest Warrant in the European Union: law, policy and practice* (Antwerp: Intersentia, 2011).

Member State must (Article 3)[91] or may (Article 4)[92] refuse their execution. The Court has held that the list of grounds provided in Article 3 and 4 is exhaustive, since a refusal on grounds other than those explicitly stated would undermine the effectiveness of the EAW FD and the principle of mutual trust and recognition.[93]

[91] Grounds for mandatory non-execution of the European arrest warrant
The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:
1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.
[92] Grounds for optional non-execution of the European arrest warrant:
The executing judicial authority may refuse to execute the European arrest warrant:
1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;
2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;
4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;
5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;
6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;
7. where the European arrest warrant relates to offences which:
(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.
[93] Case C-396/11 *Radu* EU:C:2013:39, para 36.

Article 1(2) of the FD indeed reaffirms that Member States are expected to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the FD. This principle is built on the trust and confidence in the criminal justice arrangements of all the Member States.

At the same time, however, the obligation to ensure respect for fundamental rights cannot be ignored. According to Article 1(3), the Framework Decision 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'. This implies that the EAW should be implemented while taking into consideration the overall framework in which EU law functions, including its human rights protection. Additionally, Recital 13 of the FD sets out guarantees against the surrender of an individual 'to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. Accordingly, an argument can be made that Article 1(3) FD, in conjunction with Article 6 TEU, may in itself be interpreted as providing sufficient grounds to refuse an execution of a EAW in case the latter would result in human rights violations. Many States have indeed introduced an explicit ground for refusal based on fundamental rights claims, albeit with different formulations and thresholds. In Belgium, for example, national law requires 'serious grounds to believe' that the execution of a EAW would infringe fundamental rights.[94] The extradition law in the Netherlands stipulates that the execution of a warrant can be refused where there is a 'substantiated reason to believe' that its execution would lead to a 'flagrant' breach of human rights.[95] The Dutch legislature actually took over the wording of the ECtHR in extradition cases,[96] while also making a reference to the ECHR. The Irish and the British implementing laws simply state that the execution of a EAW warrant could be refused if it would result in a violation of the ECHR.[97] In Germany, national law generally provides that the requests for surrender shall not be

[94] Article 4(5) of the Wet betreffende het Europees aanhoudingsbevel of 19 December 2003.
[95] Article 11 of the Overleveringswet of 29 April 2004.
[96] *Soering v. United Kingdom* (ECtHR, App no 14038/88, 7 July 1989) para 113.
[97] Section 37(1) of the European Arrest Warrant Act 2003 (Ireland).

granted 'if compliance would violate the principles in Article 6 of the Treaty on the European Union'.[98]

The fundamental rights concerns resulting from the FD have thus been identified quite early in the Member States, having also led to a number of constitutional challenges in several countries,99 and in academia;100 however, they had been broadly overlooked in the EU legislative process and by the EU institutions.101 Nevertheless, more recently, the institutions have also voiced their concern regarding the erosion of fundamental rights as a consequence of judicial cooperation based on mutual recognition and have recommended several changes. In 2009, the Council of the EU adopted a Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.102 The aim of the Roadmap was to strengthen the rights by employing a 'step-by-step' approach. The starting point was to adopt five measures on basic procedural rights and the Commission was invited to propose EU legislation to this end. In this context, a number of Directives have been adopted to strengthen different aspects of the rights of suspects or accused persons in criminal proceedings.103

When addressing the constitutional challenges at the national level, the courts usually confined their analyses and decisions to the acts implementing the

[98] Section 73 of the Act on International Cooperation in Criminal Matters of 23 December 1982.
[99] In 2005 the EAW has been challenged in Poland, Germany, Cyprus, and Greece with the culmination in the Belgian *Advocaten voor de Wereld* case in 2007, which is discussed further below. For the overview and analysis see E. Guild (ed) *Constitutional Challenges to the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers 2006); J. Komárek, 'European constitutionalism and the European arrest warrant: In search of the limits of contrapunctual principles' (2007) *Common Market Law Review* 44.
[100] See various chapters in E. Guild (ed) *Constitutional Challenges to the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers 2006).
[101] A. Albi, 'The European Arrest Warrant, constitutional rights and the changing legal thinking. Values once recognised lost in transition to the EU level?', in M. Fletcher, E. Herlin-Karnell and C. Matera, *The European Union as an Area of Freedom, Security and Justice* (London: Routledge, 2016).
[102] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).
[103] See, for instance, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, 20 October 2010; Directive 2012/13/EU on the right to information in criminal proceedings, 22 May 2012; Directive 2013/48 on the right of access to a lawyer in criminal proceedings, 22 October 2013.

Framework Decision rather than the Decision itself, despite the fact that the FD and the underlying principle of mutual trust and recognition had been challenged. Nevertheless, some Member States have added fundamental rights as grounds for the refusal of the execution of a EAW in their implementing legislation.

5.2 The Validity Challenge: *Advocaten voor de Wereld*

Soon after the EAW Framework Decision was adopted (pre-Charter period) the Belgian *Arbitragehof* (Arbitration Court, later renamed Constitutional Court) made a reference to the CJEU in the proceedings between Advocaten voor de Wereld, a non-profit association of legal practitioners, and the Council of Ministers.[104] Advocaten voor de Wereld challenged the validity of the legislation implementing the EAW, alleging a violation of several provisions of the Belgian Constitution, as well as Articles 5, 6 and 7 of the ECHR, and seeking an annulment. The first question concerned the correct legal basis and the second one addressed a number of specific fundamental rights implications of the principle of mutual recognition. Ten Member States were involved in the case, indicating the importance of the issues.

With respect to the first claim, that the subject-matter of the European arrest warrant ought to have been regulated by means of a convention and not a framework decision, as the latter may be adopted only for the purpose of the approximation of the laws and regulations of the Member States pursuant to Article 34(2) (b) EU Treaty, the Court of Justice ruled that it is within the discretion of the Council to choose the legal instrument it deems appropriate, as long as the conditions governing the adoption of such a measure are satisfied. The conditions in this case were fulfilled according to the Court, since implementing the principle of mutual recognition of arrest warrants requires the approximation of the laws and regulations of the Member States, in particular the rules relating to the conditions, procedures and effects of surrender.[105]

The second question concerned the fundamental rights implications of the partial renunciation of the double criminality requirement in Article 2(2) of the

[104] C- 303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECLI:EU:C:2007:261.
[105] Ibid, para 29.

Framework Decision, which contains a list of 32 offences, if those offences are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. Traditionally, double criminality requires that the acts for which an extradition is requested constitute a criminal offence in the criminal laws of both the issuing and the executing state. Article 2(2), however, removes the possibility of examining double criminality for those 32 non-defined categories of offences. Advocaten voor de Wereld challenged this provision, arguing that it breaches Article 6(2) EU Treaty and, more specifically, the principle of legality in criminal proceedings guaranteed by that provision and the principle of equality and non-discrimination. The CJEU ruled that the principle of legality was not infringed, as the challenged provision does not seek to harmonise the criminal offences in question. Instead, the definitions of the offences and penalties continue to be matters determined by the law of the issuing Member State and, as such, it is the responsibility of that state to ensure compliance with the principle of legality.[106] The Court also rejected the claim concerning the infringement of the principles of equality and non-discrimination. It found that the distinction between the 32 categories and the other offences is objectively justified, because the listed offences are serious enough, in terms of adversely affecting public order and public safety, to justify dispensing with the verification of double criminality. Based on this assessment, the Court ruled that there are no grounds capable of affecting the validity of the EAW Framework Decision.

While the first part of the judgment concerning the procedural matter of correct legal basis is more elaborate and contains an extensive analysis of the relevant provisions of the Treaty, the second part, which deals with the more critical question of fundamental rights objections and mutual trust, is rather limited. The Court did not engage properly with the arguments of the plaintiff and it provided weak arguments in order to resolve – or, in fact, avoid – some difficult issues.[107] The Belgian Constitutional Court has also been criticised in the context

[106] Ibid, paras 52-53.
[107] F. Geyer, 'European arrest warrant: Court of Justice of the European Communities: judgment of 3rd May 2007, case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*' (2008) *European Constitutional Law Review* 4, 149–161. For further criticism of the Court's approach see D. Sarmiento, 'European Union: the European arrest

of this decision for providing very little or no guidance to the CJEU regarding the interpretation of the fundamental rights implicated in the case.[108] If national courts truly are EU courts as well, then they should also – especially supreme or constitutional courts – get more involved in explaining their views as regards the interpretation of EU law.

5.3 Can National Courts Refuse the Execution of a EAW if there is a Risk of Human Rights Violations in the Issuing State?

In the years following the *Advocaten voor de Wereld* case, which was an abstract review of the Framework Decision, concrete cases of alleged fundamental rights violations in the context of the EAW had emerged in the Member States and subsequently in Luxembourg. This section examines cases in which the infringement of fundamental rights either occurred in the process prior to the issue of the EAW or when it might occur after the warrant is executed. Determining the relevance of a past or future breach of fundamental rights perpetrated by the authorities of the issuing Member State can be very difficult in practice and problematic from an EU law perspective. To what extent can domestic courts examine fundamental rights compliance by the issuing state and thereby refuse to execute a EAW?

The *Radu, Melloni* and *Aranyosi and Căldăraru* cases invited the CJEU to take a stance on, inter alia, the tension between the effectiveness of the EAW mechanism and the respect for fundamental rights. All three instances dealt in essence with the same question: can the executing judicial authority refuse to execute a EAW if the execution would lead to infringements of the requested person's fundamental rights? *Melloni* is different from the other two cases,

warrant and the quest for constitutional coherence' (2008) *International Journal of Constitutional Law* 6, 171; A. Albi, 'From the banana saga to a sugar saga and beyond: could the post-communist Constitutional Courts teach the EU a lesson in the rule of law?' (2010) *Common Market Law Review* 47, 791.

[108] E. Cloots, 'Germs of Pluralist Judicial Adjudication: Advocaten voor de Wereld and Other References from the Belgian Constitutional Court' [2010] 47 *Common Market Law Review* 645, 652.

however, in the sense that it also addresses the issue of the conflicting levels of human rights' protection. The Court's approach differs in all cases.

5.3.1 *Radu*

In *Radu*[109] the CJEU was asked, inter alia, to clarify whether the executing judicial authority can refuse to execute the EAW if the execution would lead to infringements of the requested person's fundamental rights, as protected in the Charter of Fundamental Rights and in the ECHR. The question was raised in proceedings brought by Radu, a Romanian national, before a Romanian court against a German EAW seeking his surrender on charges of aggravated burglary. The defendant claimed that the Romanian court should refuse to execute the warrants, since the issuing state had breached his right to a fair trial. Despite the general nature of the Romanian court's long list of questions in the request for a preliminary ruling, the CJEU's response was very short and very narrow. The Court reformulated the questions posed by the Romanian court and limited its decision to answering whether issuing a EAW obliges Member State authorities to give the suspect the opportunity to be heard. Its response did not amount to much more than a clear 'no'.

The Court held that such an obligation 'would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom, security and justice' and that 'the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system'.[110] Accordingly, the executing judicial authorities cannot refuse to execute a EAW on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.

[109] Case C-396/11 *Radu* [2013] EU:C:2013:39.
[110] Ibid, para 41.

The CJEU, however, did not clarify as a matter of principle whether a court executing a EAW must do so having regard to the person's Charter and ECHR rights – which surely would have been helpful – and whether it may consider matters in the issuing state, past or future, when deciding whether those rights are respected. What it seems to suggest is that regard must be had to the system as a whole, i.e. it is sufficient if rights are protected by one state. The Court also failed to address the general tension between mutual trust and fundamental rights.[111] Once again, the Court places great emphasis on the efficiency of the EAW but conveniently forgets to refer to Article 1(3) of the FD, which specifically provides that the decision is not to have the effect of modifying the obligation to respect fundamental rights.[112]

Contrary to the Court, Advocate General Sharpston had strongly argued that, although silent on the point, the Framework Decision must be interpreted as subject to the provisions of both the ECHR and the EU Charter as a *matter of EU law* and, thus, that under primary EU law a Member State executing a EAW can refuse the request for surrender where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process.[113] The key difference in the reasoning lies in the reference and interpretation of Article 1(3) of the FD as well as recitals 10, 12, 13, and 14, which the Advocate General carried out extensively, concluding that 'to interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude'.[114] Moreover, she referred to Advocate General Cruz Villalón's Opinion in *I.B.*,[115] where he stated that, although mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental

[111] On the general tension between fundamental rights and the EAW (or more broadly the mutual trust principle), see Meijers Committee, *The Principle of Mutual Trust in European Asylum, Immigration and Criminal Law: Reconciling Trust and Fundamental Rights* (2011).
[112] 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'
[113] Opinion of Advocate General Sharpston in C-396/11 *Radu*, ECLI:EU:C:2012:648.
[114] Opinion of Advocate General Sharpston in C-396/11 *Radu* ECLI:EU:C:2012:648, para 70.
[115] Opinion of Advocate General Cruz Villalón in Case C-306/09 *I.B. v Conseil des ministres* [2010] ECLI:EU:C:2010:404.

rights and freedoms is a precondition which gives legitimacy to the existence and development of this area.[116]

5.3.2 The Case of Stefano Melloni[117]

Mr Melloni was arrested and charged with bankruptcy fraud in 1996 in Italy but, having made bail, he fled to Spain. In 2003, the Italian court handed down an *in absentia* ruling, sentencing Mr Melloni to ten years' imprisonment for bankruptcy fraud. Subsequently, the Italian authorities issued a EAW for his surrender. After the Spanish police arrested him, the competent court (*Audiencia Nacional*) ordered his surrender to the Italian authorities. However, the defendant filed a constitutional complaint before the Spanish Constitutional Court, claiming that his right to a fair trial had been violated. Mr Melloni argued that the absolute requirements deriving from the right to a fair trial, stated in Article 24(2) of the Spanish Constitution, had been indirectly violated, since Italian procedural law made it impossible for him to appeal against sentences imposed *in absentia*. Additionally, such a violation disregarded the very essence of a fair trial and undermines human dignity by allowing surrender to countries that allow convictions made *in absentia* without the possibility to appeal. Finally, the defendant argued that the EAW should only be executed if the Italian authorities could guarantee the possibility of appealing against the judgment. Confronted with these facts, the Spanish Constitutional Court was aware that, if it would uphold its well-established case law on the right to a fair trial regarding persons convicted *in absentia*,[118] it would be in conflict with Article 4a(1) of the FD as amended in 2009, so it decided to send the request for a preliminary ruling to the CJEU.

In its first ever request for preliminary ruling to the CJEU, the Spanish Constitutional Court asked whether the revised EAW FD precluded Member States from making the execution of a EAW conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant and, if so, whether such a prohibition was compatible

[116] Opinion of Advocate General Sharpston in C-396/11 *Radu*, para 71.
[117] C-399/11 *Stefano Melloni v. Ministerio Fiscal* [2013] EU:C:2013:107.
[118] See e.g. Spanish Constitutional Court, STC 91/2000 (30 March 2010).

with the right to an effective judicial remedy and to a fair trial (Article 47 of the Charter) and the rights of defence (Article 48(2) of the Charter). The third question, which drew most attention, concerned the interpretation of Article 53 of the Charter and the case of 'a higher national level of protection'.

With respect to the first question, the Court maintained the same rationale as in the *Radu* decision, which was rendered only a few weeks earlier. Once again, the Court regarded the grounds for a refusal to execute a EAW listed in the Framework Decision to be exhaustive.

With respect to the second question – whether the FD infringed the Charter – the Court held that the right of the accused to be present at his trial was not absolute and that he or she may waive that right of his/her own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, a violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so. At the end of the analysis the Court added:

> This interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights (see, inter alia, ECtHR, Medenica v. Switzerland, no. 20491/92, § 56 to 59, ECHR 2001-VI; Sejdovic v. Italy [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and Haralampiev v. Bulgaria, no. 29648/03, § 32 and 33, 24 April 2012).[119]

The statement that the interpretation of the Charter is consistent with Article 6 ECHR and the case law of the ECtHR is rather blunt and contains no further explanation. While it is to be commended that the CJEU aims to ensure consistency with the ECHR when interpreting the Charter rights, the way in which it does so is inadequate. The Court only mentions it at the end of the analysis, in order to support a conclusion it already arrived at independently. There is

[119] C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107, para 50.

absolutely no assessment of the Strasbourg case law, substantiating the claim. This is in stark contrast to the Opinion of Advocate General Bot, who made an extensive analysis of the Strasbourg case law and ultimately concluded that the interpretation of the relevant Charter provisions is consistent with the ECHR and the ECtHR case law.

Yet, it is plausible that the interpretation of the ECtHR case law provided by the CJEU is incorrect. What should a national court do if it finds an inconsistency between its own interpretation of the ECHR and the ECtHR case law and the interpretation provided by the CJEU? The CJEU obviously is not the ultimate interpreter of the Convention rights or the Strasbourg case law, so national courts may find themselves faced with conflicting treaty obligations where they may need to make a choice between the two.[120]

In its third point of examination, concerning Article 53 of the Charter, the Court emphasised that a Member State cannot make use of Article 53 to refuse the surrender of a person for the reason that the standard of protection of the right to a fair trial in its national constitution is higher than the one established in the national legislation of the issuing Member State. According to the Court, the possibility of invoking Article 53 in order to refuse the execution of a EAW would undermine 'the principle of primacy of EU law' and 'the principles of mutual trust and recognition' guaranteed by the uniform level of fundamental rights protection defined in the FD.[121] The Court thus decided to uphold the principles of primacy and effectiveness: rules of national law, even of a constitutional order, must not undermine the effectiveness of EU law on the territory of that state. While this approach makes sense from an EU law perspective and may be in line with the traditional approach to the construction of the EU legal order, in practical terms and from a national law perspective, *Melloni* results in two different levels of protection in the Member States depending on whether EU law applies or not.

[120] On conflicting obligations and the position of national courts see M. Claes and Š. Imamović, 'National Courts in the New European Fundamental Rights Architecture' in V Kosta, N Skoutaris and V Tzevelekos (eds) *The EU Accession to the ECHR* (Oxford: Hart Publishing, 2013); M Claes and Š Imamović '*Caught in the middle or leading the way*? National courts in the new European fundamental rights landscape' (2013) 4 European Journal of Human Rights 627.
[121] C-399/11 *Stefano Melloni v Ministerio Fiscal*, paras 58 and 63.

This, again, puts national courts in a rather difficult position as they may be required to lower the level of constitutional protection they would otherwise be able to provide and thus jeopardise the uniform application of the Constitution domestically.[122] If the CJEU expects national courts to accept this, it needs to build its authority further, which cannot only be formal and requires substantive reasoning and a reasoned discussion.

5.3.3 Changing the Approach? The Case of *Aranyosi and Căldăraru*

The case of *Aranyosi* and *Căldăraru*[123] provided a new possibility for the Court to elaborate on its position on the limits to mutual trust and the relationship between the EAW mechanism and fundamental rights. The facts in this case were as follows. Mr Aranyosi, a Hungarian national accused of committing burglary, was arrested in Germany following a EAW issued by Hungary. Mr Aranyosi resisted the surrender, referring to reports from the Committee on the Prevention of Torture and the case law from the European Court of the Human Rights, which documented a massive over-crowding in Hungarian prisons to an extent that could be considered a violation of Article 3 of the ECHR (which corresponds to Article 4 of the EU Charter of Fundamental Rights).

Mr Căldăraru was arrested in Germany following a Romanian EAW, after he was convicted *in absentia* to eight months in prison by a court in Romania for driving without a driver's license. The defendant resisted the surrender, arguing that he will be subjected to inhuman and degrading treatment due to the awful detention conditions in the Romanian prisons. He too relied on the case law of the Strasbourg Court in order to support his claim. Indeed, the ECtHR found very recently that both Romania and Hungary had infringed fundamental rights due to

[122] Note, however, that this is not always the case. For instance, in the *Jeremy F.* case (C-168/13 PPU [2013] ECLI:EU:C:2013:358), a higher level of constitutional protection was accommodated since there was a margin of discretion for the Member States and, importantly, providing the higher level of protection did not undermine the effectiveness of the EAW FD.

[123] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

the poor detention conditions.[124] Since Căldăraru was detained in Germany from the moment of his arrest, his case has been dealt with under the urgent preliminary ruling procedure provided for in the Court's Rules of Procedure. Nevertheless, the Court decided to join the two cases, as they concerned essentially the same issue and were submitted by the same *Hanseatisches Oberlandesgericht* in Bremen, Germany.

By its questions, the referring court asked the CJEU whether, in the light of the provisions of Article 1(3) of the Framework Decision, the judicial authority executing a European arrest warrant is required to surrender the person requested for the purposes of criminal prosecution or the execution of a custodial sentence where that person is likely to be detained,in the issuing Member State in physical conditions which infringe his fundamental rights and, if so, on what terms and in accordance with what procedural requirements.[125]

The key issue for the CJEU was thus to determine and clarify whether the responsible executing authority can refuse the execution of a EAW and, if so, under which conditions. In its judgment from 5 April 2016, the CJEU started off in asimilar fashion, as in the previously discussed EAW cases, providing that the EAW system is based on the principle of mutual recognition, which itself is founded on the mutual trust between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at the EU level, and particularly in the Charter. Further, referring to its Opinion 2/13,[126] the Court stated that both the principle of mutual trust between the Member States and the principle of mutual recognition are of fundamental importance in EU law, given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires each of those states, save in exceptional circumstances, to consider all the other

[124] See *Varga and Others v Hungary*, App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13 (ECtHR, 10 March 2015). *Oprea and Others v Romania*, App nos 54966/09, 57682/10, 20499/11, 41587/11, 27583/12, 75692/12, 76944/12, 77474/12, 9985/13, 16490/13, 29530/13, 37810/13, 40759/13, 55842/13, 56837/13, 62797/13, 64858/13, 65996/13, 66101/13 and 15822/14 (ECtHR, 18 June 2015).
[125] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* para 74.
[126] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:48.

Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.[127]

The Court, rather unexpectedly, took a different approach. It continued its assessment referring to recital 10 and Article 1(3) of the FD which provide, respectively, that the implementation of the mechanism of the EAW, as such, may be suspended in the event of a serious and persistent breach of the principles referred to in Article 2 TEU and that the FD is not to have the effect of modifying the obligation to respect fundamental rights.[128]

Furthermore, the Court focused specifically on Article 4 of the Charter, stating that the absolute prohibition of inhuman or degrading treatment or punishment is part of the fundamental rights protected by EU law. Accordingly, where the authority responsible for the execution of a warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member State where the warrant was issued, that authority must assess that risk before deciding on the surrender of the individual concerned.

This statement was however immediately qualified by the following statement in which the Court explained that, if a risk derives from the general detention conditions in the Member State concerned, the identification of that risk cannot, in itself, lead to the execution of the warrant being refused. It is thus necessary to demonstrate that there are substantial grounds for believing that the individual concerned will in fact be exposed to such a risk because of the conditions in which it is envisaged that he or she will be detained.[129]

In order to be able to assess the existence of that risk in relation to the individual concerned, the authority responsible for the execution of the warrant must ask the issuing authority to provide, as a matter of urgency, all the necessary information concerning the conditions of detention, which the issuing judicial authority is obliged to provide. If, in the light of the information provided or any other information available to it, the authority in the executing state finds that

[127] Ibid, paras 77-78.
[128] Ibid, paras 81-84.
[129] Ibid, paras 91-94.

there is, for the individual who is the subject of the warrant, a real risk of inhuman or degrading treatment, the execution of the warrant must be deferred until additional information is obtained on the basis of which that risk can be discounted. If the existence of that risk cannot be discounted within a reasonable period of time, that authority must decide whether the surrender procedure should be brought to an end.[130] It seems rather naive, however, to think that any state would provide information exposing human rights violations in its own country.

The CJEU deviates (fortunately!) in its judgment from the Opinion of Advocate General Bot who concluded that EU law, and in particular the EAW FD, provides no basis for Germany to refuse to execute the arrest warrants. Instead, the Advocate General assigns the responsibility for ensuring that human rights are sufficiently protected to the Hungarian and Romanian authorities – they should be the ones to consider whether or not a EAW should be issued in the first place. In cases in which the warrants had already been issued, the issuing countries (i.e. Hungary and Romania), and not the executing state, should then undertake all the necessary measures to guarantee the protection of fundamental rights in the individual case.

Advocate General Bot raised one interesting point worth noting. It concerns the comparability of the EAW FD with the Dublin Regulation and the extent to which the *NS* rationale could be extended to the EAW cases. The comparison relates to the fact that, in Dublin cases, the Court held that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No. 343/2003 where they are aware, owing to the instruments available to them, that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State are likely to expose the asylum seeker to inhuman or degrading treatment within the meaning of Article 4 of the Charter. Despite the resemblance between the cases, however, the principle established in the *NS* case is not applicable by analogy to the interpretation of the provisions of the EAW FD, as there are important determining differences between the two instruments. After pointing out some of the obvious differences between the two

[130] Ibid, paras 95-104.

instruments,[131] the Advocate General explained that the transposition of the principle established in the *NS* case to EAW cases would lead to a situation in which the executing judicial authorities could no longer surrender the requested person for the purposes of prosecution, but they would also not have, as a general rule, jurisdiction to prosecute that person in place of the issuing state. Consequently, there is a clear and obvious risk in such cases that the offence would remain unpunished and that the offender would reoffend, thus infringing the rights and freedoms of the other citizens of the Union.[132]

Additionally, and this was not explicitly mentioned by the Advocate General, the difference between the two instruments is that, in the Dublin cases, Member States have the discretion to decide whether or not they will transfer the asylum seeker to the responsible Member State, while in the context of the EAW, the surrender is compulsory. This is an important point from the perspective of the ECHR, where the Strasbourg Court continues to apply the presumption of equivalent protection in cases where Member States do not have discretion. Notwithstanding the arguments proposed by the Advocate General and the fact that Member State authorities may be exempted from responsibility in Strasbourg, national courts should not dispose of the obligation to comply with fundamental rights. After all, the presumption of fundamental rights compliance between the Member States in the context of the EU and in the ECHR system is not absolute and can be rebutted. If this applies to the Dublin Regulation it must also apply in the context of the EAW FD and other instruments of EU law.[133]

5.4 Conclusion

[131] Opinion of Advocate General Bot in Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, delivered on 3 March 2016, at paras 45-53.
[132] Opinion of Advocate General Bot in Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:140, paras 54-60.
[133] A. Torres Pérez 'A predicament for domestic courts: caught between the European Arrest Warrant and fundamental rights', in B. De Witte, J. A. Mayoral, U. Jaremba, M. Wind and K. Podstawa, National Court and EU Law: New Issues, Theories and Methods (Cheltenham: Edward Elgar, 2016) 191, 210.

The CJEU's minimalist approach, for which it has been criticised before,[134] has come to the fore again in the EAW cases, particularly in *Radu* and *Melloni*. The part on fundamental rights in both judgments seems rather short and thinly reasoned and the Court does not engage sufficiently with the (legitimate) fundamental rights concerns of the national courts. Even if one would agree with the final outcomes, the way in which the Court reached these conclusions is inadequate.[135] It should be remembered in this context that national courts suspend proceedings in order to make a reference and often wait long periods of time to receive a useful answer. In many cases, however, the decision of the Court is of limited use for the national court(s). While avoiding general questions might have been a temporary solution for the CJEU, and a way to avoid backlash, in the long run national courts have started making their decisions independently, which could undermine the Court's role as the ultimate interpreter of EU law.

The judgment in *Aranyosi* and *Căldăraru* is perceived as a positive development in the Court's fundamental rights jurisprudence.[136] It is indeed a step in the right direction; however, a lot of criticism remains regarding the Court's approach.

First of all, the Court did not overrule its previous case law. This case is inherently different from the previous cases, as it deals with a separate and specific human rights issue, which is also something that is not dealt with in the FD itself. The question that comes to mind is whether the exception only applies

[134] See e.g. L. Pech 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez' (2012) 49 *Common Market Law Review* 6, 1841.
[135] For a general discussion on legitimacy of the CJEU's decisions, see M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds) *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart Publishing, 2013). In the context of the Belgian Constitutional Court, for example, see T. Moonen, *De keuzes van het Grondwettelijk Hof* (Brugge: Die Keure Professional Publishing, 2015).
[136] See, for instance, the blog post of Fair Trials International (FTI), which has been very active in advocating fundamental rights protection in this field, at https://www.fairtrials.org/tag/pre-trial-detention-2/ [last accessed 21 April 2017] or S. Peers, Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper?, available at http://eulawanalysis.blogspot.nl/2016/11/human-rights-and-european-arrest.html [last accessed 6 November 2016].

to infringements of Article 4 of the Charter and, if so, how national courts should deal with other – 'less fundamental' – fundamental rights claims.

Secondly, finding that there is a real risk of inhuman and degrading treatment for the person concerned does not in itself mean that national courts can refuse the execution of a warrant. Rather, it means that they should request additional information from the authorities of the issuing state and make a further assessment. This, however, is a very difficult task and one that different national courts may fulfil in very different ways. Instead of introducing a new ground for refusal based on the breach of fundamental rights, which would have been a courageous move, the Court offered a possibility to postpone the execution in exceptional circumstances. As a result, national courts are left with the heavy burden of having to conduct further assessments and decide if they can actually refuse a surrender without any indication or criteria on the basis of which national courts can ultimately make such a decision. It is thus not surprising that the same German court decided to request a second preliminary ruling in *Aranyosi II*,[137] asking for a further clarification.

The CJEU has also been extremely slow in dealing with this matter. It is remarkable that the Court that identifies itself as a constitutional court of the EU[138] was slower to react than the EU legislature, national courts and national legislatures who all introduced exceptions to mutual recognition much earlier.

It may also be interesting to refer back to Opinion 2/13 in the context of the discussion on *Aranyosi* and *Căldăraru* and consider whether this decision is compatible with Opinion 2/13. There seems to be little trace in this judgment of what was said in the Opinion regarding the principle of mutual trust. In the Opinion, the Court insisted that EU Member States should not second-guess what other states are doing 'save for exceptional circumstances' and now the Court states that they actually should check if other states observe fundamental rights and request additional information if in doubt. It is puzzling, to say the least, to

[137] Case C-496/16 *Aranyosi*. Note, however, that this reference had been withdrawn before the CJEU had the chance to rule.
[138] See, for example, Report of the Court of Justice on certain aspects on the application of the Treaty on European Union (Luxembourg, 5 May 1995). See also B. Vesterdorf, 'A Constitutional Court for the EU?' (2006) *International Journal of Constitutional Law* 4, 607.

have a Grand Chamber judgment not so long after a Full Court Opinion, in which the two documents contradict each other on this very important point.

There could be many reasons for the paradigm shift in the Court's approach. First, the compatibility of the EAW with fundamental rights has been doubted ever since it was adopted. Even the European Commission recognised that, while the EAW is a very useful tool for Member States in the fight against crime, there is certainly room for improvement in the transposition and application of the FD, particularly regarding the protection of fundamental rights, which must remain central to the operation of the system.[139] The European Parliament, for its part, recommended a fundamental rights-based refusal ground to be applied to Union mutual recognition instruments when there are substantial grounds to believe that the execution of a measure under those instruments would be incompatible with the executing Member State's obligations under Article 6 TEU and the Charter.[140] The Court now finally decided to (partly) give in. While it is impossible to say with certainty why this was a turning point for the CJEU, it is arguable that the Court felt pressured by the national courts, particularly the German *Bundesverfassungsgericht* and its EAW decision from December 2015,[141] in which it ruled in favour of a claimant who had lodged a constitutional complaint against the decision to allow his surrender to Italy on the basis of a EAW issued by the Italian authorities. The German *Bundesverfassungsgericht* ruled, without making a preliminary reference to the CJEU, that a EAW should not be executed if it is in conflict with the EU Charter of Fundamental Rights.[142] Moreover, some countries had suspended the executions of all arrest warrants to Hungary and Romania pending the outcome of the case.[143] Additionally, the pressure may also have come from Strasbourg, pending the outcome in *Avotiņš*. The CJEU was perhaps also trying to mend the relationship with the Strasbourg Court and restore the confidence after Opinion 2/13. Indeed, the CJEU has been taking a step closer

[139] See e.g. COM (2011) 175 final and SEC (2011) 430 final, dated 11 April 2011.
[140] See European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) and Annex to the Resolution.
[141] BVerfG, 2 BvR 2735/14, Order of 15 December 2015.
[142] For a further discussion and analysis see Section 2.4., Chapter 7.
[143] This was the case for example in the Netherlands.

to Strasbourg, but not completely, and the exact effects of this change remain to be seen.

6 Final Conclusion

The case law analysis in this chapter has revealed the structural differences in the approaches of the two European Courts which have at times resulted in the standard of protection in Luxembourg falling below the standard provided in Strasbourg. In all the cases discussed, the starting point for the CJEU was the application of the principle of mutual trust between the states which it had declared to be a constitutional principle of the EU legal order, allowing for deviations only in very exceptional circumstances. However, the underlying assumption – that all Member States should be considered as offering equivalent protection because they are bound by the same rules – is untenable, as evidenced in the cases discussed above. The analysis has also demonstrated that the CJEU has made important steps in order to show that it is taking fundamental rights more seriously and to bring its case law in line with that of the ECtHR. In spite of some quite encouraging developments, a lot of critique and unanswered questions remain.

What we know to date is that the CJEU accepts limited exceptions to the principle of mutual trust and recognition but only under the strict conditions prescribed in its case law. In the context of the Brussels II *bis* Regulation, the application of mutual trust and recognition appears practically automatic and without exceptions. This has been shown to be contrary to the core principles of the ECHR system, which require states to take responsibility and check whether other states have complied with fundamental rights rather than simply trusting that they have. Nevertheless, the Strasbourg Court has so far shown deference towards the EU and the CJEU in this respect and has found it sufficient if the persons concerned can seek protection in the other country. In the Dublin and the EAW cases, the CJEU acknowledged that mutual trust does not mean blind trust and that exceptions are warranted. However, by using the criterion of 'exceptional circumstance' and 'systemic deficiency', it developed a worryingly high threshold for the rebuttal of trust. In the context of the Dublin III Regulation, the CJEU

qualified its approach with regard to the systemic deficiency requirement, ruling that not only risks stemming from systemic flaws but also circumstances affecting the individual situation can preclude the transfer under the Dublin system. This however only seems to apply in the context of the Dublin Regulation and under very specific conditions that involve a potential breach of Article 4 of the Charter. While the latter is a welcome development and an important step in light of the previous case law, it is questionable whether it meets the standard set by the ECtHR in *Tarakhel*. Moreover, the CJEU has done so because of the changes in the new Regulation, which now explicitly requires compliance with the case law of the ECtHR in its application, as noted by the CJEU itself in *C.K. and Others*. The EAW FD is potentially the most problematic instrument in the story of divergences, because it leaves no discretion to the national courts: the divergences between EU and ECHR law pose a real dilemma for domestic courts, because fulfilling their obligations under the Convention may mean violating the obligation to execute the EAW.

What we do not know (and what will require further case law) is what happens with the alleged violations of other rights which are not absolute and whether the conditions will vary between different instruments. The CJEU has not yet developed specific and easily identifiable criteria for the application of the principle of mutual trust and recognition. Indeed, the cases discussed reveal that the Court is struggling to determine such criteria and ultimately to find a balance between the importance of this principle and human rights protection. A more fundamental question is should there not be a general human rights exception in the application of mutual trust and recognition in EU law? After all, it is not possible to impose mutual trust – it either exists or it does not. Allowing more exceptions will not only improve fundamental rights protection across the EU but it may, paradoxically, enhance mutual trust in the long run.[144]

[144] For a similar argument see also Š. Imamović, 'The Court of Justice of the EU as a Human Rights Adjudicator in the Area of Freedom, Security and Justice' (2017) Jean Monnet Working Paper 05/2017.

In the meantime, however, the national courts are in the eye of the storm, since the problem is not only in the end result, where it may seem that the CJEU has complied with the ECHR or that the ECtHR has decided to be lenient and accommodating towards the EU legal system, but it is in the approach and in the messages that they send to national courts in the process.

Chapter 5: EU Market Freedoms and Fundamental Labour Rights: A Lurking Conflict

1 Introduction

The Treaty of Lisbon, with its clear commitment to social protection and the development of effective social policies, was meant to create a more social Europe. This commitment has been subject to scepticism, however, given the ongoing criticism of how the EU has balanced the need for economic integration and the importance of its social dimension, as well as the criticism of the case law of the CJEU in that context.

The field of fundamental labour rights is also an area in which the CJEU has been accused of falling short in ensuring that the common minimum standards, as required by the ECHR, are respected. Even though the ECHR does not contain many socio-economic rights, as such (the few exceptions being the protection of property and the right to education), the ECtHR has found ways to protect them through a broad interpretation of other Convention rights. This chapter serves to expose a completely different area of EU law where the CJEU has been criticised for the way in which it has dealt with the fundamental labour rights and, more specifically, how it has balanced the right to take collective action against EU market freedoms.[1]

The right to take collective action is commonly understood to include the right to strike and is widely recognised as being among the most fundamental labour rights. It is protected in international and European law under several instruments including, inter alia, the International Labour Organization (ILO) Conventions Nos 87, 98 and 154,[2] International Covenant on Economic, Social

[1] Note that the right to strike is not a synonym of the right to collective action, as there are more types of actions undertaken to defend the social and economic interests of workers than solely work stoppages; however, it is certainly the most typical expression of collective action in most countries.

[2] Convention concerning Freedom of Association and Protection of the Right to Organise (No 87); Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98); and Convention concerning the Promotion of Collective Bargaining (No 154).

and Cultural Rights (ICESCR) under Article 8,[3] the European Convention on Human Rights under Article 11,[4] the European Social Charter under Article 6,[5] and the EU Charter of Fundamental Rights under Article 28.[6] It is also recognised and protected in the vast majority of the European states, albeit in different ways.[7]

The ECtHR has recognised the right to collective action, including the right to strike, as one of the essential elements of trade union rights laid down by Article 11 ECHR.[8] The Strasbourg Court made extensive reference to the standards of the ILO and the European Social Charter (ESC), as interpreted by their respective international supervisory committees. It should be stated, however, that this has been a relatively recent development in the case law of the ECtHR; traditionally, the ECtHR interpreted Article 11 with respect to trade union rights as not comprising the right to bargain collectively – thus providing a narrower interpretation of the freedom of assembly and association.[9]

The CJEU, for its part, has acknowledged the right to collective action as a fundamental right of the EU constitutional order, but it has been accused of failing to accord it the level of protection consistent with and provided by the ILO and the ECtHR – as well as by a number of EU Member States, thereby generating an inconsistency in the European standards as well as challenging the effectiveness of some of the Member States' regimes for the protection of this

[3] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.
[4] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5.
[5] Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.
[6] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.
[7] Some States recognise it as an individual right and others as a collective right, in which case individual workers only benefit from the protection of the law if the strike is organised officially by a trade union. For a comparative analysis see E. Ales and T. Novitz (eds), *Collective Action and Fundamental Freedoms in Europe. Striking the Balance*. (Cambridge: Intersentia, 2010); D. Petrylaite, 'The Right to Strike in EU Member States: A Comparative Overview with Particular Reference to Lithuania' (2010) 4 *The International Journal of Comparative Labour Law and Industrial Relations* 421.
[8] *Demir and Baykara v Turkey*, App no 34503/97 (ECtHR, 12 November 2008); *Enerji Yapı-Yol Sen v Turkey*, App no 68959/01 (ECtHR, 21 April 2009).
[9] See, for instance, *National Union of Belgian Police v Belgium*, App no 4464/70 (ECtHR, 27 October 1975); *Swedish Engine Drivers v Sweden*, App no 5614/72 (ECtHR, 6 February 1976); *Schmidt and Dahlström v Sweden*, App no 5589/72 (ECtHR, 6 February 1976); and, more recently, *Unison v United Kingdom*, App no 53574/99 (ECtHR, 10 January 2002).

right.[10] This chapter seeks to explore this accusation by analysing the protection offered in EU law, in the ECHR system and on the international plane. The first section examines how the right to strike is protected in EU law. It starts by briefly outlining the facts of *Viking* and *Laval*, the two landmark decisions by the CJEU in this context, followed by a discussion of *Rüffert* and *Commission v Luxembourg*. The latter cases have strengthened the effect of *Viking* and *Laval* and, taken together, have been referred to as the Laval quartet. All four cases have been decided before the entry into force of the Lisbon Treaty. The last part of this section analyses a number of more recent post-Lisbon decisions which bear a resemblance to *Viking* and *Laval*, even though they are not conceptualised in the same way by the CJEU. These decisions narrow the broad reading of the *Viking* and *Laval* jurisprudence, but at the same time they confirm that the CJEU is not quite willing to depart from it. The second section takes a closer look at the pertinent case law of the ECtHR, including the relevant decisions of the Council of Europe's Committee on Social Rights, and draws comparisons with the case law of the CJEU. The third section then investigates how the right to strike is protected in the ILO Conventions, before returning to a broader discussion and conclusion in the fourth, and last, section. It will emerge that restrictions deriving from the four freedoms protected by the EU Treaties, as interpreted by the CJEU, are in conflict with ILO principles or the relevant decisions of the Council of Europe's Committee on Social Rights, and they are difficult to reconcile with the case law of the ECtHR.

2 The Right to Strike in the EU Internal Market Context

As with other fundamental rights, social rights were not included in the founding Treaties. The right to strike in particular was also not covered in the EU secondary legislation, because Article 153(5) TFEU expressly excludes the right to strike from the EU legislative competences. Given the silence in the Treaties and the lack of competence in this area, the right to strike has only come into play through the case law of the CJEU. However, while the CJEU recognised and protected various

[10] A. C. L. Davies, 'One step forward, two steps back? The *Viking* and *Laval* cases in the ECJ' (2008) 37 *Industrial Law Journal* 126–148.

(civil and political) fundamental rights as unwritten general principles of EU law, it rarely did so in the context of social rights.[11]

The very first time the CJEU explicitly recognised the right to strike as a fundamental right was in the *Viking*[12] and *Laval*[13] cases, delivered on 11 and 18 December 2007 respectively. The Court noted that the right to strike 'must be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures'.[14] However, while the Court formally recognised the right to collective action as a fundamental right, it also imposed strict conditions on its exercise. The key question concerned the extent to which the right to collective action can restrict the exercise of basic economic freedoms under the Treaties.

This kind of approach could have been foreseen following the CJEU's embrace of the *Säger* 'market access' case law in the 1990s (more recently referred to as the 'restrictions' approach).[15] This approach largely replaced the discrimination analysis which the Court had previously used – an approach which managed to maintain the careful balance between the preservation of national labour law and EU rules on free movement.

The *Viking* and *Laval* cases have been discussed extensively among the scholars and lawyers in the EU, many of whom have been very critical of the

[11] The comment applies to social rights as a broad category. Of course, it would have been difficult for the CJEU to recognise the right to strike specifically as a general principle of EU law since because of the lack of competence regarding this particular right. For a further discussion see B. De Witte, 'The Trajectory of Fundamental Social Rights in the European Union', in G. de Búrca, B. De Witte, and L. Ogertschnig (eds) *Social Rights in Europe* (Oxford: Oxford University Press, 2005). There are exceptions, however, such as the protection of workers' rights in the equality field with legislation and case law protecting pregnant workers, transsexuals and homosexuals. See e.g. Directive 2006/54 on equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23 and Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[12] C-438/*05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007]
ECLI:EU:C:2007:772.

[13] C-341/05 *Laval v Svenska Byggnadsarbetarefo¨rbundet* [2007] ECLI:EU:C:2007:809.

[14] *Viking*, paras 42-44; Laval, paras 89-91.

[15] C. Barnard, 'Free Movement and Labour Rights: Squaring the Circle?', University of Cambridge Faculty of
Law Legal Studies Research Paper No. 23/2013.

Court.[16] Generally, the discussion has focused on the adequacy of EU rules to protect the rights of workers in the context of the freedom to provide services and the freedom of establishment. The perspective taken was either that of the EU or the EU Member States, given that the cases concerned a balancing exercise of EU rules of free movement and national social policy to the detriment of national rules. However, one aspect that is often missing in the discussion is the role of the ECHR and the Strasbourg Court jurisprudence, which – even though outside of the equation at first sight – may influence further development in this field.

2.1 Laval Quartet

2.1.1 *Viking* and *Laval*

Viking, a company incorporated under Finnish law, owned a ferry called the Rosella, which operated under the Finnish flag on the route between Estonia and Finland. As it was suffering financial loss, Viking decided to re-flag the ferry to Estonia, to avoid collective agreements with Finnish trade unions and thus pay lower wage costs. Following a request from the Finnish Seamen's Union (FSU), the International Transport Workers' Federation (ITF) issued an instruction to affiliates to boycott Viking's activities and announced its intention to strike, demanding that a collective agreement be concluded which provided that, during the reflagging, Viking Line would continue to comply with Finnish employment law and not lay off the crew. Viking appealed to the High Court of Justice in London, where the ITF has its headquarters, for an injunction arguing that its right to freedom of establishment and to provide services under Articles 49 and 56 TFEU (ex Arts 43 and 49 TEC) were infringed by the industrial action. The High Court granted the injunction, but the Court of Appeal refused to do so and decided to ask the CJEU for a preliminary ruling.

[16] See, inter alia, C. Kilpatrick, '*Laval's* regulatory conundrum: collective standard-setting and the Court's new approach to posted workers' (2009) 34 *European Law Review* 844; A. C. L. Davies, "One step forward, two steps back? The *Viking* and *Laval* cases in the ECJ", 37 *Industrial Law Journal* (2008), 126–148; N. Reich, 'Free movement v. social rights in an enlarged Union – The *Laval* and *Viking* cases before the ECJ' (2008) 9 *German Law Journal* 125–161; A. Hinarejos, '*Laval* and *Viking*: The right to collective action versus EU fundamental freedoms' (2008) 8 *Human Rights Law Review* 714–729.

The CJEU ruled that collective action liable to deter a private undertaking from exercising its freedom of establishment falls under the scope of Article 49 TFEU and is capable of conferring rights on that undertaking, which may be relied upon against a trade union or an association of trade unions. Further, the Court found that the strike action, such as that at issue in the proceedings, amounted to a restriction of Viking's freedom of establishment within the meaning of Article 49 TFEU. The Court explained that such a restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective. A detailed scrutiny of the facts provided by the referring court suggested that the action of the trade unions had been disproportionate and had gone beyond what was necessary to protect the crew's employment rights.

Laval, a Latvian construction company, posted Latvian workers to Vaxholm (Sweden), after having won the contract to build a school there. The Swedish construction unions initiated industrial action in an attempt to force the company to negotiate and to apply the conditions laid down by the Swedish construction agreement. Laval refused and claimed that this collective action was illegal. Laval brought proceedings before the Swedish courts arguing that its freedom to provide services had been infringed and that it had been discriminated against because of the failure of Swedish national provisions to take into account collective agreements that it had entered into with unions in Latvia (which gave it a competitive advantage). This case, too, ended up before the CJEU.

The CJEU held that Article 56 TFEU (ex Art. 49 TEC) and Article 3 of Posting of Workers Directive 96/71/EC (PWD) are to be interpreted as precluding a trade union from attempting to force a provider of services established in another Member State to accept more favourable conditions than the minimum standard allowed by the Directive and regulated by the state. Laval could thus rely directly on Article 56 TFEU against the trade unions.[17] The Court first reiterated, referring

[17] It could not rely on Article 3 of the Posted Workers Directive, since the CJEU has never accepted the direct horizontal effect of directives.

to its judgment in *Viking* rendered a week earlier, that the EU has an economic but also a social purpose and that the right to take collective action constitutes a fundamental right which forms an integral part of the general principles of Community law. However, the objectives pursued by social policy, which include improved living and working conditions, proper social protection and dialogue between management and labour have to be balanced against the rights under the provisions of the Treaty on the free movement of goods, persons, services, and capital.[18] What was problematic in this case, as it was in *Viking*, was the balancing exercise in which the Court assessed the proportionality of the impact of the right to strike on the company's right to provide services. The Court subjected the possibility for trade unions to go on strike to a review of the suitability, necessity and *ultima ratio* of the industrial action, and empowered national courts to 'verify whether the union has exhausted all other avenues under national law before the industrial action is found proportionate'.

Ultimately, the Court determined that the trade union's action amounted to a restriction on Laval's freedom to provide services and thus a violation of Article 56 TFEU and that such an action could not be justified, given that the immediate objective of the collective action was to impose on an undertaking established in other Member States to sign the collective agreement and thus comply with rates of pay which do not constitute minimum wages and are not, moreover, laid down in accordance with the means set out in that regard in Article 3 of Directive 96/71/EC.

The *Viking* and *Laval* judgments contain a number of important points. The first one is that the right to collective action, including strike action, has been recognised as a fundamental right which forms an integral part of and is protected under the general principles of EU law. This was the first time that the Court has given explicit recognition to the right to strike as an EU fundamental right. In reaching this conclusion, the Court referred to the fact that the right of collective action is protected in national laws and practices as well as in Article 28 of the EU Charter. The second – and crucial – point is that the exercise of that right must be done in a way that does not undermine the functioning of the EU common

[18] *Laval*, para 105.

market and restrict the market freedoms, as laid down in the Treaties. Any restriction of one of the freedoms is lawful only where overriding reasons of public interest require such action, the action is suitable for obtaining the objective pursued, and when it is both justified and proportionate. The possibility for trade unions to exercise their right to collective action is thus subjected to a review of the necessity, suitability, and *ultima ratio* of that action, and national courts are required to examine whether the union exhausted all other means at its disposal which were less restrictive to the freedom of establishment before the industrial action can be found proportionate.[19] One could even say that the judgments have the effect of undermining the right to collective action domestically and affecting the powers of the national judges. According to the observations submitted by the Swedish and Danish governments in *Viking* and *Laval*, the right to collective action is a fundamental right which should fall outside of the scope of freedom of establishment under Article 49 TFEU. Yet, this is not all too surprising; the creation and safeguarding of the common market lies at the heart of the EU and the preference for the market freedoms is inherent in the EU's free movement law, given its broad reach and few limitations, and in the CJEU's approach to it.[20]

2.1.2 *Rüffert and Commission v Luxembourg*[21]

Shortly after *Viking* and *Laval*, the CJEU was faced again with a similar issue in *Rüffert*. The issue at hand was the compatibility of the law on public procurement in Lower Saxony (Germany) with EU law. According to the former, the contractor must undertake to pay at least the remuneration prescribed by the collective agreement in the place where those services are performed. Such a clause was included in the contract with the German company *Objekt und Bauregie* that was awarded a public contract to perform the construction work. *Objekt und Bauregie* subcontracted work to a Polish company which posted workers from Poland to Germany to work for lower wages than those prescribed by the relevant collective agreement. Since the German company did not comply with the contract in this

[19] *Viking* para 87.
[20] S. Weatherill, 'Viking and Laval: The EU Internal Market Perspective', in M. Freedland and J. Prassl, *Viking, Laval and Beyond* (Oxford: Hart Publishing, 2014).
[21] Case C–346/06 *Rüffert v Land Niedersachsen* [2008] ECLI:EU:C:2008:189; Case C-319/06 *Commission v Luxembourg* [2007] ECLI:EU:C:2008:350.

respect, Lower Saxony annulled the contract and imposed financial penalties on it.

The CJEU held that the legislation of Lower Saxony was incompatible with the freedom to provide services as guaranteed by Article 56 TFEU (ex Art 49 TEC) and the Posted Workers Directive. The Court noted that the said Directive is to be read in light of Article 56 and should not restrict the freedom to provide services. By requiring undertakings performing public works contracts and, indirectly, their subcontractors to apply the minimum wage laid down by such a collective agreement, such legislation may impose on service providers established in another Member State (where minimum rates of pay are lower) an additional economic burden that may prohibit, impede or render less attractive providing their services in the host Member State.

The restriction of the freedom to provide services could not be justified by the objective of ensuring the protection of workers as a result of the legislation at issue, which was the justification that was provided, as it applied solely to public contracts (and thus not to private contracts). In addition, there was no evidence to support the claim that such protection is only necessary for a construction sector worker when he is employed in the context of a public works contract. The Court concluded that the stated Law is incompatible with the PWD, interpreted in light of Article 56 TFEU.

Another case in which the Court examined the interrelationship between economic freedoms and labour rights in the EU is *Commission v Luxembourg*. The case arose out of infringement proceedings against Luxembourg concerning the incorrect transposition of the Posted Workers Directive into national law. Luxembourg transposed the PWD into national law imposing obligations on foreign employers (posting workers in Luxembourg) that go beyond the terms and conditions of employment set out in Article 3(1) of the PWD. In particular, the national legislation transposing the Directive required that the employment contract had to be concluded in writing and that the minimum wages must be automatically adjusted in accordance with inflation.

In its judgment of 19 June 2008, the CJEU upheld the Commission's complaint on all points, ruling that Luxembourg has failed to fulfil its obligations under Article 3(1) of the said Directive, read in conjunction with Article 3(10) thereof, and Articles 56 and 57 TFEU (ex Arts 49 and 50 TEC). More specifically, the Court held that the way in which Luxembourg has implemented the Directive amounts to a restriction on freedom to provide services which cannot be justified under the public policy exception contained in Article 3(10) of the PWD. The Court concluded that public policy may be relied upon only if there is 'a genuine and sufficiently serious threat to a fundamental interest of society',[22] making the threshold exceptionally high. Accordingly, the state of Luxembourg has had to amend its legislation.

2.2 Overturning Laval Quartet? *Electrobudowa* and *RegioPost*

The Laval quartet and a few subsequent cases with comparable outcomes[23] have fuelled an intense debate in legal scholarship as to the consequences of the freedom to provide services for workers' rights and the rights of trade unions to protect them in cross-border situations. The CJEU has been subject of criticism, including also by the Committee of Experts of the ILO and the European Committee of Social Rights (discussed below).[24] Perhaps in response to that criticism, the CJEU's approach in some more recent cases appears slightly more balanced and social-friendly.

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[22] Case C-319/06 *Commission v Luxembourg* [2007] ECLI:EU:C:2008:350, para 50.

[23] See e.g. Case C-307/09 – C-309/09 *Vicoplus SC PUH and Others v Minister van Sociale Zaken en Werkgelegenheid* ECLI:EU:C:2011:64; C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund* ECLI:EU:C:2014:2235.

[24] J. Malmberg, 'The Impact of the ECJ Judgments in Viking, Laval, Ruffert and Luxembourg on the Practice of Collective Bargaining and the Effectiveness of Social Action' (2010) European Parliament Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 7 available at http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf [last accessed 16 May 2017]. For the criticism by the Committee of Expert of the ILO and the European Committee of Social Rights see, respectively, ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, 2010, 99th session of the International Labour Conference, Report III (Part 1A), 208–209, and European Committee of Social Rights 3 July 2013, collective complaint No. 85/2012, Swedish Trade Union Confederation (LO) and the Swedish Confederation of Professional Employees (TCO) v. Sweden.

Elektrobudowa[25] was a sequel to the above-mentioned line of cases demonstrating that the freedom to provide services across national borders remains a difficult issue. The Court was asked once again to interpret the PWD and to clarify the concept of 'minimum rates of pay' for posted workers. In *Laval*, the Court held that 'minimum rates of pay' must be read as 'minimum wages'.[26] However, it remained unclear whether certain elements of remuneration (such as allowances and supplements) could also be considered to be part of the minimum wage. This is particularly important from a workers' protection perspective: the more elements of remuneration that are included, the more it supports equal pay for workers in the host country and posted workers.

The case arose from a dispute between a Finish trade union and a Polish undertaking, Elektrobudowa, concerning 186 Polish workers posted in the Finnish branch of the undertaking. The contract between the workers and the company was concluded in Poland in accordance with Polish law. The workers argued, however, that their minimum wage is to be determined on the basis of the universally applicable Finish collective agreement. The Polish workers assigned their wage claims to the Finish trade union, which subsequently brought the case before a national court. The Finnish national court referred the case to the CJEU asking, inter alia, whether Article 3(1) of the PWD can be interpreted as meaning that an employer (*in casu* Elektrobudowa) could be obliged to pay the workers under the rules of the host state.[27]

The Court held – in what has been regarded as a 'remarkably generous judgment'[28] – that the workers have the possibility to assign their wage claims to trade unions if possible under the procedural law of the host state, regardless of

[25] Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna* [2014] ECLI:EU:C:2015:86.
[26] *Laval*, para 70.
[27] Article 3(1) provides a list of terms and conditions of employment that host Member States need to apply to posted workers, regardless which labour law applies to the employment relationship. The list is as follows: maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay; conditions of hiring-out of workers; health, safety and hygiene conditions; protective measures pertaining to the employment conditions of pregnant women, children and young people; and equality of treatment between men and women, and other provisions on non-discrimination.
[28] S. Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' (2017) 13 *European Constitutional Law Review* 23, 38.

the rules of the home state barring such assignment. In that context, the Court examined the constituent elements of the minimum wage as provided in Article 3(1) of the PWD and found that the PWD expressly refers to the national law or practice of the host Member State for the purpose of defining minimum rates of pay, as long as it does not have the effect of impeding the freedom to provide services between Member States and that the method of calculating rates of pay and the criteria used in that regard are thus a matter for the host Member State. In light of those considerations, the Court concluded that the PWD does not preclude a calculation of the minimum wage which is based on the categorisation of employees into pay groups based on criteria such as qualification training, experience and type of work performed, provided that the calculation and categorisation are carried out in accordance with binding and transparent rules.

Elektrobudowa is similar to the *Laval* case, as was also mentioned by Advocate General Wahl,[29] but there are also some important differences. In both cases, the CJEU was asked to strike a balance between, on the one hand, the interests of undertakings that wish to make use of the competitive advantage that posting workers from one Member State to another may bring and, on the other hand, the fundamental rights of the workers concerned. While *Elektrobudowa* alleviates the harsh position taken in *Laval*, since the CJEU accepted that new elements of a wage structure could be part of the minimum rates of pay, the basic premise that the PWD limits the areas of protection, which the host state may prescribe, still stands.

The change in approach is also evident in the *Regiopost*[30] decision. The dispute had arisen between RegioPost and the municipality of Landau in Germany concerning the obligation, imposed on tenderers and their subcontractors in the context of the award of a public contract for postal services in that municipality, to undertake to pay minimum wage to staff performing the services covered by that public contract.

The contract notice stated that the successful tenderer shall comply with the provisions of the 'Landesgesetz zur Gewährleistung von Tarift reue und

[29] Opinion of AG Wahl in C-396/13 ECLI:EU:C:2014:2236, paras 33, 34 and 67.
[30] Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau* [2015] ECLI:EU:C:2015:760.

Mindestentgelt bei öff entlichen Auft ragsvergaben' (LTTG), the law of Rheinland-Pfalz which regulates guaranteeing compliance with collective agreements and minimum wages in public contract awards. However, RegioPost refused on multiple occasions to make such a written declaration and the City of Landau awarded the contract to another postal services provider.

RegioPost had contended that the minimum wage requirement was incompatible with Article 56 TFEU and could not be authorised under the Public Procurement Directive 2004/18 or the PWD, referring to the Court's decision in *Rüffert* and *Bundesdruckerei*.[31] In the latter cases, the CJEU ruled that, in the context of the two stated Directives, wage requirements could only be justified if constituting the absolute minimum of worker protection, thus excluding a higher level of protection set by public procurement.

The CJEU held – contrary to the position of RegioPost and the European Commission which, in addition to several governments, submitted observations – that the PWD does not preclude legislation that requires tenderers and their subcontractors to undertake, by means of a written declaration enclosed with their tender, to pay staff called upon to perform the services a predetermined minimum wage. The Court distinguished the present case from *Rüffert* where the minimum pay requirement was laid down in a collective agreement that had not been declared universally applicable as is required by Article 3(8) of the PWD. The Court also relied on the change in legislation: Article 26 of Directive 2004/18 on public procurement, which was adopted after the *Rüffert* judgment, specifically allows the inclusion of social clauses in public procurement contracts.

In that way, the Court explained that it is not overturning its previous case law because this ruling was based 'on certain characteristics specific to th[e] measure [in question]'.[32] As such, the judgment leaves some of the same issues

[31] Cases C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund* [2014] ECLI:EU:C:2014:2235 and C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau* [2015] ECLI:EU:C:2015:760.
[32] Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau*, para 73.

concerning the interpretation of the PWD in the earlier case law open and the exact impact of *Elektorbudowa* and *Regiopost* remains to be seen.[33]

2.3 *AGET* – a Comparable Case without being Comparable

Another interesting case in this context is the Grand Chamber judgment in *AGET*,[34] which sheds some light on the strained relationship between economic freedoms and labour rights.

The Greek company AGET Iraklis, a subsidiary of the French multinational Lafarge, sought to close one of the three plants it has in Greece and therefore requested administrative authorisation to carry out collective redundancies (envisaging a loss of 236 jobs), as required by Greek law. The Minister of Labour refused to provide the requested authorisation. The company contested the decision not to authorise its collective redundancy plan before the Council of State in Greece, seeking an annulment of the contested decision, since it infringes both Council Directive 98/59 on collective redundancies and Articles 49 and 63 TFEU read in conjunction with Article 16 of the Charter (freedom to conduct business – of the employer).[35]

The Greek Council of State decided to refer the case to the CJEU, asking whether such a prior administrative authorisation is consistent with the Directive 98/59 and with freedom of establishment as guaranteed by the Treaties. If the answer is in the negative, the referring court asked whether the Greek legislation may nonetheless be held compatible with EU law, given the acute economic crisis and very high unemployment level in Greece.

The CJEU ruled that Directive 98/59 does not preclude, in principle, the provision in Greek law which requires employers to obtain administrative

[33] For a further discussion, see S. Garben, The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union (2017) 13 *European Constitutional Law Review* 23-61.
[34] C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* [2016] ECLI:EU:C:2016:972.
[35] Freedom to conduct business originates from the CJEU judgment in *Internationale Handelsgesellschaft*. See Case C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECLI:EU:C:1970:114.

authorisation prior to carrying out redundancies, unless it would have the consequence of depriving Article 2 and 4 of the Directive of their practical effect. This means that the national legislation, which sets the criteria on the basis of which collective redundancies are authorised by a public authority, even if meant to strengthen protection of workers' rights, cannot be construed in such a way as to rule out all collective redundancies.[36] The CJEU left it to the national court to ascertain whether, in light of the assessment criteria and the way in which the competent public authority had applied it, the Directive was deprived of its practical effect.

With respect to the freedom of establishment protected in Article 49 TFEU, the CJEU held that the national measure at issue renders access to the Greek market less attractive and, following access to that market, reduces considerably, or even eliminates, the ability of economic operators from other Member States who have chosen to set up in a new market to adjust their activity in that market or to give it up, by parting, to that end, with the workers previously taken on. The measure essentially makes it difficult or practically impossible to perform collective redundancies and leave the Greek market and, as such, it is 'liable to constitute a serious obstacle to the exercise of freedom of establishment in Greece'.[37] Moreover, the Court found that taking on and dismissing employees is a decisive element of the freedom of establishment. According to this logic, any legislation limiting the employers' freedom to dismiss employees would constitute a restriction of Article 49 TFEU. The same can be said for Article 16 of the Charter, the freedom to conduct business, which has been used to strengthen the freedom of establishment.

Fundamental social rights, in particular the protection of workers in the event of collective dismissal (Article 30 Charter), were considered only at the justification stage. The Court noted that, according to Article 52(1) of the Charter, 'limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others', such as the right to protection against unjustified dismissal,

[36] Case C-201/15 *AGET* [2016] ECLI:EU:C:2016:972, para 34-38.
[37] Ibid, para 56-57.

in accordance with Union law and national laws and practices.[38] However, the Court continued the analysis focusing on the question whether the framework for collective redundancies is sufficiently transparent and predictable to avoid a violation of the freedom to conduct business, without further reference to Article 30 of the Charter.[39] As a result, a legislative prohibition on effecting collective redundancies was viewed as disproportionate. In other words, such a measure could be justified in principle but, due to its specific characteristics, in particular the imprecise criteria to be applied by the competent authority when deciding whether to oppose projected redundancies, which moreover resulted in national courts not being able to review the way in which the administrative authority exercised its discretion, the challenged national measure was held to be incompatible with the requirements under Article 49 TFEU and Article 16 of the Charter. Finally, the Court held that the challenged measure could not be justified if there were serious social reasons, such as an acute economic crisis and very high unemployment.

Even though *AGET* is not conceptualised in terms of a clash between economic freedoms and fundamental social rights by the CJEU, and the fundamental right at stake is the right to conduct business and thus a fundamental right of the employer, the issues raised are along the lines of *Viking* and *Laval*. The case shows a clear imbalance between the importance given to the freedom to conduct business and fundamental social rights, which are not taken seriously in this case. The decision also shows that the Court has no problem using the freedom to conduct business to cut down on social rights and suggests that the Court may not be quite willing to depart from *Viking* and *Laval*.

3 The Right to Strike in the ECHR System

Article 11 of the ECHR establishes a right to the freedom of association, which in Article 11(1) explicitly includes the right to form and to join trade unions for the protection of one's interests. Article 11(2) then qualifies this right in the usual

[38] Ibid, para 89.
[39] Ibid, paras 96-103.

way, providing restrictions to the exercise of that right which have to be strictly construed and cannot impair the very essence of the right to organise.

The Strasbourg Court has traditionally interpreted Article 11 ECHR in a restrictive manner with respect to trade union rights, holding that the right to collective bargaining and the right to strike were not essential means for Member States to uphold the right of trade unions to represent the interests of their members under Article 11. In the *National Union of Belgian Police v Belgium*[40] and *Swedish Engine Drivers v Sweden*[41] cases, the Strasbourg Court ruled that the right to join a trade union implicitly includes the right of the union to be heard on employment issues at the workplace; however, the Court determined that Article 11 of the Convention does not prescribe any particular way the Contracting States should guarantee this –such as a right to engage in collective bargaining.

The right to strike, as such, was recognised early on by the Court as an essential means by which trade union members' interests can be protected, but the Court's proportionality test was very strict. In *Unison v United Kingdom*,[42] for example, the Court held that Article 11 safeguards the freedom of trade unions to protect the occupational interests of their members and that the ability to strike represents one of the most important means by which trade unions can fulfil this function. Nevertheless, the Court determined that there are other means too and that the Contracting States are free to decide as to how they ultimately ensure that the freedom of trade unions is safeguarded. The Court concluded that the prohibition on the applicant's ability to strike could be considered as a proportionate and necessary measure in a democratic society to protect the rights of others, *in casu* the economic interests of the employer.

In two landmark decisions, in the cases of *Demir and Baykara v Turkey*[43] and *Enerji Yapi-Yol Sen v Turkey*[44] the ECtHR departed from its previous

[40] *National Union of Belgian Police v Belgium*, App no 4464/70 (ECtHR, 27 October 1975).
[41] *Swedish Engine Drivers v Sweden*, App no 5614/72 (ECtHR, 6 February 1976).
[42] *Unison v United Kingdom*, App no 53574/99 (ECtHR, 10 January 2002).
[43] *Demir and Baykara v Turkey*, App no 34503/97 (ECtHR, 12 November 2008).
[44] *Enerji Yapi-Yol Sen v Turkey*, App no 68959/01 (ECtHR, 21 April 2009).

longstanding case law in light of the new developments in international labour law and in the relevant practice of the contracting state parties.

3.1 *Demir and Baykara v Turkey*

In *Demir*, the Grand Chamber ruled that Article 11 of the ECHR protects the freedom of trade union association, which also includes the right to collective bargaining. The Court determined that the right to bargain collectively with an employer had, in principle, become one of the essential elements of the right to form and to join trade unions set forth in Article 11 of the Convention. The Court noted that the right to bargain collectively is recognised by the supervisory bodies of the ILO as an inseparable corollary of the freedom to associate in trade unions.[45] The Court also recalled that Article 6(2) of the European Social Charter affords to all workers, and to all unions, the right to bargain collectively as a means to ensure the effective exercise of the right to collective bargaining in its Article 6(2).[46]

Although the Court accepted that states are still free to develop their own systems of industrial relations, the very essence of that right had to be preserved. The Grand Chamber was clear in *Demir and Baykara*: restrictions imposed under Article 11 should 'be construed strictly and […] must not impair the very essence of the right to organise'.[47] Furthermore, the Court also reminded that the ECHR is a 'living instrument' which must be interpreted in the light of present-day conditions and evolving norms and principles of international and national law applicable across the contracting states and beyond and that it must interpret and apply the Convention in a manner which renders its rights 'practical and effective, not theoretical and illusory'.[48]

[45] *Enerji Yapi-Yol Sen v Turkey* (ECtHR, 21 April 2009), paras 37-44.
[46] *Enerji Yap-Yol Sen v Turkey* paras 49-50.
[47] *Demir and Baykara v Turkey* para 97.
[48] *Enerji Yap-Yol Sen v Turkey* para 66.

3.2 *Enerji Yapi-Yol Sen v Turkey*

Only a few months later, in the *Enerji* decision, the Court also explicitly recognised the right to strike, as protected under Article 11 of the ECHR. The Court reiterated that the right to engage in collective bargaining is a central element of the freedom of trade union association, with a limited margin of appreciation.[49] Furthermore, the Court pointed out that a blanket ban on public sector strike action unlawfully discouraged workers from exercising their legitimate right to engage in industrial action under Article 11 of the Convention. This right may only be limited in strictly defined circumstances that must be provided by law, have a legitimate aim and be necessary in a democratic society. The Court ultimately found that the circular enacted by the Turkish government (which, inter alia, prohibited public-sector employees from taking part in a strike) did not answer a 'pressing social need' and that here had been a disproportionate interference with the applicant union's rights enshrined in Article 11 ECHR.[50]

This appears to be a kind of reverse proportionality test (in comparison to the one conducted by the CJEU): interferences with the worker's right to strike must be justified by and proportionate to the legitimate objectives they pursue, rather than the trade unions having to demonstrate the proportionality of and justification for collective action in question. In other words, the burden of proof lies on the opposite sides in Strasbourg and Luxembourg respectively.

These two decisions represent a major turning point in the case law of the ECtHR. They show the willingness of the Strasbourg Court to reconsider its previous case law and interpret Convention rights in light of the other relevant international human rights instruments. While departing from precedents established in previous case law may impact on important principles, such as legal certainty and equality before the law, a failure to do so – when there are good reasons for it – would prevent the continuous improvement and reform of the system. It is important to note here that the CJEU's judgments in *Viking* and *Laval* were delivered prior to the ECtHR's decisions in *Demir* and *Enerji*. The CJEU thus relied on the earlier position of the ECtHR whereby collective action was regarded

[49] *Enerji Yap-Yol Sen v Turkey*, para 24.
[50] *Enerji Yap-Yol Sen v Turkey*, para 33.

as one of the main ways in which trade unions could protect workers' interests, but it was not considered indispensable for the exercise of that right. After *Demir* and *Enerji*, this is no longer tenable.

The approach of the ECtHR, greatly influenced by the ILO jurisprudence, represents important progress in the European protection of collective labour rights, as it elevates collective labour rights to the status of civil and political rights in terms of the level of protection they enjoy under the Convention. The important conclusion drawn from these cases is that the right to bargain collectively, including the right to strike, is an essential element of the right to association and can therefore be restricted only in exceptional circumstances.

The ECtHR has upheld the protection of the right to strike under Article 11 in several subsequent judgments, including *Danilenkov v Russia*,[51] *Trofimchuk v Ukraine*[52] and many follow-up cases against Turkey, including *Saime Özcan v Turkey*,[53] *Kaya and Seyhan v Turkey*,[54] and *Çerikçi v Turkey*.[55] Most recently, the Court reaffirmed its position with regard to the right to collective action, reiterating that an interference with trade union freedom of association is incompatible with Article 11 when it is capable of dissuading trade union members from legitimate participation in strikes or other trade union action, and had not been 'necessary in a democratic society'.[56] If the ECtHR continues in this direction, as also expected in light of the relevant decisions of the Council of Europe's Committee on Social Rights (discussed in the next section), and the CJEU does not depart from its *Viking* and *Laval* jurisprudence in future cases, a conflict between EU law and the ECHR is likely to occur. This would put the Member States in a difficult position,

[51] *Danilenkov v Russia*, App no 67336/01 (ECtHR, 30 July 2009).
[52] *Trofimchuk v Ukraine*, App no 4241/03 (ECtHR, 28 October 2010).
[53] *Saime Özcan v Turkey*, App no 22943/04 (ECtHR, 15 September 2009).
[54] *Kaya and Seyhan v Turkey*, App no 30946/04 (ECtHR, 15 September 2009).
[55] *Çerikçi v Turkey* App no 33322/07 (ECtHR, 13 October 2010).
[56] See e.g. *Danilenkov v Russia*, App no 67336/01 (ECtHR, 30 July 2009) (holding that lack of effective judicial protection for striking employees against discrimination at work and dismissal is a breach of Article11); *Saime Özcan v. Turkey*, App no 22943/04 and *Kaya and Seyhan v Turkey*, App no 30946/04 (ECtHR, 15 September 2009) (that disciplinary action that had the effect of deterring trade union members from taking part in industrial action was in violation of Article11); *Sisman v Turkey*, App no 1305/05 (ECtHR, 27 September 2011) (that disciplinary action for advertising a trade union strike were acts of intimidation deterring trade unionists from engaging in their Article 11 rights).

since their obligations under EU law and the ECHR would clash, now also in the field of fundamental social rights.

4 The Right to Strike in the International Arena

4.1 ILO Conventions

The right to take collective action, including the right to strike, is not explicitly included in the ILO Conventions Nos 87, 98 and 154,[57] all of which concern the application of the principles of freedom of association and the right to collective bargaining. Nevertheless, the absence of an explicit reference does not mean that it was not protected.[58] In the significant body of jurisprudence developed since the 1950s, both the ILO Committee on Freedom of Association and the Committee of Experts have integrated the right to strike under the ILO umbrella as an inherent value of the ILO's Constitution.[59] It was said to be an intrinsic corollary of the right to organise protected in Article 3 of Convention 87, deriving from the right of workers' organisations to 'organise their administration and activities and formulate their programmes'. The position of the ILO Committees is thus that the broadly stated provisions of Convention 87 incorporate the right to strike, as well as other means of promoting and protecting the economic and social interests of workers. This jurisprudence is summarised in the various editions of the Committee on Freedom of Association's Digest of Decisions and is extensively discussed in different ILO publications.[60] The Employers' Group, however, contended that Convention 87 does not cover the right to strike, as it is not explicitly included and was never meant to be included, resulting in a heated

[57] ILO Convention 87 concerning Freedom of Association and Protection of the Right to Organise; ILO Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; and ILO Convention concerning the Promotion of Collective Bargaining.

[58] As early as 1924, the ILO 'Nicod' Report pointed out the close links between freedom of association and industrial action. See J. Nicod, 'Freedom of Association and Trade Unionism: An Introductory Survey' (1924) 9 *International Labour Review* 467.

[59] See e.g. ILO, 69th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B) (1983), p 62.

[60] See for example, E. Gravel, I. Duplessis and B. Gernigon, *The Committee of Freedom of Association: Its Impact over 50 Years* (ILO 2001).

debate between the tripartite constituents and a deadlock in the supervisory system.[61]

Recently, however, the matter seems to have been settled: the social partners formulated a joint statement in which they, inter alia, acknowledged that '[t]he right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organization.'[62] While the joint statement does not explicitly state that the right to strike is protected by Convention 87, the employers do agree that workers have a right to undertake industrial action and, importantly, that the ILO supervisory system should resume the supervision of standards.

An important challenge to the jurisprudence of the CJEU has come from the ILO Committee of Experts in the *BALPA* case.[63] The British Airline Pilots' Association (BALPA) had threatened strike action against British Airways (BA) when the latter decided to setup a subsidiary company in France. In response, BA decided to request an injunction before the UK High Court, arguing that the action would be illegal under *Viking* and *Laval* and expressing its intention to claim damages if strike action were to take place. Under the circumstances, BALPA decided not to follow through with the strike action due to the possible costs for the union, potentially including bankruptcy, and launched a complaint before the ILO Committee of Experts.

The ILO Committee commenced by stating that its task is not to judge the correctness of the case law of the CJEU and its interpretation of EU law but rather to examine whether the effect of these decisions at the national level is such that it denies the freedom of association under Convention No. 87. In this respect, the

[61] International Organisation of Employers (IOE), Comments for the General Survey 2012 on Fundamental ILO Conventions: Comments on Conventions Nos 87 and 98 (2012) http://www.ioe-emp.org/fileadmin/ioe_documents/publications/ILO_ILC/2013/EN/_2011-07-07_ILC_CAS_2012_IOE_Submission_on_the_General_Survey.pdf [last accessed 2 September 2017].
[62] ILO, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, TMFAPROC/2015/2 (Geneva, 22-25 February 2015).
[63] Application by the British Air Line Pilots Association to the International Labour Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No 87, London 5 October 2009.

Committee expressed its concern in relation to the fact that 'the union in question has been held liable for an action that was lawful under national law and for which it could not have been reasonably presumed that the action would be found to be in violation of European Law'. It 'recalled that imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association'.

As a more general point, the ILO Committee recalled that 'when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services'. This is an important point and one that directly calls into question the balancing test conducted by the CJEU.

The third point concerned the impact of the CJEU's judgment in the UK. Contrary to the UK Government's argument that the *Viking* and *Laval* judgments would not have much effect on trade union rights because they are only applicable where the freedom of establishment and freedom to provide services between Member States are at issue, the Committee contended that such restrictions on the right to strike are, in the current context of globalisation, likely to occur more often. This is particularly true in some sectors of employment, such as the airline sector. For the workers in these sectors, restrictions on the right to strike, following from the economic freedoms, may be devastating to their ability to negotiate meaningfully with their employers. With that in mind, the Committee observed with *serious concern* the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case and concluded that the threat of an action for damages that could bankrupt the union, now possible in the light of the *Viking* and *Laval* judgments, creates a situation in which the rights under the relevant Convention cannot be exercised.

4.2 European Social Charter

Another important challenge to the CJEU's jurisprudence has come from the Council of Europe's Committee on Social Rights, deciding a case brought by the Swedish trade unions after Sweden had changed its law following the *Laval*

judgment.[64] The trade unions argued that the change in legislation was not in conformity with the right to bargain collectively and the right to strike as stipulated in Article 6 of the European Social Charter (ESC). They also expressed the view that posted workers had to have the same rights as migrant workers. The amended law (so-called *Lex Laval*) restricted the Swedish trade unions' possibilities to take industrial action against a foreign employer who posts workers to Sweden if the industrial action aims at regulating employment conditions which go beyond the minimum requirements of the PWD.

The conclusions reached by the Committee are very interesting and important. The Committee commenced by distinguishing between the ESC and EU law, which are two different instruments belonging to different systems, and the principles, rules and obligations under EU law may not coincide with the system of values, principles and rights embodied in the ESC. As a second point, the Committee recalled that the ECtHR presumes compliance of EU law with the ECHR, in accordance with the *Bosphorus* presumption of equivalent protection. In this context, the Committee considered, however, that neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of the conformity of legal acts and rules of the EU with the European Social Charter and, secondly, that the EU has not taken the same steps to accede to the ESC, as it is with the ECHR. The Committee would therefore exercise full scrutiny.

The main question before the Committee was whether the change of laws by Sweden (in order to comply with the *Laval* decision and implement the PWD) constitutes a violation of the ESC.

As a general remark, the Committee noted that the exercise of the right to collective action, including the rights to strike, guaranteed by Article 6(2) and (4) of the ESC, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the ESC, including, for example, those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3), fair remuneration (Article 4), information and consultation (Article 21), and so

[64] *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No. 85/2012.

on.[65] More specifically, the Committee considered that the amended legislative framework imposes disproportionate limitations on the ability of Swedish trade unions to make use of collective action in establishing binding collective agreements on matters beyond the minimum rate of pay or other minimum conditions with respect to foreign posted workers. This does not promote the development of suitable machinery for voluntary negotiations between employers and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements and is therefore in violation of Article 6(2) ESC, which requires that 'Contracting Parties undertake not only to recognise, […] but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other'.[66]

As for the alleged violation of Article 6(4) ESC, which provides that the right to strike may be restricted under the conditions further provided in Article G, the Committee determined that national legislation, which prevents *a priori* the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards, would not be in conformity with Article 6(4) since it would infringe the fundamental right of workers and trade unions to engage in collective action in order to protect the economic and social interests of the workers. Collective action aimed at achieving illegitimate or abusive goals may be limited and even prohibited, but the scope of action of trade unions aimed at improving the existing living and working conditions of workers cannot be limited by legislation to the attainment of minimum conditions.[67]

The last point examined by the Committee is the alleged violation of Article 19(4) (a) and (b) ESC, relating to the right of migrant workers and their families to protection and assistance in respect of (a) remuneration and other employment and working conditions and (b) membership of trade unions and the enjoyment of the benefits of collective bargaining. This means that states are required to ascertain the absence of discrimination, direct or indirect, and should pursue a

[65] Ibid, para 109.
[66] Ibid, para 116.
[67] Ibid, paras 117-125.

positive and continuous course of action providing for the more favourable treatment of migrant workers. The Committee found that the Swedish legislation does not secure the same treatment for Swedish workers and posted foreign workers and, as such, does not guarantee equal treatment with respect to the enjoyment of the benefits of collective bargaining, thus also finding a violation of Article 19(4) (a) ad (b). The Committee concluded that the Swedish legislative acts in question, adopted in order to guarantee and facilitate free cross border movement of services as required by EU law cannot be treated, from the perspective of the ESC, as having a greater *a priori* value than fundamental labour rights, including the right for posted workers to receive treatment not less favourable than that of other workers from the host state.

5 Analysis and Conclusions

The question raised in all the cases discussed above – at least when formulated from an EU law perspective – was essentially whether the actions by the trade unions constitute a restriction of EU fundamental freedoms and, if so, whether they are justified.

The CJEU's rulings triggered an intense debate on the consequences for the protection of the rights of posted workers and, more generally, the extent to which trade unions can continue to protect workers' rights in cross-border situations. Unsurprisingly, the rulings prompted severe criticism of the Court from different corners. One of the main arguments has been that conditions imposed on the exercise of the right to strike are likely to dissuade trade unions from resorting to it, which consequently undermines the trade union freedom of association.[68]

Indeed, the Court failed to reach a fair balance; even though it claimed to have struck a balance between the free movement provisions and the right to

[68] See, for example, C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 *European Law Journal* 1; A. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* cases in the ECJ' (2008) 37 *Industrial Law Journal* 126; Sciarra, "*Viking* and *Laval*: Collective labour rights and market freedoms in the enlarged EU", 10 *CYELS* (2007–2008), 563–580.

strike, its approach clearly prioritised the former. First, the Court determined that the right to strike must be aimed at protecting the terms and conditions of employment that appear to be 'jeopardized or under serious threat'. Second, trade unions may resort to strike action only after having exhausted all other means to persuade the employer. Third, even if strike action is taken as a last resort, it still has to comply with the test of proportionality in the narrow sense: the financial burden placed on the employer as a result of strike action must not be excessive in relation to the objective of protecting employment conditions.

It is clear that the threshold set by the CJEU leaves little room for the trade unions to actually justify their actions and, in effect, exercise the right to collective action. In addition, and this is a more general point, the CJEU's proportionality test does not seem to be in line with the EU's commitment to strive for a better balance between economic growth and social policy. The EU may have been created as an economic union where the establishment of the internal market was the primary aim. Since the Maastricht Treaty, however, and especially since the Treaty of Lisbon, the social dimension is perceived as an important element connecting the EU with its citizens and, as such, occupies a prominent place among the EU's objectives.[69]

Interestingly, however, the Court's methodological approach is different when balancing market freedoms against civil and political rights in comparison to the balancing exercise against social rights. In the former cases, the Court seems to achieve a more equitable balance between the different values.[70] Examples of such cases are *Omega Spielhallen*[71] *and Schmidberger*.[72] In *Omega*, the CJEU held that the restriction on the free movement of services was justified, as it was clear to the Court that the commercial exploitation of games involving

[69] Article 3(3) TEU proclaims, inter alia, the creation of a highly competitive social market economy and promotion of social justice and protection as objectives of the Union. This social dimension is, however, not equally balanced with the (dominant) EU economic freedoms and national social rights.
[70] V. Velyvyte, 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15 *Human Rights Law Review* 73-100.
[71] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* [2004] ECLI:EU:C:2004:614.
[72] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECLI:EU:C:2003:333.

stimulated killing of human beings infringed human dignity – a fundamental value enshrined in the German Basic Law. In *Schmidberger*, the Court determined that human rights, *in casu* the freedom of expression and the freedom of assembly, are not absolute rights and may therefore be restricted; at the same time, the free movement of goods – albeit one of the fundamental freedoms in the Treaties – may also, in certain circumstances, be subject to restriction. Thus, a fair balance between the interests of freedom of expression and free trade had to be struck, and Member States enjoyed a wide margin of discretion in that regard. The Court concluded that, in this case, freedom of expression and freedom of assembly outweigh fundamental market freedoms, such as the free movement of goods.[73] It is not certain why the Court adopted a different approach in *Omega* and *Schmidberger*. One reason already implied in the discussion above could be that the Court takes civil and political rights more seriously than it does social rights and therefore conducts a more equitable balance in such cases. Another explanation is that both *Omega* and *Schmidberger* were decided in favour of the Member State and not the individual applicants, as it is most often the case when a breach of social rights is at stake.

More recently, the Court seems to have adopted a more nuanced approach without, however, fundamentally changing its position. In cases such as *AGET*, the Court ruled that the measure requiring undertakings to obtain authorisation prior to carrying out collective redundancies was incompatible with Article 49 TFEU and Article 16 of the Charter, but it also stated that such a measure could be found to be compatible if it is sufficiently precise, based on objective criteria and reviewable by national courts. However, the Court did not give any guidance as to how the Greek authorities should do this. At the same time, the Court made a great effort to distinguish this and other recent cases from its previous case law.[74] In this way, the Court did not overrule the *Viking* and *Laval* jurisprudence; if anything, it demonstrated that it is not quite willing to depart from it.

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[73] Other cases that can be mentioned in this context are e.g. *Sayn-Wittgenstein* (C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806); *Dynamic Medien* (C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505).

[74] The Court made sure to distinguish *Regiopost* from *Ruffert*, ascribing its decision in this case to the specific circumstances of the case.

The analysis of the relevant case law in Strasbourg shows a strikingly different approach: while for the Luxembourg Court the exercise of the right to strike has to be proportionate, in the Convention system it is not the exercise of the right that has to be proportionate but rather the restriction of that right. It is of course true that the CJEU, unlike the ECtHR, has to give due regard to the other fundamental principles of the EU's legal order when applying fundamental (social) rights, and this is something that has been acknowledged before. However, it would seem logical and legitimate for the CJEU to depart in fact from its previous case law and change its methodology. The Charter – which acquired the same legal value as the Treaties – now puts economic and social rights on (more or less) the same footing and, moreover, sets out the right of collective bargaining and action, including the right to strike, in Article 28 of the Charter. Accordingly, the hierarchical logic applied by the Court in the *Viking* and *Laval* cases is different today, with both fundamental market freedoms and fundamental social rights being part of EU primary law, thus necessitating a more equitable balance. While it is certainly conceivable that the CJEU might reconsider its case law in light of the changes in the Treaties and also the developments in Strasbourg and more generally in international law, this remains to be seen. What we have seen so far is not particularly encouraging, since the CJEU made it clear that none of its more recent decisions have the effect of invalidating the *Viking* and *Laval* jurisprudence.

It is not certain whether the different approaches in the Strasbourg and Luxembourg case law concerning the right to strike will lead to different conclusions in concrete future cases, but it is very likely. While such a case has not come before the Strasbourg Court yet, what we do have is a decision of the Council of Europe's Committee on Social Rights on the matter. The Committee on Social Rights concluded that the Swedish legislation implementing the PWD and the CJEU's decision in *Laval* was contrary to several provisions of the ESC and the underlying values and principles enshrined in it. The Committee on Social Rights was clear in stating that the reason that Sweden did this, i.e. being under an EU law obligation, is irrelevant. The Committee on Social Rights does not produce binding judgments, of course, but if the ECtHR would follow the Committee's conclusions next time it is confronted with a similar issue – which appears highly

likely in view of its current case law on the matter – a direct conflict between the ECHR and EU law would occur.

The case law analysed in this and the previous chapter reaffirms that the level of protection provided by the CJEU and the ECtHR is not always equivalent and that, in some cases, the CJEU can be said to have fallen below the ECHR minimum standards. While conflicts in the field of fundamental social rights are currently of a more theoretical and hypothetical nature, given that the case law in this field develops extremely slowly, the question of the role of national courts in cases of conflicts between EU and ECHR law remains relevant. The next two chapters address this very difficult and complex question.

Chapter 6: Examining Conflicts between EU and ECHR Law from a National, European and International Law Perspective

1 Introduction

The potential for the fragmentation of international law and conflicting norms has been increasing in the last few decades, given the large number of different treaty regimes, each limited to a specific subject matter, and with no formal hierarchy between them (save for a limited number of exceptions).[1] In contrast to domestic law, international law has developed in an *ad hoc* and decentralised manner, which means that parallel, and in some cases overlapping and contradictory obligations, are more likely.[2] And yet, the issue of coordinating and resolving treaty conflicts and inconsistencies between the different regimes has not been dealt with adequately. Some of the classic writers in the field have voiced their concern over the difficult question of conflicting treaty commitments[3] and the same can be said for the courts and tribunals, which have sought ways to reconcile or prioritise them.[4]

The previous two chapters have shown instances in which the CJEU and the ECtHR have adopted different approaches in interpreting EU and ECHR law which has led to divergent and sometimes also conflicting decisions. As a result, national courts have been confronted with situations in which complying with EU law would result in a breach of the ECHR and, conversely, situations in which securing protection of fundamental rights as required by the ECHR and the case law of the ECtHR would mean a failure to execute an EU law obligation. The

[1] See e.g. M. Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 *European Journal of International Law* 566-582. See also Report of the Study Group of the International Law Commission finalised by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (13 April 2006) UN Doc A/CN.4/L.682.
[2] See e.g. M. Shaw, *International Law* (Cambridge: Cambridge University Press, 2014) p 4; A. Cassese, *International Law* (Oxford: Oxford University Press, 2005), 5-6.
[3] See J. Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012).
[4] J. Klabbers, *Treaty Conflict and the European Union* (Cambridge: Cambridge University Press, 2009).

obvious question then is, of course, what should national courts do in such situations.

This chapter looks at different sources of law which may be helpful in solving conflicts between EU and ECHR law, including the rules of conflict in international law, which is something that is often overlooked. Yet, both the EU and the ECHR are conceived of as international treaties and a national judge may perceive conflicts between EU and ECHR law as conflicts between two international treaties, in which case the rules of conflict in international law may become relevant.

The fundamental assumption on which this chapter is based is that both the EU and the ECHR are international organisations founded on and governed by international treaties, which exist alongside other international treaties and rules of customary international law.[5] At the same time, however, both the ECHR and EU Treaties may be considered *special* treaties in both national and international law – the ECHR because it is a human rights treaty which may give it a special status compared to other treaties and EU Treaties because of the autonomy and supranational character of EU law. The aim of this chapter is to explore these assumptions further and to determine whether and to what extent national and international (treaty) law is helpful with regard to resolving conflicts between EU law and the ECHR.

The chapter is structured as follows. The next section provides a definition of a treaty conflict, making a distinction between conflicts in the narrow and broad sense. The third section starts with a discussion on the rules of conflicts in national law and national constitutions, since this is the first source that national courts will look at when confronted with a conflict between EU and ECHR law. Section 4 examines the question of conflicts between EU and ECHR law from the perspective of EU law and the CJEU and from the perspective of ECHR law and the ECtHR. The

[5] On the general responsibility of international organisations, see e.g. ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion (1980) para 37. See further J. Klabbers, 'Contending approaches to international organizations: Between functionalism and constitutionalism' in J. Klabbers and A. Wallendahl (eds) *Research Handbook on the Law of International Organizations* (Cheltenham: Edward Elgar, 2011).

fifth section looks into the rules of conflict resolution provided for in the Vienna Convention on Law of Treaties (hereinafter, VCLT or Vienna Convention) and customary international law, in order to determine if they are helpful in resolving conflicts between EU and ECHR law. The analysis mainly focuses on Article 30 of the VCLT, which provides the 'tool-box' for dealing with treaty conflicts. Finally, section 6 brings the different sources and perspectives together.

2 Defining Treaty Conflict

A treaty conflict in the strict sense can be defined as a conflict between provisions of different treaties which cannot be resolved using interpretative techniques such as 'conform interpretation' or 'balancing'.[6] A conflict in the strict sense occurs when a party to two treaties finds itself in a situation in which it cannot simultaneously comply with obligations under both, because treaty A prescribes what treaty B prohibits.[7] This is the situation of direct incompatibility: an obligation may be fulfilled only by thereby failing to fulfil another obligation. However, treaty conflicts can be conceived of more broadly too, including situations in which compliance with one norm *may* result in a breach of the other and where obligations and performance under one treaty frustrate the purpose of another treaty, without there being any strict incompatibility between their provisions.[8]

The VCLT itself does not contain a definition of treaty conflict and most international treaties are silent on the matter. Most treaties are also hardly ever equipped with solutions in terms of coordination mechanisms or conflict resolution provisions. This is even more so the case when the conflicting interpretation

[6] 'Balancing' or 'proportionality balancing', with its origins in Germany, has become a dominant technique of rights adjudication. See e.g. A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Faculty Scholarship Series. Paper 1296. available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2296&context=fss_papers [last accessed 28 August 2017].

[7] This definition was first formulated by Wilfred Jenks. See W. Jenks, 'The Conflict of Law-making Treaties' (1953) 30 *British Yearbook of International Law* 401, 426.

[8] H. Kelsen, *General Theory of Norms* (Mischael Hartney tr: Oxford University Press, 1991) 123; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) 164-200.

concerns normative preferences, since these are never explicitly addressed in the treaties themselves. It will usually be that the judge who is confronted with the conflict will have to figure out how to deal with it.

Limiting the definition to a narrow description seems too restrictive, however, particularly in the context of human rights treaties,[9] where their application will more often involve inconsistencies and divergences rather than directly conflicting obligations. Therefore, the analysis in this chapter will use the broader definition of a treaty conflict, thus also including inconsistencies and divergences in Strasbourg and Luxembourg which may not necessarily result in directly conflicting obligations but which may be perceived as such by the national courts, or where compliance with one obligation considerably limits or frustrates the purpose of the other. While it may be possible, theoretically, to comply with both treaty obligations ultimately, in cases of broader conflicts the situation is more complex in practice. Time is an important factor also, because it may take a while before it becomes clear whether the two obligations are truly conflicting, but the courts are required to deal with it in the meantime. Moreover, both narrow and broad conflicts remain problematic from the perspective of coherence and have the negative effect of weakening international law as a whole.[10]

3 National Law and National Constitutions

The first place a national judge will look for an answer when confronted with conflicting treaty obligations is the national constitution. What does the national constitution say about the status of international treaties in the domestic legal order and, in particular, of EU and ECHR and (how) can those rules be interpreted as giving priority to one over the other?

There are two preliminary points to be made here. The first one concerns the domestic effect of international (treaty) law in the national legal system and

[9] Ibid. Furthermore, for the argument that the narrow definition is inadequate, see E. Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 *European Journal of International Law* 395.
[10] R. Wolfrum and N. Matz, *Conflicts in International Environmental Law* (Berlin/London: Springer, 2003) 6.

the traditional description of the relationship between states and international law in terms of monism and dualism. In monist countries, international treaties are directly incorporated into the domestic legal orders. In dualist countries, on the contrary, international treaties have to be transposed into the domestic legal order. This means that an incompatibility between EU law and the ECHR in those countries would in principle be seen as an incompatibility between EU law and an act of national law, incorporating the ECHR in the national legal system, and vice versa. Yet, as will be shown in this and the next chapter, even in dualist countries the Convention is often used and applied directly by the national courts, presumably due to its special character as a human rights treaty, but also because of the authoritative role played by the Strasbourg case law. The second point relates to the fact that national courts in some countries may consider EU law to be different from other international law and give it a different (higher) status in the domestic legal order in comparison to other sources of international law. The consequence would then be that EU Treaties and EU law would have priority over other international treaties in the national legal order. The same may be applicable in relation to the ECHR for states that give a special status to international human rights treaties in their constitutions, requiring an interpretation of all applicable law in conformity with those treaties. These preliminary points are further developed below.

3.1 The *Special* Status of EU Law in Domestic Legal Orders

Article 1 of the Treaty of Lisbon states that: 'By this Treaty, the High Contracting Parties establish among themselves a European Union […] on which the Member States confer competences to attain objectives they have in common' and, thus, by using the language of international law, confirms the EU's international character. Even though there have been several proposals over the years to modify the existing treaty architecture, none of these attempts resulted in a clear and explicit change in the nature of the EU and EU law.[11] The legal regime of the amendments, including its latest Treaty of Lisbon, is still set out in Articles 39, 40

[11] B. De Witte, 'The European Union as an International Legal Experiment', in G. de Burca and J. H. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012) 19-56.

and 41 of the Vienna Convention, which govern amendments to and modifications of international treaties. In fact, the Treaty of Lisbon abandoned the idea of changing the nature of the EU in the Treaties, which arguably had been attempted in the preceding Constitutional Treaty, which had intended, according to its title, to 'establish a Constitution for Europe'.[12] As is well known, the Constitutional Treaty or the 'EU Constitution', as it was often referred to, never entered into force after being rejected by the French and Dutch electorates. As for any future amendments to the EU Treaties, Article 48 TEU provides that any amendment to the Treaties 'shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements', again using the traditional language of the law of international treaties, referring to 'treaties' and 'ratification'.[13] The EU legal system and everything built on it is thus not self-sustaining: it is reliant on the Treaties and owes its validity to them. The Treaties, in turn, owe their validity to international law.

Ultimately, therefore, the EU Member States are the main actors that establish the EU Treaties, bound only by their national constitutional rules and the rules of international treaty law. The EU (or previously the EC) was and still is a voluntary association of states in which many decisions are taken as a result of negotiations among the leaders of the states. The Member States remain in a privileged position within the EU, because they can change the general institutional framework of the Union through treaty amendment, which still requires unanimous consent from all the Member States, and they can even decide to withdraw from it, as we have witnessed in the recent Brexit developments.[14] Moreover, the EU Member States have referred to the EU as an international

[12] B. De Witte, 'The European Union as an International Legal Experiment', in G. de Burca and J. H. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012) 19-56.

[13] It should be noted here, however, that the amendment rules under EU law are actually more rigid than those of general international law, since Article 48 TEU provides less flexibility than Article 39 of the Vienna Convention on the Law of Treaties. In the latter, the contracting parties are free to arrange the manner of later amendments or to change the procedure formulated in the preceding treaty. In contrast, the EU Treaties contain the mandatory treaty revision procedure in Article 48 and the Member States must follow it. See also 1976 *Defrenne* case [ECLI:EU:C:1976:56] where the CJEU confirmed this duty of the Member States.

[14] On sovereignty and Brexit see e.g. M. Gordon, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond' (2016) *King's Law Journal* 27.

organisation or as a regional economic integration organisation (REIO) in many of the multilateral treaties and conventions to which the EU is a contracting party.[15]

The qualification of the EU as an international organisation and EU law as international law is not only part of state practice in the international arena, but it is also preserved internally, in the constitutional laws of the Member States. Indeed, the national constitutions in some countries contain a generic transfer of powers provision without a specific reference to the EU.[16] An example is Spain, as already discussed in Chapter 2, but also, for instance, the Czech Republic, Poland and the Netherlands. Other countries, however, single out a provision on the transfer of powers to the EU specifically, which in itself shows that the EU is different. Some examples include Germany, Croatia, Finland, and Denmark.

National courts do not often make specific statements about the nature of the EU and EU law. One of the few examples is the French *Conseil constitutionnel*, which has stated, albeit in a somewhat controversial way, that EU law is distinct from international law.[17] It first stated that 'the provisions of the "Treaty establishing a Constitution for Europe", […] show that said instrument retains the nature of an international treaty entered into by the States […]'.[18] But it then continued: 'pursuant to Article 88-1 of the Constitution: […]; that the drafters of this provision thus formally acknowledged the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order'.[19]

[15] There are several examples of such references in multilateral treaties. See, for example, the UN Framework Convention on Climate Change (1992), Article 20 or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (2015), Article XXI. For a discussion on this particular aspect see E. Paasivirta and P.J. Kuiper, 'Does one size Fit All? The European Community and the Responsibility of International Organizations' (2005) 26 *Netherlands Yearbook of International Law* 169.

[16] For an overview of 'transfer of power' clauses in all 28 Member States, see L. Besselink, M. Claes, Š. Imamović & J.H. Reestman (2014). *National constitutional avenues for further EU integration*, Report for the European Parliament's Committees on Legal Affairs and on Constitutional Affairs No. PE 493.046. Brussels: European Union.

[17] *Conseil Constitutionnel*, Decision n° 2004-505 DC of 19 November 2004, *The Treaty establishing a Constitution for Europe*.

[18] *Conseil Constitutionnel*, Decision n° 2004-505 DC of 19 November 2004, *The Treaty establishing a Constitution for Europe*, para 9.

[19] *Conseil Constitutionnel*, Decision n° 2004-505 DC of 19 November 2004, *The Treaty establishing a Constitution for Europe*, para 11.

It is therefore not entirely clear what the position of the *Conseil connstitutionnel* is but it seems that, even though the Constitutional Treaty, as was the case (but the same argument could be made for the Lisbon Treaty), retained the nature of an international treaty, it has become distinctive from the French perspective due to the special reference to the EU in Article 88(1) of the French Constitution. This may be different in other states that do not have such a reference in their constitutions.

Another attempt to define the nature of EU law was made by the German *Bundesverfassungsgericht*. Already in 1967, the German Constitutional Court described the (then) Community legal order as follows:

> The Community is not a state and not even a federal state. Rather it is a Community of a special nature in the process of an ever closer integration, in intergovernmental institution within the meaning of article 24/1 of the Basic law, to which the Federal Republic of Germany, in common with other Member States has transferred certain sovereign rights. A new public authority has thereby been created, which is autonomous and independent vis-à-vis the public authorities of each Member State. Consequently its acts do not require approval /ratification/ by the Member States, nor can they be annulled by those States. The EEC Treaty to a certain extent constitutes the Constitution of the Community, […] it forms its own legal order which is part of neither public international law nor the national law of the Member States. Community law and municipal law of Member States are two internal legal orders which are distinct and different from each other […].[20]

While the French and German highest courts may have followed the CJEU's view considering the EU to be a 'new legal order', it is not in itself enough to conclude that the EU would take a position of priority over the ECHR or other international treaties in the French and German domestic legal orders. Moreover, most national courts try to avoid making a pronouncement on this particular matter, especially in fundamental rights cases – exactly the cases in which the issue of conflicting obligations under EU and ECHR law will come up.

3.2 The *Special* Status of ECHR Law in Domestic Legal Orders

[20] Order of 18 October, 1967, 22 BVerfGE 293 para 19.

While the label 'supranational' or 'special' has been traditionally reserved in Europe for the EU and its judiciary, it has become more common in recent years also to characterise the ECtHR as a supranational jurisdiction.[21] The ECHR seems to be just as integrated into the national legal systems as EU law and national courts often feel obliged to follow the case law of the Strasbourg Court as much as they feel bound by the Luxembourg Court's judgments. The ECtHR has been referred to as 'the Constitutional Court for Europe' in legal writings[22] and national courts in many EU states frequently refer to its case law and adapt national law so as to comply with the requirements imposed by the Convention as interpreted by the ECtHR. In practical terms, thus, ECHR law has become a vital component of the daily work of national courts in most EU Member States.

In some states, human rights treaties, as a category of international treaties, have a special status. In such cases, national constitutions distinguish between human rights treaties and other treaties, giving the former a special status. For instance, Article 20(2) of the Romanian Constitution states that 'where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions'. In the Czech Republic human rights treaties have acquired a special status too, albeit in a different way. Until 2001, international human rights treaties had a special position in comparison to other treaties, as they were the only treaties that were directly incorporated and were, moreover, granted constitutional status. In 2001, the incorporation provision was extended to all ratified and promulgated international treaties. As this could result in restricting the already attained legal status of the incorporated human rights treaties, the Constitutional Court of the Czech Republic declared in 2002 that human rights treaties ratified prior to the constitutional amendment would not be affected by the change in the regulation.[23] Furthermore, the Constitution of

[21] For the argument on ongoing convergence in the application of EU and ECHR law domestically, see G. Martinico, *The interaction between Europe's legal systems. Judicial dialogue and the creation of supranational laws* (London: Edward Elgar Publishing, 2012).
[22] S. Greer, *The European Convention on Human Rights* (Cambridge: Cambridge University Press, 2006), 173.
[23] Czech Constitutional Court, Pl. ÚS 36/01, published under no. 403/2002 Coll.

Slovakia refers to human rights treaties in a separate paragraph stipulating, somewhat vaguely, that 'international treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws'.[24]

Other countries that give a special status to international human rights treaties are Spain and Portugal, providing an interpretative support for constitutional human rights provisions. Section 10(2) of the Spanish Constitution provides that 'Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain'. Similarly, Article 16 of the Portuguese Constitution reads as follows:

> 1. The fundamental rights enshrined in this Constitution shall not exclude such other rights as may be laid down by law and in the applicable rules of international law.
>
> 2. The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights.

In Italy, the Constitutional Court interpreted Article 117(1) of the Italian Constitution, which mandates the country's exercise of powers to be within the limits set by the international obligations, meaning that international human rights treaties and, in particular, the ECHR, is an 'intermediary norm', somewhere between constitutional and ordinary norms.[25]

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[24] Article 7(5) of the Constitution of Slovakia [emphasis added].

[25] Criminal Proceedings against Paolo Dorigo, Constitutional review, No 113/2011; ILDC 1732, (IT 2011). Mr Dorigo had been the victim of a violation of Article 6 ECHR, as found by the European Commission of Human Rights. He had asked *Corte di Appello* of Bologna to review his (final) conviction in accordance with the international decision. The Appellate Court decided to raise a constitutionality claims before the Constitutional Court in respect to Article 630 of the Italian Code of Criminal Procedure (CPP). The Constitutional Court agreed with the reasoning of the *Corte di Appello*, according to which the provision at issue violates the international obligations undertaken by Italy to which Article 117(1) of the Constitution

Constitutions in other states contain more general provisions, giving priority to international treaties, without a distinction between human rights and other treaties. The Constitution of Bulgaria, for example, stipulates that ratified and promulgated international treaties 'shall have primacy over any conflicting provision of the domestic legislation'.[26] A similar primacy clause can be found in Poland (Article 91), Croatia (Article 141) and Greece (Article 28). In Germany, primacy is only given to international customary law. Article 25 of the German Basic Law states that the general rules of international law 'shall be an integral part of federal law' and 'shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory'.

The Netherlands is another legal system that gives priority to international treaties in the domestic legal order without making a distinction between different types of international treaties. The example of the Netherlands is different, however, because Articles 93 and 94 of the Constitution have been interpreted as also applying to national constitutional law. In other words, international treaty law (hence both EU and ECHR law) has direct effect and primacy over national law, also including over the national Constitution. The general practice of Dutch courts, including that of the *Hoge Raad*, is that they consider themselves bound by the ECHR, as interpreted by the ECtHR and by EU law, as interpreted by the CJEU. Curiously, in case of the latter, the legal literature in the Netherlands takes the position that there is primacy of EU law because it is required by the EU's special autonomous nature proclaimed by the CJEU.[27] While this is controversial – since one would assume that there is primacy of EU law because the national constitution permits it – the effect remains the same.[28] Nevertheless, even if it

makes reference. Accordingly, the Court declared the partial unconstitutionality of Article 630 of the Italian CPP.

[26] Article 5(4) of the Constitution of Bulgaria.

[27] J. Fleuren, 'The Application of Public International Law by Dutch Courts' (2010) *Netherlands International Law Review*, 57, 245.

[28] See in this context L. F. M. Besselink, 'The Proliferation of Constitutional Law and Constitutional Adjudication, or How America Judicial Review Came to Europe After All' (2013) 9 Utrecht Law Review 2, 19.

would be EU law that is in conflict with a human rights treaty, such as the ECHR, the priority would be given to the latter.[29]

Finally, there are also national legal systems that do not contain written rules in their Constitutions with respect to the legal status of international treaties, such as in Austria and Belgium. Article 9 of the Austrian Constitution states very generally that recognised rules of international law are valid parts of Federal law (first paragraph) and that specific sovereign rights can be transferred to intergovernmental institutions and their organs by means of a treaty, which then has to be ratified in accordance with Article 50 of the Constitution (second paragraph). Similarly, Article 34 of the Belgian Constitution provides that 'The exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law'. In such situations, the case law of national courts, in particular the national constitutional court is relevant in determining the status of treaties in national law. In Austria, however, the ECHR is also specifically given constitutional status through a federal constitutional amendment.[30]

There is thus a great variety with regard to the status of human rights treaties in the national legal orders: some states give priority to such treaties and other do not make a distinction between human rights treaties and other treaties. Notwithstanding the differences, and as already discussed in Chapter 2, the Convention has become deeply embedded in the domestic legal orders of the EU Member States, shaping fundamental rights domestically either directly or through the interpretation of the national constitutional bill of rights.[31] Its special

[29] L. F. M. Besselink, 'Constitutional Adjudication in the Era of Globalization: The Netherlands in the Comparative Perspective' (2012) 18 *European Public Law* 231.
[30] BVG BGBl Nr 59/1964. For further details see A. Gamper, 'Austria: Endorsing the Convention System, Endorsing the Constitution', in Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016) 75.
[31] See Section 4.2., Chapter 2. See also L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *European Journal of International Law* 125. See also H. Keller and A. Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008); G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen: European Law Publishing, 2010); P. Popelier, C. Van de Heyning and P. van Nuffel (eds), *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp: Intersentia, 2011); J.H. Gerards and J.W.A. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the*

character, in comparison to other international treaties, is represented in different ways, but the authorities in most Convention states consider themselves bound by the ECHR and the ECtHR case law and they adapt national law so as to comply with it. In recent declarations, the Contracting Parties have confirmed the interpretative task of the Court and re-affirmed the need to consider the effects of all of its judgments seriously. Therefore, the Convention seems to have acquired a special status in the legal systems of most (EU) contracting parties, not only in the countries in which national constitutions give it such a status but also in other Convention states in which the domestic authorities have accepted it, even without it being an official requirement in the national constitution.

3.3 Conclusion

National constitutions and/or the case law of the national constitutional courts have made both EU and ECHR law special in the domestic legal orders, despite the fact that both are, strictly speaking, based on international treaties and are thus international law. At the same time, the national constitutions lack clear rules in the case of a conflict between the two and national constitutional courts have avoided addressing this matter. Therefore, the next logical step is to look beyond the domestic legal orders, at the Treaties themselves, and general international law.

4 Conflict Clauses in the Treaties

The Vienna Convention on the Law of the Treaties refers, in Article 30, to the so-called conflict clauses that can be included in the treaties and can act as conflict rules between treaties. These clauses can be of a more general nature or they can be designed to cover specific treaties, thus giving priority to the treaty in question or to another treaty in the case of a conflict. The following sections discuss the conflict clauses contained in EU Treaties and in the ECHR.

4.1 Conflict Clauses in EU Treaties

judgments of the ECtHR in national case law. A comparative analysis (Antwerp: Intersentia, 2014).

EU primary law contains several rules that may be applicable in the case of a conflict between EU Treaties and other international treaties and laws. First of all, EU Treaties recognise the right of the Member States to conclude new or to continue to adhere to existing international agreements: Article 34(2) TEU refers to the Member States' participation in international organisations and Articles 165(3), 166(3), 167(3), and 168(3) TFEU provide that the EU and the Member States shall foster cooperation with third countries and international organisations in certain fields.

These agreements are generally perceived as acts pertaining to national law, however, as in the case of a conflict with EU law, the latter will prevail, as would be the case with any other act of national law.[32] But there is an exception to this general rule: by virtue of Article 351 TFEU, a Member State may be able to invoke an international agreement concluded by it before it became an EU Member State in order to derogate from the EU law obligation. Article 351 TFEU reads in full:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding states, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> To the extent that such agreements are not compatible with the Treaties, the Member State or states concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
>
> In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

[32] A. Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 *Fordham International Law Journal* 5, 1304.

Article 351 TFEU thus refers to agreements concluded between one or more Member States, on the one hand, and one or more third countries, on the other, where conflicts are solved in favour of obligations which pre-date the EU membership. This would also be in accordance with the international law maxim *pacta sunt servanda*. Since the ECHR is the older Treaty, one could argue that, in case of a conflict between Member States' obligations under the ECHR and those under EU law, the former would prevail.[33] This kind of logic was used by Italy in the first case to invoke Article 351 TFEU (then Article 234 TEC) in relation to its rights and obligations under the General Agreement on Tariffs and Trade (GATT).[34] But the third paragraph of Article 351 TFEU also imposes an obligation to interpret, as far as possible, the agreements concluded with third countries in conformity with the EU law obligations of the Member State concerned. Unsurprisingly perhaps, the CJEU focused on that third paragraph in its analysis and ruled, following the Opinion of Advicate General Lagrange and the Commission's argumentation, that Article 351 TFEU only protects the rights of third countries under the earlier agreement; the Member States themselves should refrain from exercising those rights to the extent necessary for the performance of their obligations under the (then) EEC Treaty.[35] This stance has been upheld in the subsequent case law with some minor variations.[36] Accordingly, Article 351 TFEU has not been interpreted as a conflict rule – it seems to be more about balancing EU law with the international commitments of the Member States rather than a rule giving priority to the latter.[37]

But what about human rights treaties? Human rights treaties are not about the reciprocal relationships between states, so the reasoning above would not apply. The case law of the Luxembourg Court does not address this matter except

[33] The exception would be in France because France joined the EU before it ratified the ECHR in 1974. See also T. Lock, *The European Court of Justice and International Courts* (Oxford: Oxford University Press, 2015) 188.
[34] Case 10/61 *Commission v Italy* [1962] ECLI:EU:C:1962:2.
[35] Ibid, p 10.
[36] See inter alia Case 812/79 *Attorney General v Burgoa* ECLI:EU:C:1980:231, para 8; Case 286/86 *Ministère public v Gérard Deserbais* ECLI:EU:C:1988:434, para 17; Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* ECLI:EU:C:1997:8, para 56; Case T-315/01 *Kadi* ECLI:EU:T:2005:332, para 185-186.
[37] J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009) 118; P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2006) 304.

in one case in which the Court accepted a treaty obligation arising from an earlier (individual rights) treaty as a justification for non-compliance with EU law on the basis of Article 351 TFEU. The case in point is *Levy*.[38] Prior to joining the EU, France had concluded an ILO agreement which required the prohibition of night work for women. In order to comply with it, France had passed legislation prohibiting women from working at night. Subsequently, the EU adopted a directive on sex equality in employment which gave women the same rights as men with regard to night work. There was thus a conflict between the French legislation implementing the ILO agreement and the EU Directive on sex equality. The CJEU ruled that the Directive would not take effect in France to the extent that it would prevent France from complying with the obligations that were incumbent on it under an earlier agreement, in accordance with Article 351 of the TFEU (ex 234 EC Treaty). The Court made clear, however, that this is accepted only if the other agreement is concluded with non-member countries. Nevertheless, the case is important, because it shows that the Court has accepted the principle of earlier treaties having priority over later treaties under certain conditions. Thus, an argument could be made that the ECHR obligations should prevail over EU law obligations in case of a conflict in all EU states that have ratified the ECHR before joining the EU. After all, Article 351 TFEU is a clear conflict of law provision and one that has never been removed from the Treaties. However, the argument is also problematic. Firstly, the rule would not be applicable in all states. France, for example, only ratified the ECHR in 1974, which means that the French authorities could not use Article 351 to argue that the Convention has priority over EU law. Secondly, and more importantly, the rule contains some very formalistic time criteria, which gives precedence to an earlier treaty while the ECHR, as well as most other treaties, are living instruments that change over time. It would be very odd, therefore, if the question of priority would depend on what was agreed upon almost 70 years ago.

Furthermore, and as already asserted, primary EU law also contains specific provisions with respect to the ECHR. The ECHR is a human rights treaty which has played an important role in EU law and in particular in EU human rights

[38] Case C-158/91 *Ministère public en Direction du travail et de l'emploi v Jean-Claude Levy* [1993] ECLI:EU:C:1993:332.

law, and the EU Charter (which is part of primary EU law since the entry into force of the Treaty of Lisbon) makes several references to the ECHR as a source of both inspiration and reference. The most important provision in this context is Article 52(3) of the Charter, which provides that the Charter rights that correspond to the Convention rights should have the same meaning and scope. Article 52(3) is thus a conflict avoidance rule: conflicts between EU and ECHR law should not arise. If, however, conflicts were to arise, this provision could act as a conflict rule. National courts could use Article 52(3) to argue that, if there is a conflict between EU law and the ECHR, the provision of EU law is invalid because it violates the Charter, which should be interpreted in accordance with the ECHR.[39]

The CJEU has not accepted Article 52(3) of the Charter as a conflict rule.[40] In some of its recent judgments, the CJEU has held that national courts, when checking the compliance of EU law (which most often will be implementing legislation) with fundamental rights, should do so *solely* on the basis of the Charter.[41] The Court has also ruled that Article 52(3) of the Charter does not require national courts to apply the provision of the ECHR directly in case of a conflict with national law[42] and that the ECHR 'does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law'.[43] The CJEU thus has the tendency to translate questions on the ECHR posed by the national courts into Charter questions, often focusing exclusively on the Charter and leaving the ECHR to the side. This is not problematic if there is no conflict between the two, but, if there is a discrepancy, the national courts could use this provision as a conflict rule. They could argue that this Treaty provision governs the relationship between the Charter and the Convention and dictates that EU law should provide at least the same level of protection as the ECHR when Charter and Convention rights correspond. Otherwise, national courts risk being in breach of EU law, because EU

[39] This argument is further developed in the next chapter.
[40] This is particularly true if read alongside Opinion 2/13 of the accession of the EU to the ECHR. The subsequent case law has been less clear as to the exact meaning of Article 52(3) and the role it plays in the CJEU's case law.
[41] C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 45.
[42] Case C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233, paras 62-63.
[43] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:280, para 44; a more recent case confirming this is C- 217/15 *Orsi* [2017] ECLI:EU:C:2017:264, para 15.

law itself requires a conform interpretation. Of course, Article 52(3) only refers to the Convention and does not mention the case law of the Strasbourg Court, but the text of the Convention is meaningless without the case law, so its interpretation must also include the case law of the ECtHR.[44]

However, even if Article 52(3) would be accepted as a conflict rule by the national courts and ultimately even the CJEU, it would still not cover all possible conflicts between EU law and the ECHR, since it only covers rights that correspond to each other. The Explanations relating to the Charter provide a list of the Charter and Convention rights that correspond to each other, leaving a gap, albeit small, containing rights that are not covered by this provision. A different provision that comes to mind in this context is Article 6(3) TEU, which states rather directly and convincingly that fundamental rights, as guaranteed by the ECHR, 'shall constitute general principles of the Union's law'.[45] An argument could thus be made that all ECHR rights are general principles of EU law and hence that there should never be a conflict between EU law and the (whole) ECHR, thus also covering Convention rights that do not correspond to the Charter rights. This argument is harder to make, however, since the CJEU has consistently rejected this interpretation of Article 6(3), which was, moreover, suggested by some national courts. Thus, if the national courts would use this provision to give priority to the ECHR and the Strasbourg Court, they would openly disobey the judgments of the CJEU.

Furthermore, Article 53 of the Charter stipulates that the Charter cannot restrict the level of protection offered by the Convention as well as the rights protected by Union law, international law and in the Member States' constitutions. This means that the level of protection provided in the Charter should correspond to that of the ECHR, EU law, international law, and the national constitutions, unless the level of protection offered by the Charter is higher. This provision has also been interpreted differently by the CJEU in its *Melloni* judgment and Opinion 2/13, discussed earlier in this book.[46]

[44] For an earlier discussion on Article 52(3) of the Charter see Section 3.1.2., Chapter 2 and Section 3.3, Chapter 3.
[45] For a discussion on this particular point see Section 3.1.1, Chapter 2.
[46] See Chapters 3 and 4 of this book.

The last point concerns a completely different approach to dealing with conflicts between EU and ECHR law, namely, through the intervention of the EU legislature, which could amend the conflicting legislation and, in this way, try to solve the problem of incompatibility with the ECHR. It could be argued that, since the Treaties presume that EU law complies with the ECHR, and otherwise it imposes an obligation to ensure that compliance with Article 51 of the Charter, this could be another way of 'managing' the conflicts available in EU law. Indeed, it seems to have worked in the context of the Dublin III Regulation in terms of conflicts between EU and ECHR law and, more specifically, between the case law of the CJEU and the ECtHR, even though it still remains to be seen how the new Regulation will be interpreted further and applied by the CJEU.

4.2 Conflict Clauses in the ECHR and the Perspective of the Strasbourg Court

The ECHR does not contain conflict rules in its text, except for Article 53 which is intended to maintain the (minimum) level of protection afforded under the Convention. Generally speaking, the ECHR Contracting Parties are required to ensure compliance with the ECHR minimum standards at all times. As far back as 1958, the European Commission of Human Rights ruled that 'if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty'.[47]

In 1989, in its famous *Soering*[48] decision, the ECtHR addressed the issue of treaty conflicts and ruled that the extradition of a criminal suspect from the UK to the US was contrary to the UK's obligations under the Convention, even when required under the bilateral extradition treaty concluded between the two countries. This judgment changed the traditional understanding of the state's capacity to extradite and its responsibilities in that respect, with significant effects beyond the ECHR itself. The case concerned a German national, Jens Soering, who was accused in the US on two counts of capital murder, which he and his girlfriend

[47] *X v Germany* App no 235/56 (European Commission of Human Rights, 10 June 1958).
[48] *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

had allegedly committed. They fled to the UK where they were subsequently arrested. The US requested their extradition under the terms of the existing extradition treaty between the UK and the US.

The Strasbourg Court unanimously upheld the previous case law of the European Commission on Human Rights by which extradition of an individual to a state where he would be likely to be subjected to torture or inhuman or degrading treatment engaged the responsibility of the requested state under Article 3 of the Convention. Stressing the absolute nature of Article 3 and the need to interpret the ECHR in a way that renders its safeguards practical and effective, the ECtHR ruled that the loss of control after extradition did not absolve the state from responsibility for the foreseeable consequences of extradition suffered outside its jurisdiction.[49]

The ECtHR did not accept the argument advanced by the UK that it was bound by the extradition treaty concluded with the US, without however explicitly addressing the question of the priority of the treaty obligations or how to balance them otherwise. Instead, it proceeded with examining whether there was a violation of the ECHR which, in effect, resulted in giving primacy to the ECHR over the extradition treaty. The ECtHR did emphasise the particular importance of the right at issue in this case, but it did not clarify whether only certain rights qualify as potential obstacles to extradition or if there is a need to balance the state's interest of criminal law enforcement and the respect for individual rights in the extradition process in every case.

The Strasbourg Court maintained its approach in *Slivenko and others v Latvia*.[50] The case concerned the expulsion of a family of a former Soviet (later Russian) military officer following the withdrawal of Soviet troops from Latvia, as required by the treaty of April 1994 on the withdrawal of Russian troops. The applicants argued that their removal constituted an interference with respect for

[49] The general applicability of international guarantees has been acknowledged by the UN Committee on Human Rights in several landmark cases, which explicitly refer to the *Soering* decision and the principles contained therein. See, e.g., *Kindler v Canada* No. 470/1991, UN Doc. CCPR/C/48/D/470/1991; *Ng v Canada* No. 469/1991, UN Doc. CCPR/C/49/D/469/1991; *Cox v Canada* No. 486/1992, UN Doc. CCPR/C/45/D/486/1992.
[50] *Slivenko and others v Latvia,* App no 48321/99 (ECtHR, 9 October 2003).

their private life and home. The ECtHR found a violation of Article 8(1) of the Convention and ruled that a prior bilateral treaty between Latvia and Russia could not be invoked to limit the application of the ECHR. It stated:

> In any event, the Court reiterates that the treaty cannot serve as a valid basis for depriving the Court of its power to review whether there was an interference with the applicants' rights and freedoms under the Convention, and, if so, whether such interference was justified (see the admissibility decision in the present application, § 62, ECHR 2002-II).[51]

In the decision on admissibility, the Strasbourg Court already clarified:

> It follows from the text of Article 57 § 1 of the Convention, read in conjunction with Article 1, that ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention. If that should not be the case, the State concerned has the possibility of entering a reservation in respect of the specific provisions of the Convention (or Protocols) with which it cannot fully comply by reason of the continued existence of the law in question. Reservations of a general character, in particular those which do not specify the relevant provisions of the national law or fail to indicate the Convention articles that might be affected by the application of those provisions, are not however permitted. The Court always retains the power to examine whether or not a purported reservation has been validly made in conformity with the requirements of Article 57; if the reservation is found to be valid, the Court will be barred from examining the conformity of the reserved legal provisions with the Convention articles in relation to which the reservation has been made […].[52]

Moreover, in the Court's opinion, the same principles must apply as regards any provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might result in an inconsistency with some of its provisions.

The incompatibility between EU law and the ECHR was considered by the Strasbourg Court in the *Bosphorus* decision.[53] In this case, the Irish authorities

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[51] *Slivenko and others v Latvia,* App no 48321/99 (ECtHR, 9 October 2003), para 120.
[52] *Slivenko and others v Latvia,* App no 48321/99 (ECtHR, admissibility decision of 23 January 2002) para 46.
[53] *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005). For a more elaborate discussion of the case see Section 2.2.2., Chapter 2.

impounded an aircraft used by JAT, an undertaking established in the Federal Republic of Yugoslavia (FRY), on the basis of the EC Regulation 990/93 (implementing the UN Security Council Resolution which had implemented sanctions again the FRY). Even though the incompatibility has its origin in a UNSC resolution, the ECtHR did not address the hierarchy argument on the basis of Article 103 of the UN Charter and focused solely on the incompatibility between the ECHR and EU law. The Court reiterated that a Contracting Party is responsible under Article 1 of the ECHR for all acts and omissions of its organs, regardless of whether the act or omission in question is a consequence of domestic law or the necessity to comply with international obligations. In the Strasbourg Court's view, Article 1 does not exclude any part of the Contracting Party's jurisdiction from scrutiny under the ECHR.[54] However, the ECtHR also held that it presumes that the 'the protection of fundamental rights by Community law [is] ... "equivalent" ... to that of the Convention system'. The presumption is only applicable if the Member States have no discretion, in which case the Strasbourg Court will presume that they are in compliance and will check only if there are signs of manifest deficiency. However, if the Member States have any discretion as to how they implement and apply EU law, they are fully responsible under the ECHR and the presumption of equivalent protection does not apply.[55]

Thus, if Ireland in this case had had discretion as to whether to impound the aircraft or not, the applicant's claim would have been assessed as any other claim in Strasbourg. The presumption of equivalent protection was also not rebutted in this case. If, however, the ECtHR would find that the presumption had been rebutted and rule in favour of the applicant, the defendant (Ireland) would have been faced with an unresolvable conflict between the ECHR and EU law, requiring Ireland to apply the Regulation. This means that, in the case of a conflict between EU and ECHR law, the ECtHR will first determine if the state had discretion when acting and, on that basis, will decide whether it will exercise a full test of compatibility between EU law and the Convention or if it will limit itself to assessing whether there is a manifest deficiency in the protection provided. If the

[54] *Bosphorus,* para 153.
[55] For a more detailed discussion of the *Bosphorus* and other cases in which the *Bosphorus* presumption has been applied see Section 2, Chapter 2.

ECtHR determines that there has been a violation of the Convention which cannot be justified, the Contracting State is required to put an end to that violation regardless of the fact that the violation originates in EU law.

The *Bosphorus* doctrine could thus be viewed as a kind of conflict rule as well. The national court could potentially use it to argue that, in a case where the conditions are fulfilled – the state had no discretion as to how EU law is applied domestically and the CJEU had ruled on the matter concluding that EU fundamental rights had not been breached – EU law should prevail over the Convention, because the Strasbourg Court presumes that the protection provided is equivalent and will only check if there is manifest deficiency. If the national court establishes that there is no manifest deficiency, it could give priority to EU law. Caution is advised, however, since the *Bosphorus* doctrine is a vague rule – to the extent that it can be considered a conflict rule – and the presumption of equivalent protection is always rebuttable. It has never been rebutted in Strasbourg thus far, but the Court came close to rebutting it in the recent *Avotiņš* case.[56]

5 Conflict Rules in International Law

After having examined the question of conflicts between EU and ECHR law from a purely national perspective, looking at national constitutions and the relevant case law of the national courts, as well as from the EU and the ECHR perspective, this section explores the international law perspective. Treaty conflicts have been at the center of the scholarly debate for many years,[57] because of the growing number of international traeties as well the fact that the existing conflict rules

[56] *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016). See also P. Gragl, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case: ECtHR 23 May 2016, Case No. 17502/07, Avotiņš v Latvia' (2017) 13 *European Constitutional Law Review* 3, 551.

[57] See, among many, J. Pauwelyn*, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003); R. Wolfrum and N. Matz, *Conflicts in International Environmental Law* (Berlin/London: Springer, 2003); S. A. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Brill, 2003); J. B. Mus, *Verdragsconflicten voor de Nederlandse rechter* (Zwolle: W.E.J. Tjeenk Willink, 1996); A.W. Heringa, Verdragsconflicten en de rechter' (1988) 63 *Nederlands juristenblad* 33.

provided in treaty law – part of which reflects customary international law – are often considered inadequate to solve conflicts between (multilateral) international treaties. The most important source is the VCLT.

5.1 The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties, completed in 1969 and in force since 1980, is the 'treaty on treaties'. It determines general rules governing the operation of the treaties, but it is also means of avoiding or resolving potential conflicts between the treaties. Most of its rules have been recognised as customary international law by the International Court of Justice and other international courts and tribunals.

In general, international law has a strong presumption against treaty conflicts and conflict avoidance is often used as an interpretation technique to avoid conflicts altogether.[58] If, however, it is not possible to avoid a conflict, it is necessary to resolve it, which requires concrete rules. The main rules concerning treaty conflicts in the VCLT can be found in its Article 30, entitled Application of Successive Treaties Relating to the Same Subject-Matter. In addition to Article 30, the VCLT contains other important rules, such as Articles 53 and 64 concerning *jus cogens* norms (also referred to in Article 30); Article 41 which deals with the so-called *inter se* agreements; and Article 59 regarding the termination or suspension of a treaty implied by the conclusion of a later treaty. The following discussion focuses on *jus cogens* norms and Article 30 VCLT, since other provisions do not seem to be applicable to conflicts between EU and ECHR law.

5.2 *Jus Cogens*

[58] On the so-called presumption against conflicts in international law see J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003), 240-244. See also J. Finke, 'Regime-collisions: Tensions between treaties (and how to solve them)' in C. J. Tams et al. (eds) *Research Handbook on the Law of Treaties* (Edward Elgar Publishing, 2014), 421.

If a norm can be identified as *jus cogens*, then it invalidates any other conflicting treaty provision. *Jus cogens* or peremptory norms are defined in Article 53 of the VCLT:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 63 VCLT adds that, if a new peremptory norm would emerge, any existing conflicting treaty would become void.[59] The International Court of Justice (ICJ) recognised the rules of *jus cogens* as part of international law in the *Nicaragua Case*.[60] These norms can develop from treaty law, international customary law and general principles of law, but the notion still remains underdeveloped and there is much uncertainty and dispute about how *jus cogens* norms acquire such status.[61]

The *jus cogens* rule is not a classical conflict rule, as it does not give priority to one norm over another, but it invalidates the other norm. Nevertheless, it can be used as such if it is possible to identify a certain norm as being an internationally recognised *jus cogens* norm. Thus, if the ECHR (or part of it), being a human rights treaty, can be considered to embody *jus cogens* norms, then it could be argued that EU law, which is in breach of one or more Convention rights, is null and void.[62] It would be difficult, however, to find support for this position in international law, since identifications of *jus cogens* norms are limited and

[59] O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: a commentary* (Springer, 2012).
[60] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v USA*) (1986) ICJ Rep 14.
[61] U. Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 *European Journal of International Law* 853; D. Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291, 304.
[62] A. Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *The European Journal of International Law* 3, 491–508.

invalidations of other norms on that basis hardly ever occur in practice.[63] The few examples of rights that are generally recognised as being *jus cogens* are the prohibition of genocide and the prohibition of torture.[64]

The EU Court of First Instance (CFI) considered *jus cogens* rules in the *Kadi* case. Mr Kadi, a Saudi resident, and the Al Barakaat International Foundation, established in Sweden – both of which had been listed in the annex to EU Regulation 881/2002 as suspects of supporting terrorism – brought actions for annulment before the Court of First Instance (CFI),[65] claiming that the Council was not competent to adopt the abovementioned Regulation and that the Regulation violated their fundamental rights, in particular the right to property and the rights of the defence. The Regulation imposed sanctions on the applicants, in particular freezing their financial assets.[66] The applicants argued that they had never been involved in terrorism or supported it in any way. In response, the EU Council and the Commission contended that the EU, as well as its Member States, was bound by international law and was thus obliged to give effect to the mandatory measures of the UN Security Council. To question the lawfulness of those measures by means of judicial review 'would cause serious disruption to the international relations of the Community'.[67]

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[63] M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of International and Comparative Law* 69; A. Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *The European Journal of International Law* 3, 491–508.

[64] For a more inclusive list see Venice Commission Report 'Are There Differentiations Among Human Rights? Jus Cogens, Core Human Rights, Obligations Erga Omnes and Non-Derogability' CDL-UD(2005)020rep-e. On the prohibition of torture specifically, see E. De Wet, 'The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 1, 97-121. On the prohibition of genocide as *jus cogens*, see J. Wouters and S. Verhoeven, 'The Prohibition of Genocide as a Norm of Ius Cogens and Its Implications for the Enforcement of the Law of Genocide' (2005) *International Criminal Law Review* 5, 401-416.

[65] Note that the Court of First Instance (CFI) is renamed the 'General Court' after the entry into force of the Lisbon Treaty on 1 December 2009.

[66] The EU Regulation was implementing a number of United Nations Security Council (UNSC) resolutions concerning the suppression of international terrorism and adopted under Chapter VII of the UN Charter. These include SC Res. 1267, 15 October 1999, S/RES/1267 (1999); SC Res. 1333, 19 December 2000, S/RES/1333 (2000); and SC Res.1390 of 28 January 2002, S/RES/1390 (2002).

[67] T-315/01 *Kadi v Council and Commission* Judgment of the Court of First Instance [2005] ECLI:EU:T:2005:332, para 162.

The CFI dismissed these actions and ruled that the EU Member States were indeed required to comply with the UNSC resolutions, in accordance with customary international law and Article 103 of the UN Charter. Furthermore, the Court held that UNSC resolutions have primacy over EU law, as well as over any other obligations of domestic or international law, including those under the ECHR. The CFI considered that the only way EU courts may review the legality of the Regulation at issue would be in the light of higher norms of public international law, i.e. *jus cogens*, from which even the UN bodies cannot derogate. It found that these higher rules – to the extent the right to property and defence rights can be considered as part of *jus cogens* – were not infringed in this case.[68]

On appeal before the CJEU, the Court reversed the judgment of the CFI, annulling the relevant implementing measures and declaring that they had violated fundamental rights protected by the EU legal order.[69] The CJEU concluded that the CFI erred in law by holding that the EU judiciary was only competent to review the legality of the Regulation at issue with regard to *jus cogens*.

5.3 Article 30 VCLT

Article 30 VCLT reads as follows:

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States and international organizations parties to successive treaties

[68] The CFI's assessment of the content of *jus cogens* was criticised by several commentators. See, with further references, P. Eeckhout, 'Community Terrorism Listing, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit' (2007) 3 *European Constitutional Law Review* 183.

[69] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECLI:EU:C:2008:461. The judgment has been met with mixed criticism; see eg J.H.H. Weiler 'Editorial' (2009) 19 *European Journal of International Law* 895; K. Ziegler, Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights'(2009) 9 *Human Rights Law Review* 288; Guy Harpaz, 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the Kadi Dispute' (2009) 14 *European Foreign Affairs Review* 65; G. De Búrca, 'The European Court of Justice and the International Legal Order After *Kadi'*, (2010) 51 *Harvard International Law Journal* 1; G. De Búrca, 'The ECJ and the International Legal Order: A Re-evaluation' in G. de Búrca and J.H.H. Weiler *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012) 105.

relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between 2 parties each of which is a party to both treaties, the same rule applies as in paragraph 3;

(b) as between a party to both treaties and a party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

5.3.1 *Lex Superior*

The principle *lex superior derogat legi inferiori*, contained in the first paragraph of Article 30 VCLT, refers to situations in which one law is subordinate to another law. This rule is well established in many domestic law hierarchies and has been traditionally applied to resolving conflicts within a single legal system, where rules exist in the form of hierarchy. In federal systems, for example, federal law takes precedence over state law,[70] and in unitary and devolved systems primary legislation is higher in rank than secondary legislation. Similarly, there are norms

[70] See, inter alia, Article 32 of the German Constitution.

in international law that are considered to rant higher than all other norms. The first paragraph of Article 30 VCLT refers explicitly to Article 103 of the UN Charter as *lex superior*. Article 103 gives the UN Charter supremacy providing that, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[71] As a result, the obligations of the UN members under the UN Charter take precedence over their obligations under any other international agreement.[72] This effect of Article 103 has been challenged before, however, in the context of its relationship with international customary law, with *jus cogens* and human rights norms, as well as in the context of agreements made between UN and non-UN members.[73]

5.3.2 Conflict Clauses in Treaties

The second paragraph of Article 30 VCLT refers to the specific conflict clauses which may be included in the treaties themselves. As already explained above, such clauses regulate the relationship between the provisions of the treaty that is

[71] The legitimacy of the rule in Article 103 UN Charter stems from the fact that it is widely accepted by the UN member states, international courts and tribunals as well as other international treaties and organisations, including also the VCLT. For the confirmation of its supremacy over other international agreements in the case law of international courts see *Questions of Interpretation & Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libya v UK*) and (*Libya v USA*), [1992] ICJ Rep paras 39-41; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), [1985] ICJ Rep para 107; Case T-315/01 *Kadi v Council and Commission* ECLI:EU:T:2005:332, paras 183-204; Case T-306/01 *Yusuf Al Barakaat v Council* ECLI:EU:T:2005:331, paras 233-254; *Behrami and Behrami v France, Saramati v France, Germany and Norway,* ECHR, App nos 71412/01 and 78166/01 (ECtHR, Decision on Admissibility of 2 May 2007) para 61, respectively at para 141; *Berić and Others v Bosnia and Herzegovina*, App no 36257/04 (ECtHR, Decision on Admissibility of 16 October 2007), para 29. It is of course interesting in this context to mention the decision of the CJEU in *Kadi*, where the Court disregarded the relevance of Article 103 – without even referring to it – by ruling that the EU is exempted from complying with the UN sanctions adopted under Chapter VII of the UN Charter if they are in conflict with 'higher' EU law. See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the EC* [2008] ECLI:EU:C:2008:461.

[72] J. Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in E. de Wet and J. Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012) 13, 18.

[73] See the discussion, with further references, in V. Jeutner, *Irresolvable Norm Conflicts in International Law* (Oxford: Oxford University Press, 2017) 49-50. On the supremacy of Article 103 in the EU legal order see Section 6.1.2. of this chapter.

being drafted and other treaties, in order to resolve or prevent conflicts between provisions stemming from different legal instruments.[74] Conflict clauses can be categorised in three ways: they can provide expressly for the derogation from earlier treaties; they can give priority to the treaty over later treaties; and they can provide that the later treaty is compatible with an earlier treaty. Conflict clauses can be limited to certain specific treaties or apply to all treaties.

The International Law Commission (ILC) Fragmentation Study stated that '[a]lthough such [conflict resolution] clauses are undoubtedly useful, there is a limit to what they can achieve', and that 'sometimes conflict clauses may themselves conflict or cancel each other out'.[75] While it may indeed be difficult to implement them in practice, since it is generally hard to predict the impact other (new) treaties may have on the existing obligations and, moreover, such rules are open to interpretation, specific conflict resolution clauses may also prove to be a useful tool in solving conflicts. This will of course depend on the Treaty itself and how the conflict clause has been formulated. When the wording of such a provision gives rise to difficulties and controversy concerning its interpretation, a conflict clause may indeed fail to achieve its aim.

5.3.3 *Lex Posterior*

The *lex posterior derogat legi priori* principle, as articulated in the third and fourth paragraph (under a) of Article 30 of the VCLT, regulates conflicts between treaties concluded between the same parties, where the relationship between those treaties is not regulated in one of them. The principle translated literary means 'later law overrides earlier law'. The legal consequence is thus that the rule in the older treaty is not applied but its validity is not affected. There are however two requirements that need to be fulfilled: first, the parties to the earlier and later treaty must be the same and, second, the conclusion of the later treaty must not imply the termination or suspension of the earlier one in accordance with Article

[74] International Law Commission (ILC), *Draft Articles on the Law of Treaties with Commentaries* (Yearbook of International Law Commission, 1996, vol 2, 187), Article 26(2).
[75] International Law Commission (ILC), '*Report of the International Law Commission on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*' (13 April 2006) A/CN.4/L.663/Rev.1 (ILC Fragmentation Study), paras 269–70.

59 VCLT. The main justification for giving the later treaty priority is that it is the most recent, and presumably most accurate, reflection of the will of the relevant actors. Determining which treaty is earlier or later should be done on the basis of the date of adoption of the treaty rather than the entry into force. Even though the rights and obligations stemming from the treaty become effective only when the treaty enters into force, it was considered necessary to go back to the moment of adoption in order to understand the priorities at the time fully.[76]

5.4 Application of Article 30 VCLT

Article 30 VCLT contains conflict rules that should be applied to treaty conflicts, but it also restricts that same application. What becomes immediately obvious is that the normative framework of Article 30 only applies in certain defined instances. Its title suggests a limited scope of application: it applies only when the treaties are successive and when they relate to the same subject matter. The latter limits the scope of the very notion of treaty conflict, since the most serious conflicts tend to be between provisions from different fields covering – strictly speaking – different subject matters (e.g. trade versus environment, investment versus labour or extradition versus human rights). It could be argued, however, that, even though the provisions may originate in treaties that cover different subject matters, the boundaries between them are (often) blurred: a treaty on trade may contain human rights and environmental provisions, for example, although in principle they all cover different subject matters. Moreover, there is no pre-determined classification scheme of different subjects that could be used to determine which subject matter is covered in which treaty.[77] This strict interpretation of the wording of Article 30 VCLT is therefore often considered inadequate and an argument has been made for its broader interpretation and application.[78] Indeed, the conflict rules provided in Article 30 are restrictive if

[76] O. Corten and P. Klein, *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011).
[77] International Law Commission, Report of the Study Group of the International Law Commission finalised by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (13 April 2006) UN Doc A/CN.4/L.682.
[78] B. Conforti, *Consistency among Treaty Obligations* (Oxford: Oxford University Press, 2011); C. Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington International*

interpreted narrowly, and even when they are interpreted and applied more broadly they appear not to be very useful with regard to solving difficult conflicts between EU and ECHR law.

The *lex superior* rule refers to norms recognised to rank higher than any other norms of international law. These include Article 103 of the UN Charter and the *jus cogens* norms, which were already discussed above. Article 103 of the UN Charter only comes into play when there is a conflict between states' obligations under EU and/or ECHR law and the UN Charter, giving priority to the latter. This rule, therefore, is not relevant in the context of conflicts between EU and ECHR law.

Lex posterior is another conflict rule contained in Article 30 VCLT which does not seem to be helpful in the context of conflicts between EU and ECHR law. While the application of *lex posterior* to bilateral treaties is rather straightforward, this is not the case with regard to multilateral treaties which are 'living instruments',[79] continuously evolving through judicial and non-judicial interpretation and application. The rationale behind the *lex posterior* principle is that the later treaty will reflect the intention of the parties more accurately. This, again, is applicable to bilateral treaties and, more generally, treaties that deal with the same subject matter, but it is difficult to apply it to conflicts between multilateral treaties. Indeed, it would not make much sense to say, for instance, that the EU Treaty should have priority because it was adopted later than the ECHR, or vice versa. In fact, Pauwelyn has argued that Article 30 of the VCLT would generally not apply to multilateral treaties of a 'living' or 'continuing' nature, as it presupposes that the treaties are fixed in and do not evolve through time.[80] Moreover, Article 30 VCLT also includes an exception to the *lex posterior* rule in its fourth paragraph, allowing for parallel application, even if parties to the earlier and later treaty are not the same. In such cases, the *lex posterior* rule applies

Law Review 573, 578. See also M. Koskenniemi, 'Fragmentation of international law: difficulties arising from diversification and expansion of international law' Report of the Study Group of the International Law Commission A/CN.4/L.682, 13 April 2006.

[79] See e.g. G. Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in A. Føllesdal, B. Peters and G. Ulfstein, *Constituting Europe* (Cambridge: Cambridge University Press, 2013).

[80] J. Pauwelyn*, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) 378.

only to the countries that are contracting parties to both treaties and thus it covers only a limited set of cases.

Since the rules contained in Article 30 of the Vienna Treaty offer little guidance concerning conflicts between EU and ECHR law, it is be important to check whether guidance can be sought elsewhere: in the treaties themselves for example. In that context, Article 52(3) of the EU Charter is relevant, as it is a specifically designed conflict rule in primary EU law that requires consistency between the corresponding rights in the Charter and in the Convention. It is arguable that an international judge, in its assessment of conflicts between EU and ECHR law and the application of the VCLT, would simply make reference to this provision giving priority to the ECHR.

5.5 *Lex Specialis*

The maxim *lex specialis derogat legi generali*, even though it is not specifically mentioned in the VCLT, is generally accepted as a principle of public international law.[81] It entails the rule that, whenever two or more norms deal with the same subject matter, precedence should be given to the norm that is more specific over the more general norm. It is recognised and applied by the international courts and tribunals, in particular with regard to conflicts between treaties on the same subject matter or those being part of the same regime.[82] Similar to the rules in Article 30 VCLT, the rationale behind *lex specialis* is the fact that a more specific rule would be a more accurate expression of state consent. In practical terms,

[81] S. Borelli, 'The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship between International Human Rights Law and the Laws of Armed Conflict' in L. Pineschi (ed) *General Principles of Law: The Role of the Judiciary* (Springer, 2015). For an argument that it is factually incorrect to say that *lex specialis* enjoys general acceptance as a principle of international law or that it is entrenched in long-standing custom see M. Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law' in *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge: Cambridge University Press, 2016).

[82] The ECtHR, for instance, has considered Article 6 of the ECHR providing the right to a fair trial as *lex specialis* in relation to Article 13 providing for the right to an effective remedy in *Yankov v Bulgaria* App no 39084/97 (ECtHR, 11 December 2003) para 150. See also *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) [1997] ICJ Rep para 132; *Ambatielos case* (*Greece v United Kingdom*), [1952] ICJ Rep para 44.

however, *lex specialis* is mainly used as a conflict avoidance rather than conflict resolution rule.[83]

5.6 Application of *Lex Specialis*

Lex specialis as a rule of conflict resolution is also problematic. The most contentious point is how to determine which measure is more specific, especially in cases of the so-called genuine or true conflicts, where one treaty prescribes and the other one prohibits certain behavior. In such cases, it is difficult to determine which norm is *lex generalis* and which is *lex specialis*. Consequently, this conflict resolution rule also only addresses a limited set of cases and cannot be taken as a generally applicable rule. In addition, as with previous conflict rules, there are not many examples in international practice where *lex specialis* has been used as a rule of conflict resolution, which may also imply that it is not widely applicable or indeed useful in different types of treaty conflicts.[84]

The notion of *lex specialis* does not appear to be helpful in the conflicts between the ECHR and EU law, since such conflicts mainly concern obligations arising from the ECHR (a human rights treaty) and the application and implementation of EU secondary law (obligations arising under the EU Treaties), whereas a *lex specialis* rule, as defined above, is more suitable for treaties on the same subject matter or treaties that are part of the same regime.[85] It could possibly apply in cases of conflicts between the ECHR and the EU Charter of Fundamental Rights, but conflicts that are considered in this research are mainly between the ECHR and EU secondary law (interpreted in the light of the Charter). Moreover, *lex specialis* seems to be a rule of conflict avoidance rather than conflict resolution – it can tell us which treaty to choose if both are saying the same thing,

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[83] For the two different understandings of *lex specialis* (as a conflict avoidance and a conflict resolution rule) see Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (A/CN.4/L.682), 13 April 2006, paras 56-57 and 88. See also J. Pauwelyn*, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) 396.

[84] M. Milanovic, Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of International and Comparative Law* 69.

[85] J. Finke, 'Regime-collisions: Tensions between treaties (and how to solve them)' in C. J. Tams et al. (eds) *Research Handbook on the Law of Treaties* (London: Edward Elgar Publishing, 2014).

one being more specific or recent than the other, but if the two norms require conflicting actions it may be difficult to determine which one is more specific and on that basis resolve the conflict.

5.7 *Lex Specialis* and Self-contained Regimes

The notion of *lex specialis* can also be conceptualized differently. In addition to its application to specific treaty provisions, it could also apply to the whole treaty regime, which is self-contained and thus *lex specialis*. Such regimes contain sets of rules that form a separate system in international law containing its own rules on substance, interpretation and enforcement. The EU has been considered a self-contained regime,[86] but this idea has also been contested.[87] If EU law could be considered *lex specialis*, then it would have priority over other international treaties (which cannot be identified as *lex* specialis). The question arises, is EU law *lex specialis*?

Looking at the EU and EU law from a general international law perspective, we see an association of sovereign states that cooperate very intensely and that have decided to limit their sovereignty for that purpose. This is not problematic from an international law perspective, since the rules of international law, and more specifically international treaty law, are flexible and allow for such a high level of integration. The VCLT does not contain any rules or limitations in this regard, other than that the states are not permitted to make treaties that would be in conflict with *jus cogens*, which is not applicable in this case.[88] The VCLT in fact accepts distinct legal orders pursuant to Article 5, which states that the VCLT applies to any treaty without prejudice to any relevant rules of the organisation. International treaty law thus gives a lot of freedom to the states to decide on the different aspects concerning the international organisation they are creating, including the domestic enforcement of international obligations. In that sense, there is no obvious reason why the special characteristics of EU law, such as the

[86] J.H.H. Weiler, 'The Transformation of Europe' (1990-1991) 100 *Yale Law Journal* 2403, 2422.
[87] B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483, 519.
[88] Article 53 VCLT.

principle of primacy and direct effect, would not be compatible with international treaty law or would imply that EU law should be treated differently in international law. Limitations of national sovereignty for the sake of a high level of integration in international organisations only accounts for the further development of international law and does not in itself give a higher hierarchical status to such treaties.[89] If it would, it would mean that any group of states could create a highly integrated international organisation with unique characteristics and claim hierarchical superiority in international law. Moreover, the idea of self-contained regimes, as such, is disputed and several other regimes are considered to be self-contained, such as international human rights law, international trade law and so on.[90] This is thus not something that can be considered to be an established rule in international law.

5.8 Human Rights Treaties as *Lex Specialis*

Human rights treaties could also be considered *lex specialis* because of their special nature. The argument that human rights treaties are special and therefore hierarchically superior to other treaties in international law has been evolving over the years in both doctrine and court practice and many debates have arisen about how the law of treaties applies to human rights agreements and how it may accommodate their special characteristics.[91] The doctrinal premise used in this argument is that there is an ongoing process of constitutionalisation in international law[92] and that the international legal order is moving towards a

[89] B. De Witte, 'The European Union as an International Legal Experiment', in G. de Burca and J. H. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012) 19-56; B. De Witte, 'Rules of Change in International Law: How Special is the European Community?' (1994) 25 *Netherlands Yearbook of International Law* 299-334

[90] J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), 2.

[91] See, e.g., A. Orakhelashvili, 'Peremptory Norms in International Law' (2006) Oxford Scholarship Online.

[92] M. Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9; J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford, Oxford University Press, 2009).

vertical legal system with human rights at its apex.[93] The question is whether this is indeed the case.

The underlying reason most international treaties are concluded is for the establishment of reciprocal obligations between states for a specific purpose. While this is also true for human rights treaties, they are also different in a number of ways: they are not based on reciprocity; they operate between states and individuals rather than just states, creating obligations for the states towards individuals; and the compliance of states' obligations with human rights treaties is sometimes monitored by the institutions and procedures employed to ensure their enforcement. The Human Rights Committee described human rights treaties as treaties providing 'the endowment of individuals with rights' rather than 'a web of inter-state exchanges of mutual obligations'.[94] In some cases, those rights are directly effective at the national level but they can also be vindicated at the international level through a complaint procedure before international courts (this is the case under the ECHR machinery). This means that human rights treaties are not static elements of international law, as many other international treaties are, but they comprise universal norms driven by the common concerns of the international society. This has been confirmed in the human rights treaties themselves and is mirrored in the ethical and legal foundations of those treaties, including reference to human dignity, equality, fairness, and justice for all without distinction. In that sense, human rights treaties create obligations towards the international community as a whole and thus generally have an *erga omnes* character.

Indeed, the International Court of Justice asserted in the *Barcelona Traction* case that certain basic human rights give rise to international obligations owed by states to all other states, which the Court thus characterised as *erga omnes* obligations.[95] This approach builds its parameters partly with reference to

[93] E. de Wet and J. Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012).
[94] CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 Nov. 1994, CCPR/C/21/Rev. 1/Add. 6.
[95] *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)* [1970] ICJ Rep 3, paras 33-34.

the category of *jus cogens*, also recognised in the VCLT, and partly on the more general assumption that human rights treaties are *special*. The content of *jus cogens* norms when considered in relation to treaty provisions that could be incompatible with such norms is very limited, however, since *jus coogens* comprises only the most basic fundamental rights and freedoms such as the freedom from torture.[96] If a multilateral treaty contains rules that reproduce norms of *jus cogens*, such norms will take priority. For the most part, however, the special character of human rights treaties rests on the special nature of human rights, as such, which is undeniably different from the content of any other contractual treaties between states. Values enshrined in human rights are considered to be of constitutional importance in most, if not all, states and the same status should be accorded to the international treaties that embody them. The ECHR can be said to possess these special characteristics, as it imposes obligations on states towards individuals and grants the latter rights of enforcement. Furthermore, as a matter of structure, the ECHR provides its own machinery to interpret and apply ECHR provisions.

A specific example put forward in favour of the argument that human rights treaties are special and different from other treaties concerns their status in the case of state succession. The 1978 Vienna Convention on Succession of States in Respect of Treaties provides for the continuity of obligations in respect of all treaties that were previously binding on the predecessor states. Contrary to this rule, the practice in general international law is that the new state is free to choose whether it will become a party to the treaties adhered to by the predecessor state. Since the rule in the 1978 Vienna Convention does not reflect customary international law, it has been met with little support in the international community. However, this is different for human rights treaties; the new state does not have a choice when it comes to human rights treaties, since the inhabitants of a territory cannot be deprived of rights previously granted to them under a human rights treaty due to succession. Therefore, the continuity of obligations occurs automatically and does not require a formal confirmation by the

[96] M. Scheinin, 'Human Rights Treaties and the Vienna Convention on the Law of Treaties: Conflict or Harmony?', in *The status of international treaties on human rights* (Strasbourg: Council of Europe Publishing, 2006) 43, 49.

successor state, which represents an important exception to the general customary rule of non-continuity of treaty obligations.[97] This has been considered as providing strong evidence that human rights treaties do not only enjoy superior ranking in comparison to other international treaties, but they are also 'permanent and inalienable'.[98] Nevertheless, in practice, a formal notification that the new state considers itself bound is welcome in order to clarify any ambiguities that may exist. An example of such a practice in the ECHR system would be the dissolution of the Czech and Slovak Federal Republic. The Council of Europe's Committee of Ministers decided that the Czech Republic and the Slovak Republic are to be regarded as having succeeded to the Convention retroactively from their date of independence, and the ECtHR followed suit.

Another distinct characteristic of human rights treaties is the test of the compatibility of reservations employed in relation to such treaties. Since human rights treaties are intended to be subject to the wide participation of the states, the right to make a reservation is an important tool in achieving that while, at the same time, a reservation cannot be contrary to the object and purpose of the Treaty and its acceptance will depend on specific circumstances.[99]

What can be concluded here is that there is an emerging theory in international law that human rights treaties have a special status in international law and therefore they take priority over other international treaties. This could be used as an argument to say that obligations under ECHR law should take priority over EU law obligations in the case of a conflict. The same does not necessarily apply to EU Treaties since, as argued before, there is no obvious reason why, from a general international law point of view, EU Treaties or EU law should have priority. While EU law has certain distinct characteristics, such as primacy and direct effect, this in itself does not mean that it is hierarchically superior to other international treaties. Furthermore, a reference should also be

[97] Other exceptions are treaties providing for territorial regimes. See M. Kamminga, 'Human Rights Treaties and State Succession', in *The status of international treaties on human rights* (Strasbourg: Council of Europe Publishing, 2006). See also Human Rights Committee, General Comment No. 26: Continuity of obligations, 8 September 1997.
[98] M. Kamminga, 'Human Rights Treaties and State Succession' in *The status of international treaties on human rights* (Strasbourg: Council of Europe Publishing, 2006), 41.
[99] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion [1951] ICJ Rep 24. See also Article 19 of the VCLT.

made to the Vienna Convention, in particular its Article 30(2), which refers to conflict clauses found in the treaties themselves. In that context, Article 52(3) of the EU Charter is important, as it can be seen as a conflict clause specifically designed for conflicts between the ECHR and the EU Charter (in light of which EU law has to be interpreted) providing that corresponding Charter and Convention rights shall have the same meaning and scope. This means that EU law should be interpreted and applied in conformity with the ECHR whenever the Charter rights that are at stake correspond to the Convention rights. In practical terms, this means that, in such instances, ECHR law prevails.

6 Conclusion

Conflicts between EU and ECHR law are notoriously difficult to solve. All EU Member States are also parties to the ECHR and, as such, have to ensure compliance with both, while there is no higher authority to solve potential conflicts between them.

The first thing a national court will do is look at the national constitution. However, most constitutions give a special status to both EU and ECHR law and do not offer clear rules as to which one takes priority in the case of a conflict. This is true for monist states and also for dualist states, most of which have at some point given a special status to the ECHR in the national legal orders and where national courts do not directly give priority to EU law, even though that may seem logical from the point of view of a dualist state. This means that the national courts in most countries will have to look beyond the national constitution for a solution. The next step for the national courts would be to look at the treaties themselves.

The final step is international law with the most important source is the VCLT. Even though the Vienna Convention is written in a way that appears to be applicable to all treaty relationships between states, it contains a number of assumptions that do not apply to human rights treaties and other treaties that possess certain characteristics. Indeed, the VCLT implies or refers to reciprocal treaty relationships between states, where every right by one state corresponds to a duty of another state. There are no third parties involved – except perhaps third states. This again would not apply to human rights treaties or to EU Treaties,

since they create concrete obligations for states towards individuals and are not based on reciprocity.

What we can conclude from examining conflicts between EU and ECHR law from an international law perspective is that there is an emerging theory in international law that human rights treaties are *lex specialis* due to their special nature and, as such, should have priority over other international treaties. This is an argument that could be used by national courts to justify giving precedence to the ECHR over EU law, where the higher hierarchical level is not already granted in the constitution. However, an argument could be made that EU law is *lex specialis* too, because of its autonomy and supranational character.[100] The CJEU has repeatedly held that the EU legal order is autonomous and bound by international law, only to the extent that EU law itself allows it. While this is not how international law normally works, this view plays an important role in determining the place of EU law in international law as well as the relationship between the two. The argument is thus circular: determining the status of EU law in international law, from the perspective of international law, also includes the view of the CJEU. As a consequence, arguments can be made for both EU and ECHR law, having special status in international law and international law does not provide conclusive answers in that respect.

However, the VCLT does offer a way out: Article 30(2) of the Vienna Treaty refers to conflict clauses that can be included in the treaties and later applied in cases of conflicts. Indeed, if there is a conflict clause in the treaties themselves, that clause should be applied to solve the conflict (unless one of them can be considered *lex superior*). Here again, Article 52(3) of the EU Charter becomes relevant. This provision, as stated earlier, is meant to regulate the consistency between EU and ECHR law, requiring a consistent interpretation of the corresponding Charter and Convention rights.[101] Even though the CJEU has interpreted it differently in its case law, it is suggested that Article 52(3) of the Charter can be used as a specific conflict rule by national courts in order to solve

[100] M. Scheinn, 'Human Rights Treaties and the Vienna Convention on the Law of Treaties: Conflict or Harmony?' in *The status of international treaties on human rights* (Strasbourg: Council of Europe Publishing, 2006).
[101] See in particular Section 3.3., Chapter 3.

conflicts between EU law (interpreted in light of the Charter) and ECHR law, by ultimately giving priority to the ECHR, provided that EU law fails to accord the same minimum level of protection. However, there is also the *Bosphorus* doctrine which national courts may also view as a conflict rule. The *Bospohorus* doctrine implies that the ECtHR accepts the primacy of EU law if certain conditions are fulfilled and national courts may use it to give priority to EU law when those conditions are fulfilled. At the end of the day, therefore, the final answer will depend on the sources of law and the arguments used by the adjudicator, i.e. the national court, and the responses are bound to vary.

Chapter 7: Scenarios from the Member States

1 Introduction

As shown in the previous chapter, conflict rules in international (treaty) law do not offer final answers when it comes to solving conflicts between EU and ECHR law, except for the rules that are provided in the Treaties themselves. The most important provision in this context is Article 52(3) of the EU Charter, which could be referred to as a 'minimum standard' rule and which intends to ensure a consistent interpretation of the corresponding Charter and Convention rights. However, the CJEU has interpreted this provision differently, going as far as to hold that EU law must be examined 'solely in the light of the fundamental rights guaranteed by the Charter'.[1] National courts have also weighed in on the debate on conflicting obligations arising from EU and ECHR law, with notable contributions from the Dutch, German, UK, and Irish courts. This chapter tests the theoretical discussion from the previous chapter and investigates how national courts actually deal with what they have perceived to be conflicting obligations arising from EU and ECHR law. As explained earlier in this book, divergences and perceived conflicts between EU and ECHR law do not necessarily mean conflicting obligations for the national courts: national courts may be able to comply with both EU and ECHR law even if they diverge, because there is: (1) discretion left to the national authorities as to how to implement EU law or (2) the divergence does not result in EU law going below the minimum standards of the ECHR.

In 2014, the UK Supreme Court was confronted with a decision of the Court of Appeal in which the Court of Appeal, after having identified the incompatibility between EU law and the ECHR, felt compelled to follow EU law and disregard the ECHR, because 'the decision of CJEU was binding on courts of this country'.[2] The Supreme Court conducted an analysis of the relevant case law on its own and found no conflict, ultimately following the interpretation of the ECtHR without making a reference to the CJEU. Irish courts have refused to execute a

[1] C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, paras 45-46.
[2] *EM (Eritrea) v. Secretary of State for the Home Department* [2012] EWCA Civ 1336.

EAW in several cases, without referring a question to the CJEU, because the applicants were facing a risk of being exposed to human rights violations upon their return and 'to do so would be incompatible with this State's obligations under the European Convention on Human Rights',[3] thus, apparently giving priority to the ECHR. In Germany, the Federal Constitutional Court has precluded surrender pursuant to a EAW several times, finding a breach of a rights protected in the German Basic Law interpretation in line with the ECHR and the Strasbourg case law. Also, in the Netherlands, the *Raad van State* challenged the validity of EU law on the basis of its incompatibility with the ECHR, submitting a question for preliminary ruling to the CJEU.

These real life cases have something in common: they all involve conflicts – or what national courts may perceive as conflicts – between EU and ECHR law that have come before national courts. In the UK case, the Dublin II Regulation on asylum claims was at issue. In the Irish and German cases, it was the EAW Framework Decision, and the Dutch *Raad van State* challenged the validity of the recast Reception Conditions Directive, which lays down standards for the reception of applicants for international protection. The result is diverse and extremely interesting: some national courts decide to follow the ECHR and the interpretation of the ECtHR, without making a reference to the CJEU, giving priority to their ECHR obligations or obligations under the national constitution paired with the ECHR, while others consider themselves bound to give priority to EU law. While some of these issues have been temporarily resolved in the subsequent case law of the CJEU, in particular in relation to the EAW,[4] many more remain open.

The first part of this chapter will describe scenarios of different ways in which national courts have approached the issue of conflicts between EU and ECHR law. The aim is to illustrate, using examples, drawn from the practice of various national courts, techniques available to judges as they approach cases that appear to involve conflicts between EU and ECHR law. After developing different scenarios, the analysis will move to the normative question: how should national

[3] See e.g. Irish High Court, *Minister for Justice and Equality v Rostaş* [2014] EHC 391 para 121.
[4] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

courts deal with what they perceive to be conflicts between EU and ECHR law? Should they follow EU law and the case law of the CJEU, as required by the primacy of EU law, or is there an argument to be made that they should follow the ECHR, even if that means infringing EU law? These questions have not been settled yet and the case law in which EU and ECHR law overlap and potentially also contradict each other is only growing.

It is interesting to note that the general perception has always been that conflicts between EU and ECHR law rarely occur and, when they do occur, that they are solved by the European and national courts by means of dialogue and conform interpretation. The 'myth' of judicial dialogue and mutual deference appears in a different light today, however, with some notable divergences between the two and with the national judges repeatedly raising these issues in Luxembourg.[5] Moreover, the EU's accession to the ECHR, which was meant to offer a solution to the potential conflicts, seems no longer to be an option, at least not in the foreseeable future.[6]

This chapter develops a scenario analysis of ways to approach the specific conflicts between EU and ECHR law while, at the same time, providing relevant examples from the actual case law of national courts, where available. The aim is to discern different choices national courts have made when faced with a situation in which complying with EU law leads or may lead to a violation of the ECHR or when ensuring compliance with the ECHR standards may mean a failure to comply with EU law obligations. In methodological terms, it is important to note that the analysis will not consider all the cases that have been decided by all Member State courts, as this would be impossible for pragmatic reasons; rather, it uses the actual practice of national courts as a tool to illustrate the diversity and the

[5] On the dialogues and constitutional pluralism in European Human Rights Law, see A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford: Oxford University Press, 2009); M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5 *European Constitutional Law Review* 5-31; N. Kirsch, 'The Open Architecture of European Human Rights Law' LSE Working Papers 11/2007.

[6] As a matter of EU law, accession to the ECHR remains a legal obligation. Article 6(2) TEU states in clear terms that '[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms […].' The EU institutions can be sued for any 'failure to act' to comply with their legal obligations which means that the Commission is under an obligation to request an amendment to its negotiating mandate but the Council of Europe can refuse to continue negotiations.

complexity of the problem and to develop a normative account of how national courts could and should approach the conflicts between EU and ECHR law, drawing on the conclusions drawn in the previous chapters. It also does not aim to find a single solution that fits all purposes, since the answer may be different in different fields and for different countries.

When faced with incompatibility between EU law (or the national implementing act) and the Convention, national courts have to decide on the course of action: to make their own assessment and try to find a conform interpretation (section 2); to make a preliminary reference to the CJEU (section 3); or to ensure compliance with the ECHR, even if that means failure to execute an EU law obligation, thus risking that the decision may violate EU law (section 4). Alternatively, national courts could put the question before the Constitutional Court, if such a mechanism exists, but this is a scenario that does not come about often. Supreme and Constitutional courts could also decide to examine the cases on the basis of their own Constitution and thus reframe the conflict between EU law and the Convention rights into a conflict between EU law and national fundamental rights (section 5). Section 6 is an overall assessment and analysis of the findings.

2 Conform Interpretation

The first scenario under analysis is a classic one: national courts seek a conform interpretation of two seemingly conflicting positions without explicitly following one or the other. In 2014, the UK Supreme Court was confronted with a decision of the Court of Appeal which, after having identified the incompatibility between EU law and the ECHR, felt compelled to follow EU law and disregard the ECHR, because 'the decision of CJEU was binding on courts of this country'.[7] The Supreme Court, however, decided to conduct an analysis of the case law of the European

[7] *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, para 32.

Courts on its own and reached what it considered to be a consistent reading of both.[8]

The case arose from the joined appeals of four Iranian and Eritrean asylum seekers against their return to Italy under the Dublin Regulation. The applicants claimed to be at risk of ill treatment in Italy, their first country of entry according to the Dublin system, for reasons including homelessness and hardship, a risk of rape, and a lack of access to psychological treatment. The Home Secretary certified the claims at issue as clearly unfounded on the basis that Italy is not in systemic breach of its international obligations and that there is no other reason to abstain from their removal. The right to appeal could only be permitted if it was shown that Italy was 'in systemic rather than sporadic breach of its international obligations', as required by EU law, which the appellants failed to prove.

The appellants' application for judicial review was refused at first instance but it was allowed at the Court of Appeal. The Court of Appeal stated at the outset that it was confronted with conflicting decisions of the ECtHR and CJEU in the case at hand. It referred specifically to paragraphs 81 and 82 of the CJEU *N.S.* judgment,[9] in which the Court of Justice had made a distinction between a true systemic deficiency and operational problems, whereby only in the former cases transfers are not allowed. Accordingly, even if the problems create a substantial risk that asylum seekers would be treated in a manner incompatible with their fundamental rights, a person should still be transferred. At the same time, however, the ECtHR requires its contracting parties to refrain from transferring in such situations. Interestingly, the Court of Appeal reached this conclusion in reference to *M.S.S. v Belgium and Greece* only (*Tarakhel* was not decided at the

[8] *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12. For the judgment of the Court of Appeal, see *EM (Eritrea) and Others v Secretary of State for the Home Department* [2012] EWCA Civ 1336.

[9] 81. It is not however inconceivable that the system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.
82. Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

time), thus already predicting what would follow later on regarding the systemic deficiency requirement in the case law of the two European Courts.[10]

It is evident from the judgment that the Court faced a dilemma in deciding the case, as it was inclined to follow the Strasbourg jurisprudence while, at same time, being aware of the requirements coming from Luxembourg. Comparing the *MSS* and the *NS* judgments, the Court of Appeal concluded that the requirements appear to be different in Strasbourg and Luxembourg: while proof of individual risk seems sufficient for the ECtHR to prevent a Dublin II return, such proof of risk, however grave and whether or not arising from operational problems, was deemed insufficient for the latter Court, without proof of a true systemic deficiency in the state's system. While the Court found that the threshold established by the CJEU 'existed nowhere else in refugee law', it ultimately adopted the interpretation consistent with its interpretation of the CJEU's *NS* decision.[11]

The Supreme Court conducted its own analysis of the relevant cases and reached a different conclusion. The principal issue for the Supreme Court was to determine whether the complainants are required to demonstrate that there are *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in the country, which amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.[12]

First, the Court stated that there can be little doubt that the existence of a presumption that Member States would comply with their international obligations is necessary to produce a workable system, but it is in its nature that it can be rebutted in appropriate circumstances. In the Court's view, an infringement of Article 3 ECHR does not require (or, at least, does not necessarily require) that conditions alleged to constitute inhuman or degrading conditions are

[10] *EM (Eritrea) and Others v Secretary of State for the Home Department* [2012] EWCA Civ 1336, paras 43-48.
[11] Ibid, para 61. The Court of Appeal referred specifically to paragraphs 81 and 82 of the CJEU *NS* judgment, where the Court drew a distinction between a true systemic deficiency and operational problems. The transfer was allowed in latter cases, even if the problems created a substantial risk that asylum seekers would be treated in a manner incompatible with their fundamental rights.
[12] *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12.

the product of systemic shortcomings; it is self-evident that a violation of Article 3 is not dependent on the failure of a system.[13] Furthermore, the Court pointed out that a violation resulting from a systemic failure would in no way be considered as more serious or more deserving of protection.

With respect to the conflicting obligations, the Court pointed out that, if the Court of Appeal's interpretation of *NS* would be correct, it would give rise to an inevitable tension between the Home Secretary's obligation to abide by EU law, as pronounced by the CJEU, and her duty as a public authority under Section 6 of the Human Rights Act 1998. The latter refers to the domestic transposition of the ECHR.

It is interesting to note that, all parties to the case, including the appellants, the interveners (UNHCR) and the respondent agreed that the Court of Appeal was wrong to hold that '… the *sole ground* on which a second state is required to exercise its power under article 3(2) of Regulation 343/2003 to entertain a re-application for asylum or humanitarian protection, and to refrain from returning the applicant to the state of first arrival, is that the source of risk to the applicant is a *systemic deficiency*, known to the former, in the latter's asylum or reception'.[14] In other words, they all disagreed with the CJEU's findings and conclusions in the *N.S.* case (at least, to the extent that the Appeal Court interpreted the *N.S.* case correctly which, in my opinion, it did). The fact that the Supreme Court reached a different conclusion from that of the Court of Appeal as to what the CJEU *meant to say* in the *NS* case is due to its approach in the analysis rather than the literal reading of the case.

The Supreme Court ruled that the systemic deficiency test applied by the Court of Appeal, and derived from EU law, is incorrect. It found that an account had to be given to the practical realities that lie at the heart of the inquiry; evidence of what happens on the ground must be capable of rebutting the presumption, if it can be shown sufficiently clearly that there is a real risk of Article 3 ill-treatment if there is an enforced return. The correct test is therefore the ECtHR's *Soering* test which, according to the UK Supreme Court, provides that

[13] Ibid, para 42.
[14] Ibid, para 2.

'the removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to article 3 of ECHR'.[15] What the Supreme Court thus actually did was to conduct an ECHR conform interpretation of the CJEU's case law. The Supreme Court mentioned, at some point, that Article 3 ECHR contains human rights protection in equivalent language to Article 4 of the Charter and that the UK is also obliged to observe and promote the application of the Charter whenever it is implementing EU law, without however mentioning Article 52(3) of the Charter.[16]

Concerning the conflicting obligations, the Supreme Court explained that the CJEU did not intend to stipulate that a violation of Article 3 can only be established if it is a result of systemic deficiency in the asylum procedure and reception conditions of the receiving state. Because, if it did, it would mean that the courts should disregard a real risk of Article 3 ill-treatment, other than that resulting from a systemic deficiency in the procedure and reception conditions in the receiving state, which, in the Supreme Court's view, would be rather remarkable. Yet, this is exactly what the CJEU meant and this has been confirmed in the subsequent case law. Even if the wording of the *NS* case is uncertain and open to interpretation, the Court confirmed its systemic deficiency test in the *Puid* and *Abdullahi* cases. In those cases, the Court clearly held that 'the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face

[15] Ibid, para 58. In *Soering v United Kingdom*, the Strasbourg court held indeed that there is an 'inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)'. See *Soering v United Kingdom*, App no 14038/88 (ECtHR, 7 July 1989), para 88. In addition, Judge De Meyer, in a concurring opinion, stated that 'No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State. Extraditing somebody in such circumstances would be repugnant to European standards of justice, and contrary to the public order of Europe'.

[16] In its assessment, the Supreme Court focused on the ECHR and the Human Rights Act, while the Charter stayed in the background and was referred to mainly in the context of the discussion or quoting of the CJEU's judgments.

a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.[17] The Supreme Court decided not to consider the latter judgments, even though they were decided at the same time and, in this way, facilitated a consistent interpretation of the Luxembourg and Strasbourg case law on the matter. In reality, of course, the Court decided to follow the interpretation of the ECtHR, without making the reference to the CJEU. The conform interpretation scenario thus ultimately amounts to changing the meaning of EU law as interpreted by the CJEU in order to ensure consistency with the ECHR and hence avoid conflicts between the two.

3 The Preliminary Reference Procedure

The second scenario concerns situations in which national courts opt for a judicial dialogue with the CJEU as a way of dealing with what they perceive to be a conflict between EU law and the ECHR.[18] This will often be when EU law itself is deemed to be the source of a breach of fundamental rights, thus putting into question the validity of EU law. In such a situation, the preliminary reference procedure appears to be the only option for the national court, since the CJEU holds exclusive monopoly over a review of EU law.[19]

The validity of EU law has been challenged on the basis of its incompatibility with the ECHR in several cases. Predictably, many of those cases concern the European Asylum System and the European Arrest Warrant (EAW) Framework Decision, which have been the two fields that have created most problems recently. An example that illustrates this type of response by national courts well is the *J.N.* case.[20] In this case, the request for a preliminary ruling was made by the Dutch *Raad van State* (Council of State) concerning the validity of

[17] Case C-4/11 *Puid* [2013] ECLI:EU:C:2013:740, para 30; C-394/12 *Abdullahi* [2013] ECLI:EU:C:2013:813, para 60.
[18] There are many forms and patterns of judicial dialogue. In this context, judicial dialogue refers to dialogue between national courts and the CJEU by means of the preliminary reference procedure which enables national courts to question the Court of Justice on the interpretation or validity of EU law (Article 267 TFEU).
[19] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost.* [1987] ECLI:EU:C:1987:452.
[20] C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84.

the recast Reception Conditions Directive (hereinafter recast RCD),[21] which lays down standards for the reception of applicants for international protection.

Mr N. was a third country national who entered the Netherlands in 1995 and made his first asylum application. In the years following the entry, Mr N. had been convicted on 21 charges, mostly for theft-related offences, with sentences that varied from fines to terms of imprisonment of three months. After the rejection of his third asylum claim in 2014, he was ordered to leave the territory of the EU with a ten-year entry ban, in accordance with Article 11 of the so-called 'Return Directive' of 2008.[22] In January 2015, he was arrested again for theft and for violating the entry ban and was sentenced to a term of imprisonment, during which he made a fourth asylum claim. After serving his sentence, he was placed in detention. The detention decision was based on a provision implementing Article 8 paragraph 3(e) of the recast RCD, which regulates the detention of persons applying for international protection and provides in paragraph 3(e) that an applicant may be detained 'when protection of national security or public order so requires'.

The applicant brought an action before the court of first instance, challenging the detention decision and claiming damages. The District Court in The Hague dismissed the claim. Mr N. appealed, maintaining that his detention was contrary to Article 5 paragraph 1(f) second limb of the ECHR, under which the detention of a foreign national may be justified only when action is being taken against him with a view to deportation or extradition; hence, detention of a foreign national when he is lawfully resident in the Netherlands pending a decision on his asylum application is in breach of the said provision.

The Dutch Council of State shared these concerns. It noticed an incompatibility between EU law and the ECHR and decided to refer the question for a preliminary ruling to the CJEU concerning the validity of Article 8 paragraph

[21] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).
[22] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98. Its Article 11 regulates the conditions under which an entry ban may be issued together with a return decision and the duration of the ban.

3(e) of the recast RCD in light of Article 6 of the Charter, pointing out that, according to the Explanations relating to the Charter, the rights provided for in Article 6 thereof correspond to those guaranteed by Article 5 of the ECHR and have, by virtue of Article 52(3) of the Charter, the same meaning and scope as those laid down by the ECHR.

The Council of State also explicitly referred to the judgment of the ECtHR in *Nabil v Hungary*[23] on the detention of asylum seekers. In that case, the ECtHR ruled that the detention of asylum seekers, with a view to deportation, is allowed only if the deportation is in progress and there is a real prospect of executing it. Furthermore, the Council of State also noticed a problem stemming from its own case law, whereby the introduction of an asylum application by a person who is subject to a return decision automatically causes all return decisions that may previously have been adopted in the context of that procedure to lapse.

The CJEU addressed the relationship between EU law and the ECHR in its preliminary points in the judgment. The Court reiterated that, while Article 6(3) TEU confirms that fundamental rights recognszed by the ECHR constitute general principles of EU law, and Article 52(3) of the Charter indeed provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into EU law, as long as the EU has not acceded to it. An examination of the validity of Article 8 paragraph 3(e) of the recast RCD must therefore be undertaken 'solely in the light of the fundamental rights guaranteed by the Charter'.[24]

Nevertheless, the Court also recognised that the rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR and that the limitations which may legitimately be imposed on the exercise of the former may not exceed those permitted by the ECHR. At the same time, however, the Court added that the explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency

[23] *Nabil and Others v Hungary*, App no 62116/12 (ECtHR, 22 September 2015).
[24] Case C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 45.

between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and [...] that of the Court of Justice of the European Union'.[25]

Here, again, we find the same rhetoric relating to the autonomy of EU law, which has been used by the CJEU in earlier judgments and opinions. In the Court's view, the consistency between the Charter and the ECHR should indeed be ensured, but to the extent that it does not affect the autonomy of EU law and of the Court itself. The Court also refers to the Explanations relating to the Charter selectively, emphasising the part of the Explanations which states that consistency ought to be achieved without adversely affecting the Court's autonomy and the autonomy of EU law, while giving little weight to the reference to the case law of the ECtHR in the Explanations, which should be taken into account when interpreting Charter rights that correspond to ECHR rights.

With respect to this case, the Court considered that Article 8(3)(e) of the recast RCD was a limitation on the right to liberty guaranteed by Article 6 of the Charter, at the same time pointing to the legitimate interest in detaining certainpersons to protect national security and public order, which also contributes to protecting the rights and freedoms of others. The Court concluded that the EU legislature had struck the correct balance between the right to liberty of the applicant and the requirements of protection of national security and public order. The assessment of Article 8(3)(e) of Directive 2013/33 thus disclosed no grounds as to affect the validity of that provision in the light of Articles 6 and 52(1) and (3) of the Charter.

The judgment raises important questions about the relationship between the EU legal order and the ECHR in cases of conflicts between the two. Under EU law, as interpreted by the CJEU, the validity of EU law is to be checked only in relation to the EU Charter. However, the Dutch court asked about the validity of EU law on the basis of the ECHR, thus assuming that, or at least wondering if, a breach of the ECHR would mean that EU law is invalid. This is a natural reaction from the national courts and one that was seen in earlier cases also, since all EU

[25] Ibid, para 47.

Member States are also Contracting Parties to the ECHR and have to ensure compliance with the Convention rights in all circumstances, thus also when applying EU law. This puts national courts in a difficult position, particularly in cases in which Member States have discretion in the way they apply EU law (and where the *Bosphorus* presumption would thus not be applicable), but where that discretion has been limited in the case law of the CJEU to the extent that it does not allow for simultaneous compliance with both. The question arises, however, whether the Charter itself would not requirea compatibility check with the ECHR, by virtue of Article 52(3)? The answer provided in Luxembourg seems to be a negative one.

This scenario is also well illustrated in *Aranyosi and Căldăraru*, which is discussed extensively earlier in this book.[26] In this case, the German court questioned the validity of the EAW Framework Decision on the basis of the possible violation of Article 3 of the ECHR. The German court made a reference to the case law of the ECtHR, where the Strasbourg Court had found Hungary (the requesting country in *Aranyosi*) to be in violation of Article 3 for reasons of overcrowding in its prisons. In this case, the CJEU changed its approach and ruled that national courts had to apply a two-step test in such cases, assessing whether there was (1) a systemic failure to ensure decent prison conditions in those states and (2) a real risk that the appellant would be subject to such conditions if the EAW was executed. If the national court finds that there is a real risk of an Article 4 violation, the EAW must be postponed and assurances have to be requested from the issuing Member State. Where such a risk cannot be discounted, the national court must decide whether or not to terminate the surrender procedure. The answer provided was deemed insufficient by the German domestic court, since the same court decided to request a second preliminary ruling on this very aspect in *Aranyosi II*,[27]

[26] For a detailed analysis and discussion of this case, see Chapter 5.
[27] C-496/16 *Aranyosi n.y.r.* The request was made on 16 September 2016 and the question referred to the CJEU are as follows:
1. Are Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA (1) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States to be interpreted as meaning that the executing Member State, when taking a decision on extradition for the purposes of prosecution, must eliminate any real risk of inhuman or degrading treatment of the person sought, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, attributable to the conditions of

asking for a further clarification. The second reference was withdrawn before the CJEU had the chance to rule, however, and therefore there will have to be a new case in order to acquire some clarity in regard to the questions posed in *Aranyosi II*.

One may thus wonder whether dialogue with the CJEU may always provide useful answers and, ultimately, solutions for the national courts in cases of conflict between EU law and the Convention, and whether it is sufficient to capture all aspects of the relationship between Strasbourg, Luxembourg and national courts, since different courts perceive the relationships in different and sometimes also contradicting ways.

As for the direct dialogue with the ECHR, Protocol 16 to the ECHR offers another similar or competing in a way (if you follow the CJEU's logic),[28] avenue for national courts to seek a solution. However, the mechanism of Protocol 16 to the ECHR is also different from the preliminary ruling procedure. It will allow the highest courts and tribunals of a State Party that has ratified it to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Thus, unlike the preliminary ruling procedure, it will be available only to the highest courts in the Member States, which will be able to decide to request an opinion completely at their own discretion, and it will, moreover, produce non-binding advisory opinions.[29] In order for the Protocol to enter into force, it needs to be ratified by at least 10 Council of Europe Member

his detention only in the first prison in which that person will be imprisoned following his surrender to the issuing Member State?
2. Must the executing State, when taking that decision, also eliminate any real risk of inhuman or degrading treatment of the person whose surrender is sought that may be attributable to the conditions of his detention in the place of his subsequent imprisonment in the event of conviction?
3. Must the executing State eliminate that risk for the person whose surrender is sought also in the event of possible relocations to other prisons?

[28] See the position of the CJEU on Protocol No 16 to the ECHR in CJEU Opinion 2/13 on the EU's accession to the ECHR.

[29] For a discussion on Protocol No 16 to the ECHR, see J. Gerards, 'Advisory Opinions, Preliminary Rulings, and the New Protocol No 16 to the European Convention of Human Rights, a Comparative and Critical Appraisal' (2014) 21 *Maastricht Journal of European and Comparative Law* 4; K. Dzehtsiarou and N. O'Meara 'Advisory Jurisdiction of the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?' (2014) 34 *Legal Studies* 3, 444.

States. After several years, the threshold has been reached with the French ratification and the Protocol will enter into force on 1 August 2018. The ten ratifications include five by EU Member States.[30] A number of other EU countries have signed the Protocol but have not yet proceeded to ratification.[31] It will be interesting to see how the mechanism will be used by the highest courts in the states that have ratified it and whether the courts will ask questions of compatibility between the ECHR and their EU law obligations to the Strasbourg Court.

4 Giving Priority to the ECHR

The third scenario arises when national courts decide not to refer the question to the CJEU, or to follow its jurisprudence, but rather to ensure compliance with the ECHR and thus, ultimately, to follow the Strasbourg Court and risk infringing EU law. This scenario differs from the first one, since national courts do not seek conform interpretations of the different parameters of fundamental rights, but rather they acknowledge the incompatibility and choose to follow the ECHR and the case law of the ECtHR. There have been quite a few cases in which national courts have given priority to the obligations arising from the Convention, most notably in Ireland.[32]

The fact that it is exactly in Ireland that we find such case law is interesting, because Ireland is a dualist country and the conflict between EU law and ECHR can essentially be seen as a conflict between EU law and the Irish national law giving effect to the Convention into the national legal system – namely the ECHR Act 2003. However, the Irish courts tend to focus on the ECHR itself and frame the conflict as one between what EU law requires and the ECHR,

[30] Estonia, Finland, Lithuania, Slovenia, and France.
[31] For example, Italy and the Netherlands. For a full overview see the chart of signatures and ratifications at the CoE website.
[32] Irish Supreme Court, *Minister for Justice, Equality and Law Reform v Rettinger* [2010]; Irish Supreme Court, *Minister for Justice and Equality v Kelly aka Nolan* [2013]; Irish High Court, *Minister for Justice and Equality v Rostaş* [2014] EHC 391.

as interpreted by the Strasbourg Court. This is different in Germany, for example, as we shall see further below.

Already in 2010, the Irish courts were faced with difficulties arising from EU law, in particular the EAW Framework Decision and the ECHR.[33] The case concerned a EAW issued by Poland requesting the surrender of Mr Rettinger, who had been convicted for burglary. He had spent 203 days in pre-trial detention in Poland before traveling to Ireland, where he was later arrested. The applicant argued that his surrender would result in a violation of Article 3 ECHR, referring to Section 37 of the Irish EAW Act 2003, which states, inter alia, that surrender is prohibited if it would be incompatible with Ireland's obligations under the ECHR or its protocols. The applicant based his claims on his personal experience in Poland during the pre-trial detention, as well as the ECtHR decision in *Orchowski v. Poland*,[34] in which the ECtHR found prison conditions in Poland to be incompatible with Article 3.

Yet, the Irish High Court decided that the surrender would not violate Article 3 ECHR, since it was not known which Polish prison the applicant would be sent to. The Irish Supreme Court ruled, however, that the High Court did not apply the correct test and remanded the case back to the High Court. The Supreme Court argued, relying on the ECtHR's judgments in *Soering v. United Kingdom* and *Saadi v Italy*,[35] that it is not necessary for a requested person to prove that he or she will suffer inhuman and degrading treatment; it is enough to establish that there is a real risk, distinct from a mere possibility. In order to do that, the High Court must conduct a 'rigorous examination' of 'all the materials before it and, if necessary, material sought by its own motion'.[36]

It does not come as a surprise that, in the two comparable cases in 2013 and 2014, the Irish Supreme and High Courts, respectively, decided to refuse surrender on the basis of a EAW (without making a preliminary reference to the

[33] Irish Supreme Court, *Minister for Justice, Equality and Law Reform v Rettinger* [2010] Appeal No: 165 & 189.
[34] *Orchowski v Poland*, App no 17885/04 (ECtHR, 22 October 2009).
[35] *Soering v United Kingdom* (ECtHR, App no 14038/88, 7 July 1989); *Saadi v Italy*, App no 37201/06 (ECtHR, 28 February 2008).
[36] Irish Supreme Court, *Minister for Justice, Equality and Law Reform v Rettinger* [2010] para 30.

CJEU) because 'to do so would be incompatible with this State's obligations under the European Convention on Human Rights'. In the first case, *Minister for Justice and Equality v Kelly aka Nolan*,[37] the Irish Supreme Court ruled that the surrender of the respondent to the UK would constitute a breach of Article 5 ECHR (the right to liberty, contained in Article 6 of the Charter). The respondent had been sentenced in the UK to a determinate period of two and a half years' imprisonment, to be followed by an indeterminate sentence for the sake of public safety. The latter part of the sentence was a preventative measure and depended on an assessment of future risk. After serving five years and three months, the respondent fled to Ireland while on temporary release, leading to the EAW from the UK requesting his surrender. The Irish Supreme Court found that the UK's practice of indeterminate sentencing was in conflict with Article 5(1) ECHR, as previously held by the ECtHR, and refused to execute the EAW.

The second case, *Minister for Justice and Equality v Rostaş*,[38] concerned a EAW issued by a Romanian court seeking the return of Ms Rostaş for the purpose of the execution of a prison sentence in respect of a single robbery-type offence. The sentence was passed 16 years previously, when the respondent was 18 years of age, and it was already partly completed. Ms Rostaş refused to consent to her surrender to Romania, raising a number of objections based on unfair trial grounds, including discrimination in the trial process based on race. She relied, inter alia, on section 37(1)(a) of the EAW Act 2003.[39] In substantiating the claim,

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[37] Irish Supreme Court, *Minister for Justice and Equality v Kelly aka Nolan* [2013].
[38] Irish High Court, *Minister for Justice and Equality v Rostaş* [2014] EHC 391 para 121.
[39] Section 37(1) of the European Arrest Warrant Act 2003 as amended provides:
"A person shall not be surrendered under this Act if—
(a) his or her surrender would be incompatible with the State's obligations under—
(i) the Convention, or
(ii) the Protocols to the Convention,
(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),
(c) there are reasonable grounds for believing that—
(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or
(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—
(I) is not his or her sex, race, religion, nationality or ethnic origin,
(II) … (not relevant)

she referred to numerous reports from the European Commission, the European Parliament and several NGO's including Amnesty International and Human Rights Watch, which expounded on and referred to n aextensive body of information concerning Romania and discrimination faced by Roma in that relevant period of time.

The respondent also referred to the judgments of the ECtHR concerning discrimination against the Roma in Romania.[40] Romania was found to be in breach of the ECHR multiple times for the discriminatory attitude of the authorities, including the police and the courts, against the Roma in Romania in the 1990s.

Interestingly, the respondent argued that the mutual trust between Member States, which is the basis of the EAW system, cannot apply in this case, because the conviction on which the EAW is based dates back to the period of time when Romania was not considered fit to join the European Union and more than ten years before Romania was permitted to join the Union in 2007.

The second claim by the respondent concerned the interference with family rights or the right to respect for family life, as guaranteed under the Irish Constitution, under Article 8 ECHR and the Charter of Fundamental Rights.

After a rigorous examination of the evidence provided, the Irish High Court refused the order to execute the warrant on the basis that to do so would be incompatible with this state's obligations under the ECHR, without making a preliminary reference to the CJEU. The Court considered that there are substantial grounds for believing that the trial, in which the respondent had been convicted 16 years previously, amounted to a flagrant denial of justice.[41] The Court held there was a wide practice of discrimination against Roma in Romania at the time and therefore there are reasonable grounds to believe that the respondent, who

(III) speaks a different language than he or she does, or
(IV) … (not relevant)
or
(iii) … (not relevant)."

[40] E.g. *Moldovan and others v Romania (No.1)* App nos 41138/98 and 64320/01 (ECtHR, 5 July 2005); *Moldovan and others v Romania (No.2)* App nos. 41138/98 and 64320/01 (ECtHR, 12 July 2005); *Cobzaru v Romania* App no 48254/99 (ECtHR, 26 July 2007).

[41] *The Minister for Justice and Equality v Magdalena Rostaş* [2014] IEHC 391.

was Roma and illiterate, was discriminated against in the course of her prosecution and conviction in Romania. In other words, Ms Rostaş was being treated less favorably than a person who is not of her ethnic origin would be.

Similarly, in the UK, the Supreme Court refused to surrender a Polish mother of five children, who was to be tried for fraud in Poland.[42] The main question before the Supreme Court was whether extradition would be incompatible with the rights of the applicant's children to respect for private and family life under Article 8 of the ECHR. The Supreme Court took several aspects into account, such as the gravity of the offence, the amount of time that had passed since the offence occurred and the fact that the applicant had started a new life in the UK with her five children, two of whom were very young, and the Court decided that the protection of private and family life outweighed the legitimate aim pursued by extradition.

It should be noted, however, that the ruling in this case is more of an exception than a rule in the UK, since the UK courts tend to give more weight to the importance of international cooperation in extradition cases in their jurisprudence and seem not to be very sympathetic to violations of Article 8 ECHR in that context.[43]

With respect to alleged violations of Article 3 of the ECHR, the UK courts are more generous, but they remain pragmatic nonetheless. In *Krolik v Regional Court in Czestochowa, Poland*,[44] the appellants contested their surrender to Poland because of the Polish prison conditions, arguing that the execution of the warrant would put them at risk of 'inhuman and degrading treatment', in violation of Article 3 ECHR. The High Court relied on the presumption of fundamental rights compliance, i.e. the presumption that Poland, as a Member of the Council of Europe, is able and willing to fulfil its obligations under the Convention, which is

[42] UK Supreme Court, *F-K v Polish Judicial Authority* [2012].
[43] For instance, in *Norris v US* (No 2) [2010] UKSC 9, [2010] 2 A.C. 487, the UK Supreme Court rejected an appeal by a retired businessman who argued that his extradition would result in a violation of Article 8 ECHR, suggesting that, for an Article 8 argument to succeed, the facts would have to be 'exceptional'. On this point, see also J. R. Spencer, 'Extradition, the EAW and human rights' (2013) 72 *Cambridge Law Journal* 2.
[44] England and Wales High Court, *Krolik v Regional Court in Czestochova, Poland* [2012] EWHC 2357.

also a presumption underlying the common European asylum system, and required 'clear, cogent and compelling evidence' to rebut it, which was not provided in this case.[45]

It is important to note here that some of these cases were also the reason why the CJEU decided to adapt its case law in *Aranyosi and Căldăraru*, since the decisions made by national courts would have been problematic from the perspective of EU law had the Court not changed its approach. Another question that arises is also whether the national courts in the discussed cases actually applied the strict two-step test imposed by the CJEU (discussed in the previous section). In some cases, the test would perhaps correspond to that of the CJEU, but in other cases, the 'real risk' requirement may not have been satisfied. Either way, the national courts took those decisions prior to *Aranyosi and Căldăraru*, which means that they consciously decided not to execute an EU law obligation in order to ensure compliance with the ECHR.

5 Reframing the Conflict

Another way to check the compatibility of a certain decision or action with fundamental rights, especially for constitutional courts, is to check the compatibility with national constitutional provisions which are generally interpreted in light of the ECHR and the case law of the ECtHR in all EU states. This is particularly true for states with a strong protection of fundamental rights in their domestic legal systems and when some of the most fundamental rights may be at stake. This, however, is no longer a scenario of dealing with the conflicts between EU law and the ECHR; rather, it is reframing the conflict into one that is between EU law and the national constitution, where other rules may be applicable. Even though this scenario moves away from the explicit discussion on the conflicts between EU and ECHR law, it remains relevant in this context for states and courts that have very developed fundamental rights systems at home and tend to translate the ECHR and the Strasbourg case law into their domestic constitutions. A prominent example of such an approach in the fields under

[45] Ibid, para 5.

examination is the EAW decision of the German Federal Constitutional Court from December 2015.[46]

The case concerned a constitutional complaint to the German Federal Constitutional Court against an extradition decision adopted by the German Düsseldorf Higher Regional Court (*Oberlandesgericht*). The applicant in the case was a citizen of the United States of America, who was sentenced in Italy *in absentia* to a custodial sentence of 30 years for participation in a criminal organisation and the import and possession of cocaine; he was subsequently arrested in Germany on the basis of an extradition request made by Italy.

The Higher Regional Court decided to order the extradition on the basis of the EAW Framework Decision, as well as additional information provided by the Italian authorities, which stated that the applicant, after his surrender, would be granted the express right to a retrial (which would be a completely new trial) in which the charges against him would be fully examined and it which he would, without reservations, be assured of his right to a defence. In this Court's view, such a re-examination of the charges was guaranteed by the relevant Italian legislation in the version communicated to it.

The applicant argued, however, that he did not have any knowledge of his conviction and that there was no guarantee under Italian law that, after his extradition, he would be afforded the right to a trial in which the charges against him would be re-examined based on fact and law in his presence. In particular, referring to the German legal doctrine, he stated that, reinstating him into the position to lodge an appeal was not equivalent to being granted the right to a trial at first instance, of which he had been deprived. He claimed that, because of the courts' limited competence to hear evidence in such cases, the 'late' appeal did not, as a rule, meet the requirements that apply if the right to be heard is granted at a later stage. He stated that generally no new evidence was heard during the main hearing of the appeal. He claimed that the court would decide on the basis

[46] 2 BvR 2735/14, *Mr R v Order of the Oberlandesgericht Düsseldorf*, Order of the Bundesverfassungsgericht (Second Senate) of 15 December 2015, DE:BVerfG:2015:rs20151215.2bvr273514.

of the case files only, and that the hearing of new evidence was only possible in exceptional cases. According to him, the present legal situation in Italy would not provide for the hearing of new evidence in the case of a conviction *in absentia* and, as such, would be in violation of several articles of the German Basic Law, including Article 1 which protects human dignity, as well as Article 6(3) of the ECHR.

As for the assurances provided by the Italian authorities, the applicant argued that they were insufficient, as they did not have the necessary binding effect under international law and, moreover, it was questionable whether these assurances could be trusted with absolute certainty. In order to support the claim, the applicant also referred to the relevant case law of the ECtHR, in which the Strasbourg Court considered the late appeal under Italian law to provide an insufficient possibility for review.

The Higher Regional Court rejected the arguments of the applicant as being unfounded and stated that, in any case, in deciding on whether an extradition to another Member State of the European Union is permissible, the specific structure and practice of appeal proceedings under German law could not be taken as the standard to be expected.

The *Bundesverfassungsgericht* found the complaint to be admissible and well-founded. It stated that it would review the alleged breach of the guarantee of human dignity in the context of the constitutional identity review.[47] The Court stated that EU acts, as well as national implementing legislation, are, due to the primacy of EU law, generally exempted from a review of compliance with human rights standards as provided for in the Basic Law. However, 'the precedence of application of European Union Law is limited by the constitutional principles that are beyond the reach of European integration […]'.[48] The latter include human dignity protected in Article 1(1) of the German Basic Law which, in turn, encompasses the principle of individual guilt.

[47] Ibid, para 34.
[48] Ibid, para 36.

The *Bundesverfassungsgericht* commenced by acknowledging the importance of primacy and uniform application of EU law across the Member States; without these principles, the EU would not be able to continue to exist as a legal community of currently 28 Member States. The Court also acknowledged the importance of the principle of mutual recognition and the high level of confidence between states on which the EAW mechanism is based. At the same time, however, the Court pointed out that EU law may be given effect only within the framework of the applicable constitutional order. This means that the core principles of EU law, such as primacy, uniformity and mutual recognition are limited by the German constitutional identity, which is beyond the reach of both European integration and constitutional amendment.[49]

This position of the German Constitutional Court is not unique; it is a position shared by most supreme and constitutional courts.[50] It is also not new, since the Constitutional Court already posed limits to European integration is the *Solange* jurisprudence as well as in its Maastricht and Lisbon decisions.

The second part of the judgment is devoted to the review of the decision of the Higher Regional Court. The *Bundesverfassungsgericht* ruled that German courts are under an obligation to ensure that the minimum guarantees of rights of the accused in criminal proceedings are respected in extradition decisions, where sentences had been rendered *in absentia*. Accordingly, the decision at hand breached Article 1(1) of the German Constitution, since the Higher Regional Court failed to examine sufficiently whether Mr R would be able to present new evidence in a trial in Italy. The Federal Constitutional Court supported its conclusion referring to, inter alia, the case law of the ECtHR, in which the Strasbourg Court had found deficiencies in the Italian criminal code in the context of trials *in absentia*, as well as to cases of other Higher Regional Courts in Germany that have refused surrender in similar cases based on Article 4(a) of the Framework Decision. As for mutual trust, the *Bundesverfassungsgericht* held that, while important, 'mutual trust is shaken if there are indications based on facts that the

[49] Ibid, paras 37-50.
[50] The difference is that Germany, in comparison to most other countries, specifically protects the notion of constitutional identity in Article 79 in the German Constitution – comprising one of the values that even constitutional amendment cannot touch.

requirements indispensable for the protection of human dignity would not be complied with in a case of an extradition'.[51] In this respect, the national authority executing the warrant must investigate both the legal situation and legal practice of the requesting Member State, if the person concerned has submitted evidence that suggests that the requesting state did not comply with the minimum constitutional requirement.

In its last point in the judgment, the *Bundesverfassungsgericht* clarified rather briefly that there was no need to send a request for a preliminary ruling to the CJEU under Article 267 TFEU, since the correct application of EU law was sufficiently clear and there was no room for reasonable doubt (*acte clair*). In the Constitutional Court's opinion, the Framework Decision on the EAW does not require German courts and authorities to execute a warrant without reviewing its compliance with the requirements ensuing from Article 1 of the German Basic Law.

The case thus concerned fundamental rights guarantees in the EAW procedure, the very same issue at the centre of the *Melloni* judgment in which the CJEU ruled that once the EU had adopted a common fundamental rights standard, EU Member States would be no longer entitled to apply their own higher standards, even when provided for in the constitution, because this would undermine the 'primacy, unity and effectiveness' of EU law. Yet, the German case was different in one important aspect: the applicant was not aware of the proceedings against him and the trial and conviction occurred truly in the absence of the applicant. Mr Melloni, on the contrary, had been informed about the trial, voluntarily decided not to be present, and appointed two lawyers who represented him throughout the entire criminal proceedings.

There are two main comments that can be made here. The first one is that the decision of the *Bundesverfassungsgericht* was meant to send an important message to the CJEU. The Federal Constitutional Court could have decided this case on the basis of the EAW Framework Decision alone (which provides for the possibility to suspend a warrant in cases of trials *in absentia*), without invoking

[51] 2 BvR 2735/14, *Mr R v Order of the Oberlandesgericht Düsseldorf*, Order of the Bundesverfassungsgericht (Second Senate) of 15 December 2015, DE:BVerfG:2015:rs20151215.2bvr273514, para 74.

the constitutional identity review. The facts of the case at hand meet the conditions for refusing surrender spelled out in the EAW FD and there was, in principle, no conflict between EU law and the German Constitution. Nevertheless, the *Bundesverfassungsgericht* decided to make it a constitutional identity control case in order to clarify, once again, that there are limits to EU law and its principles when the constitutional core, and more specifically core fundamental rights, are at stake.[52] And it seems to have worked, given the CJEU's decision in *Aranyosi and Căldăraru* rendered a few months later.[53] There is, of course, no trace of the decision of the *Bundesverfassungsgericht* in the *Aranyosi and Căldăraru* judgment, but it can be presumed that it has had an impact in context, not only because the case was construed as an identity control case but also because of the extensive interpretation of EU law provided by the German Constitutional Court. The Constitutional Court took upon itself to provide extensive interpretations of provisions of the Framework Decision as well as the EU Charter and, on the basis of its own interpretation, it concluded that there is no conflict between EU law and the German Constitution.[54] In addition and importantly, the *Bundesverfassungsgericht* relied heavily on the case law of the ECtHR, which indeed requires Member States to ensure that the remedy provided under Article 6 ECHR is effective. The statement of the Italian authorities, that a new hearing of evidence is 'in any case not impossible' for the criminal proceedings held *in absentia*, simply falls short of both the ECHR and the German (minimum) standards, notwithstanding the EU obligation of mutual trust. In *Aranyosi*, the Luxembourg Court changed its approach, providing for a possibility to refuse surrender beyond the grounds of the EAW FD. However, as argued before,

[52] Some commentators have referred to the decision as a *Solange III* decision. See, for example, M. Hong, 'Human Dignity and constitutional identity: The Solange-III Decision of the German Constitutional Court', *Verfassungsblog*, 18 February 2016, available at http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/ [last accessed 5 April 2017].

[53] There is, of course, no trace of the German decision in the CJEU *Aranyosi* judgment but it can be presumed that it has had an impact on the Court.

[54] The German Constitutional Court concluded in paragraph 107 that 'the requirements under Union law with regard to the execution of a European arrest warrant are not lower than those that are required by Art. 1 sec. 1 GG as minimum guarantees of the rights of the accused'.

Aranyosi is only a step in the right direction and does not fully resolve the tension between the EAW mechanism and fundamental rights.

Secondly, and this relates to the previous point, the case is obviously important in the context of the discussion on conflicts, as it shows that national courts (looking to the ECtHR for guidance and support) can pressure the CJEU to rethink its choices. It is also a tool for national (constitutional) courts that have a possibility to conduct a constitutional identity review and investigate compliance with the national fundamental rights. Bringing EU law into conformity with national fundamental rights, interpreted in light of the ECHR, will also mean bringing EU law in line with the ECHR and this will thus solve any potential conflicts. Caution is advised, however, in order to prevent the abuse of this position which should be reserved for exceptional cases, where fundamental rights are truly at stake or, indeed, as a warning when needed.

In December 2017, the *Bundesverfassungsgericht* decided another EAW case, ruling in favour of a claimant who lodged a constitutional complaint against a decision of the Higher Regional Court of Hamburg ordering his surrender to Romania on the basis of a EAW.[55] The German Higher Regional Court had ordered the surrender relying on the assurances provided to it by the Romanian authorities, as required in the existing case law of the CJEU, even though the guarantees provided were not in accordance with the minimum requirements established by the ECtHR in relation to living space available to prisoners. The ECtHR has explicitly stated that the living space of less than 3 sq. m. per prisoner in itself constitutes a violation of Article 3 of the ECHR.[56] In other cases, the ECtHR indicated that even a space of 4 sq. m. would result in a violation of Article 3 ECHR when coupled with other relevant conditions of detention that are lacking, such as the availability of ventilation, access to natural light or air, adequacy of heating arrangements, and the basic sanitary requirements.[57] Moreover, and importantly,

[55] Order of the *Bundesverfassungsgericht* (Second Senate) of 19 December 2017, 2 BvR 424/17.
[56] See, among others, *Lind v Russia*, App no 25664/05 (ECtHR, 6 December 2007), para 59; *Kantyrev v Russia*, App no 37213/02 (ECtHR, 21 June 2007) paras 50-51.
[57] *Babushkin v Russia* App no 67253/01 (ECtHR, 18 October 2007); *Ostrovar v Moldova* App no 35207/03 (ECtHR, 13 September 2005); *Peers v Greece* App no 28524/95 (ECtHR, 19 April 2001).

the Strasbourg Court had already condemned Romania for violations of the Convention (in particular Article 3) which point to a structural deficiency specific to Romanian prisons.[58]

In the case at hand, the assurances given by the Romanian authorities clearly did not comply with the ECHR minimum standards, since the guaranteed personal space amounted to 3 sq. m. in closed quarters and 2 sq. m. in semi-open or open quarters (and this calculation also included space for furniture).[59] But the Romanian authorities explained that they have been working and continue to work on improving the detention conditions, which was apparently sufficient for the Higher Regional Court to consider that the assurances provided were in accordance with EU law overall and the CJEU's case law, since it decided to order the surrender. Subsequently, the applicant lodged a constitutional compliant, arguing that his surrender would amount to a violation of human dignity as protected in Article 1(1) of the German Basic Law.

Interestingly, the German Constitutional Court did not examine the case on the basis of Article 1(1) of the Constitution but found that the challenged decision violated the complainant's right to a lawful judge, as protected in Article 101(1) of the Basic Law because of, inter alia, the strong presumption that the restricted personal space in Romanian prisons is in violation of Article 3 of the Convention, which the domestic court did not sufficiently take into account. Contrary to the Higher Regional Court, the Constitutional Court considered the case law of the CJEU in this context to be incomplete, thus requiring a request for a preliminary ruling in accordance with Article 267(3) TFEU. In particular, the CJEU still has to explain which minimum requirements relating to detention conditions derive from Article 4 of the Charter of Fundamental Rights and which standards apply to the review of detention conditions in accordance with EU

[58] *Rezmiveș and Others v Romania* App nos 61467/12, 39516/13, 48213/13 and 68191/13 (ECtHR, 25 April 2017); *Ali v Romania*, App no 30595/09 (ECtHR, 15 January 2014); *Petrea v Romania*, App no 4792/03 (ECtHR, 29 April 2008).

[59] Note, however, that, according to the ECtHR, the calculation of the space of detention must be based solely on the actual area to be used by the prisoner, thus not including the area used for the furniture.

fundamental rights. The case has now been referred back to the Higher Regional Court, which is expected to submit question(s) for a preliminary ruling to the CJEU.

This post-*Aranyosi* case shows that the *Aranyosi* judgment did not solve all issues. There are still many practical problems regarding the assurances that national courts are supposed to scrutinise, accept and ultimately trust.

A similar development can be found in the case law of the Italian Constitutional Court, albeit not in the context of the EAW. With Order no. 24/2017,[60] the *Corte Costituzionale* requested a preliminary ruling from the CJEU concerning the applicability of a national law that prevents the imposititon of effective penalities or provides for longer limitation periods, in cases of fraud affecting the financial interests of the EU (i.e. in the VAT cases). The request was a follow-up to an earlier judgment of the CJEU (*Taricco I*)[61] in which the Luxembourg Court held that the national rule interfering with effective penalities for serious fraud affecting the EU's financial interest should be disregarded by national courts (the so-called Taricco rule).[62] In its order, the *Corte Costituzionale* pointed out that disregarding national legislation concerning the maximum limitation period for criminal offences, as reqested by the CJEU, would adversely affect the principle of legality, which is one of the most fundamental principles of the Italian legal order and hence of the Italian constitutional identity. Essentially, the Italian Constitutional Court asked the CJEU to reconsider the Taricco rule in light of, inter alia, Article 4(2) TEU, while also threatening to apply the *controlimiti* doctrine if the CJEU would refuse.[63] In doing so, the Italian Constitutitonal Court relied on the ECHR and the ECtHR's case law for support. It stated that a similar concern is 'shared by the Strasbourg Court', and that it is 'necessary' to look into the compatibility of the CJEU's Taricco rule with Article 7 ECHR (no punishment without law).[64] Even though the Constitutional Court found that the level of protection provided in the Italian Constitution in respect of this right was higer

[60] Italian Constitutional Court, Order no 24/2017.
[61] C-105/14, *Ivo Taricco and Others* ECLI:EU:C:2015:555.
[62] This line of case law is often referred to as 'Taricco saga'. See e.g. M. Bonelli, 'The Taricco saga and the consolidations of judicial dialogue in the European Union' (2018) 25 *Maastricht Journal of European and Comparative Law* 3, 357.
[63] Italian Constitutional Court, Order no 24/2017.
[64] Italian Constitutional Court, Order no 24/2017, para 5.

than the required minimum under the ECHR, the important starting point in the analysis was the Convention and the case law of the ECtHR, which has given additional weight to its arguments. Moreover, towards the end of the judgment, the Constitutional Court also stated that there might still be questions regarding the compatibility of the Taricco rule with the ECHR, particularly regarding the requirement of the precision of the provision concerning the punishment regime. In *Taricco II*,[65] the CJEU held that the Taricco rule does not oblige national courts to disapply the relevant provision of the Criminal Code if it would lead to a violation of fundamental rights, in particular the principle of legality, which is not only an important consititional principle in Italy but a common constitutional principle protected under EU law.

Although this line of case law is important and interesting because of its contribution to the discussion on the conflicts between EU law and national constitutional law, and between the CJEU and the national (constitutional) courts, it also shows important elements of the latter's relationship with the ECtHR. National (constitutional) courts tend to use the ECHR and the Strasbourg case law to support their arguments when national law (which is to be interpreted in light of the ECHR) appears to be in conflict with EU law, thus pointing to the fact that a conflict between EU law and national law may also imply a conflict between EU law and the ECHR.

6 Analysis and Conclusions

When applying EU law, domestic courts may find themselves doubting the compatibility of EU law (or national implementing legislation) with fundamental rights, which could be enshrined in the Constitution, the Convention or the Charter. If the incompatibility concerns the Constitution, national courts might decide to refer the question to the Constitutional Court, if one exists, or otherwise to another judicial body in charge of interpreting the Constitution. If the incompatibility concerns Charter rights, the national courts – being also EU courts – could make an assessment on their own and, in the case of doubt, refer the

[65] Case C-42/17 *M.A.S. & M.B.* (Taricco II) ECLI:EU:C:2017:936.

questions for a preliminary reference to the CJEU. If, however, the conflict is between EU law and the ECHR – the central concern in this book – and a conform interpretation is not possible, there is no obvious answer and national courts will ultimately have to make a choice. While the different scenarios are a good illustration of how the conflicts between EU and ECHR law have materialised, they also show that national courts are aware of the problem and have found ways to deal with it. It is true that such scenarios do not come about every day, but they seem to reoccur with increasing frequency.

Providing a conform interpretation is the first thing national courts will try to do. Some courts will go to great lengths to find that the jurisprudence of the Luxembourg and Strasbourg courts is consistent and avoid the conflict altogether. However, this is truly possible only in cases of the so-called broader conflicts, i.e. perceived conflicts where there may be space for a consistent interpretation. The first scenario in this chapter has, however, also demonstrated the difficulty with conform interpretation, namely, the fact that national courts present the outcome of the case as a conform interpretation, but, in reality, they give priority to one or to the other. The example of the UK Supreme Court in the *Eritrea* case shows this very well: the Supreme Court stated that the case law of the Luxembourg and Strasbourg Courts is not inconsistent, but it ultimately gave an ECHR-conform interpretation of EU law. In any event, national courts should seek a conform interpretation where this is convincingly possible and avoid open conflicts.

When a consistent interpretation is not possible, the national judge will have to make a choice. The first option is to refer the questions of compatibility to the CJEU, the outcome of which may or may not also ensure compliance with the ECHR (depending on the interpretation provided by the CJEU). But there is also an additional element here. National courts should not only refer the questions to the CJEU, but they should also actively engage in a dialogue with the Court, questioning the interpretation of EU law as well as the choices the CJEU made in that regard, and suggesting their own interpretation of the provisions of EU law in light of the Charter (which should then be interpreted in conformity with the ECHR). The national courts should of course motivate their interpretation by

referring to Article 52(3) of the Charter but also the preamble of the Charter as well as its Article 53.

This is the preferred scenario, because it not only ensures that the national courts are able to comply with their obligations under EU law and the ECHR, but it also pushes the CJEU to rethink its choices. The CJEU has made significant advancements in the field of fundamental rights protection, but there is more that can be done by just using the tools available in EU law. The EU does not have to accede to the ECHR in order to consider itself bound by the ECHR minimum standards: the obligation is already in primary EU law. Therefore, the EU and its Court have to ensure that the ECHR minimum standards are respected, as a matter of EU law.

The second option is to ensure compliance with the ECHR, following the guidance of the Strasbourg Court, even if this results in a breach of an EU law obligation. Either way, this would mean making a choice between the two, since it would be impossible to comply with both at the same time.

The important question is of course why judges choose different options. In the UK, the courts opt for conform interpretation, at least to the extent that such a conclusion can be made on the basis of the few cases discussed above. The difficulty in this scenario is that the courts say that it is a conform interpretation but, in reality, they give priority to one or to the other, for instance by focusing and relying on the case law that suits their conclusions. Lower courts in the UK have however also acknowledged the existence of conflicting obligations arising from EU and ECHR law and have decided to comply with EU law obligations because of the primacy of EU law. This was corrected by the Supreme Court, which sought a conform interpretation. It could be said that the Supreme Court in fact applied Article 52(3) of the Charter, but without an explicit reference to it. In Ireland, the courts tend to focus on the ECHR and give it priority over EU law obligations. This could be due to the fact that the implementing legislation makes explicit references to the ECHR or that they are more fundamental-rights minded. In Germany, the courts tend to question the validity of EU in light of the German Basic Law, which however is interpreted in light of the ECHR. This may be due to the particular approach of the German courts concerning the ECHR. In Germany,

the ECHR is part of the law of the land and the Constitution, while being the highest in rank, is interpreted in light of the ECHR.

Whichever road national courts decide to take, they could use Article 52(3) of the Charter to argue that there should never be an incompatibility between the two sources, given the clear wording of this provision, and that complying with the ECHR minimum standards, as interpreted by the ECtHR, would also mean compliance with primary law of the EU.

The CJEU's interpretation of Article 52(3) over the years is puzzling. In *J.McB. v L.E.* the CJEU held that, where Charter rights are the same as those in the ECHR, they must be given the same meaning and the same scope, 'as interpreted by the case-law of the European Court of Human Rights'.[66] In other cases, the approach was softer: in accordance with Article 52(3) of the Charter, the case law of the ECtHR must be taken into account when interpreting a Charter provision that corresponds to a Convention right.[67] In later judgments, however, the Court clearly stated that the ECHR is not formally binding on the EU, as long as the Union has not acceded to it and that it will review compatibility with fundamental rights 'solely on the basis of the Charter'.[68] Yet, the issue does not seem to be settled. National courts keep coming back to Luxembourg with the same question, mostly in reference to Article 52(3) of the Charter, but sometimes also referring to other provisions of the primary EU law. Even after several judgments in which the CJEU clearly stated that Article 52(3) does not mean that the ECHR and/or ECtHR case law has become part of EU law or that it is binding on national courts when applying EU law, national courts have referred the same question over and again, suggesting that the answer provided by the Court is unsatisfactory. There are also examples of cases in which the national court raises questions about conflicts between EU and ECHR law, but without referring to any particular provision to justify the question – it is almost as if the national court intuitively considers that the two should be in harmony. In a case decided in

[66] Case C-400/10 PPU *JMcB v LE* [2010] ECLI:EU:C:2010:582, para 53.
[67] Case C-562/13, *Abdida v Centre public d'action sociale d'Ottignies-Louvain-La-Neuve* [2014] ECLI:EU:C:2014:2453, para 47.
[68] Case C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 46.

Luxembourg in late 2017, concerning the interpretation of several provisions of Directive 95/46/EC,[69] as well as Articles 7, 8 and 47 of the Charter and of Article 4(3) TEU and Article 267 TFEU, the Slovak Supreme Court asked, inter alia, whether a national court should follow the case law of the CJEU where this conflicts with the case law of the ECtHR.[70] Interestingly, the context in which the case was referred involves a dispute between the Slovak Constitutional Court and the Slovak Supreme Court, in which the former only refers to the case law of the ECtHR and does not express any views on the relevant case law of the Court of Justice. The Supreme Court was unsure whether the case law of the CJEU is consistent with the case law of the Slovak Constitutional Court and thereby also with that of the ECtHR and, if not, whether that is problematic from the perspective of EU law. The referring court did not make a reference to Article 52(3) when asking this question, but it had presumably interpreted the relevant Charter rights in the light of this Artice when it decided to refer that question. The CJEU found the question to be hypothetical and hence inadmissible, but Advocate General Kokott reformulated the question and provided an answer which also included an interpretation of Article 52(3) of the Charter. As the AG explains, the rights in the Charter, which correspond to rights guaranteed by the ECHR, have the same meaning and scope as conferred by the ECHR, which are, pursuant to the explanatory notes on this provision, not determined by the wording of the Convention but inter alia by the case law of the Strasbourg Court. Consequently,

> […] EU law permits the Court of Justice to deviate from the case-law of the ECtHR only to the extent that the former ascribes more extensive protection to specific fundamental rights than the latter. This deviation in turn is only permitted provided that it does not also cause another fundamental right in the Charter corresponding

[69] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281).

[70] Case C-73/16 *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky, Kriminálny úrad finančnej správy* ECLI:EU:C:2017:725. The question was phrased as follows: 'Is the abovementioned right to an effective legal remedy and to a fair hearing (in particular under Article 47 of the Charter) consistent with an approach taken by the referring court whereby, when, in this case, there is case-law from the European Court of Human Rights which differs from the answer obtained from the Court of Justice of the European Union, the referring court, in accordance with the principle of sincere cooperation in Article 4(3) TEU and Article 267 TFEU, gives precedence to the Court of Justice's legal approach?' (para 32).

> to a right in the ECHR to be accorded less protection than in the case-law of the ECtHR.[71]

Therefore, if the national court would come to a conclusion that the case law of the CJEU provides less protection than the case law of the ECtHR in respect of a specific fundamental right provided for in both the Charter and in the ECHR, such a finding would amount to the view that the interpretation of the fundamental right in question by the Court of Justice is not compatible with Article 52(3), in which case the national court may or must (if there is no judicial remedy against the decision of the national courts itself under national law) call on the CJEU to ascertain how EU law is to be interpreted in that situation.

This brings us to the essence of the argument. There is a clear EU law obligation to ensure consistency between the Charter (and secondary EU law interpreted in the light of it)[72] and the ECHR when the rights correspond, which will be in the majority of the cases.[73] EU primary law imposes that obligation and national courts could argue that they are obliged to ensure the minimum standard of protection as required in Strasbourg when applying EU law, not only because this is required under the ECHR but also because it is the requirement under EU law. National courts could do that in the first three scenarios described in this chapter: they could seek an ECHR conform interpretation; they could send questions of validity of EU law in light of its compliance with the ECHR and ask the CJEU for clarification; or they could simply follow the ECHR as interpreted by the ECtHR in light of Article 52(3) of the Charter. The preliminary reference would be the most preferred scenario, however, since it would allow national courts to remind the CJEU that the two fundamental rights catalogues should be interpreted in harmony. Furthermore, the CJEU should openly acknowledge that there is an obligation under EU law to ensure consistency with the ECHR in accordance with Article 52(3) and thus make it a general rule, rather than producing inconsistent

[71] Advocate General Kokott in C-73/16, para 123.
[72] As the CJEU held, the scope of the Charter is identical to the scope of EU law and where Member States' action or inaction falls within the scope of EU law these should comply with the EU Charter. See e.g. *Åkerberg Fransson*.
[73] Most ECHR rights have been taken over into the Charter and have been identified as 'corresponding rights' in the Explanations to the Charter.

judgments in this respect, depending, inter alia, on whether the legislature has added this requirement explicitly in the legislation or not.

There are other arguments in EU law that lend support to the 'consistency argument'. Article 6(3) TEU now states that fundamental rights, as guaranteed by the ECHR, *shall constitute* general principles of EU law. As argued earlier, this provision is rather straightforward and clearly reflects a will of the treaty drafters to ensure consistency between EU and ECHR law with regard to common standards of fundamental rights protection in the EU and in Europe. The ECHR is of course not directly applicable as a result of this provision but through the general principles of EU law. A case in point is *Kamberaj* (discussed in more detail in Chapter 2), where the Italian national court raised the question of interpretation of Article 6(3) TEU, asking whether the ECHR has become part of EU law by virtue of that provision and, if so, whether EU law transforms national judges also into ECHR judges. More specifically, the referring court was wondering whether it can, on its own motion, set aside national legislation that conflicts with the ECHR (presumably in cases coming within the scope of EU law), without first making a reference to the *Corte Costituzionale*. The answer of the CJEU, as discussed before, did not amount to much more than a 'no'.[74] This is puzzling, however, given the unambigous wording of the provision. It also does not help that the Court does not explain *why* this should not be the case. It opens with the orthodox statement that 'fundamental rights form an integral part of the general principles of law the observance of which the Court ensures',[75] but it does not clarify what that means for the nature and effect of fundamental rights 'as guaranteed by the ECHR' (in the phrasing of article 6 TEU).

On a closer inspection, the CJEU has also stated *obiter* that 'the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court' and has stressed the 'special significance' of the ECHR is several judgments,[76] but, according to the more recent and prevailing case law,

[74] Section 3.1.1., Chapter 2.
[75] Case C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233, para 61.
[76] Case C-465/07 *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECLI:EU:C:2009:94, para 28. For a further discussion see B. De Witte, 'The use of the ECHR and Convention case law by the European Court of Justice', in P. Popelier, C. Van de Heyning

as long as the EU has not acceded to it, the ECHR does not constitute a legal instrument which has been formally incorporated into EU law. It is however arguable, as emphasised throughout this book, that Article 6(3) TEU together with Article 52(3) of the Charter limits the ability of the CJEU to provide a fully autonomous interpretation of EU fundamental rights, be it Charter rights or general principles of EU law.

Finally, the position corresponds to the generally accepted view in the legal literature. While not all authors will agree with the interpretation of Article 52(3) of the Charter put forward in this research, most will and do acknowledge the importance of the consistent interpretation of EU and ECHR law. The CJEU has been praised for its commitment and frequent references to the text of the Convention in the pre-Lisbon period and has been criticised for the lack of it in the period after the Lisbon Treaty entered into force, as shown in Chapter 3.

This should not mean, however, that the ECHR should become the minimum and maximum standard. Neither the national courts nor the CJEU should restrict the protection of human rights to the standards of the ECHR in all cases. The ECHR standards are minimum standards and both EU law and national law should provide more protection when possible under the respective legal frameworks, as also provided in Articles 53 of the Convention and the Charter.

While incompatibilities between EU and ECHR law should be used as a trigger for judicial dialogue and mutual influences, legal obligations are sometimes simply irreconcilable and making a choice is necessary. Fortunately, national courts in the EU should no longer feel compelled to make a choice, because they can actually ensure compliance with both by following the current state of the law as clearly and convincingly worded in Article 52(3) of the EU Charter.

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and P. Van Nuffel (eds) *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp, Intersentia, 2011) 17, 23.

Epilogue

The legal architecture of European fundamental rights is not yet completed. It is a work in progress, both in the courts' practices and in scholarly debate. What is still missing is the formal link between the EU and ECHR systems, as well as a clear vision on the role and function of fundamental rights in the context of EU law, and on the role of both European and national courts. Accession of the EU to the ECHR would have created the link between the two and would have introduced a legal avenue to resolve conflicts. However, the CJEU's negative Opinion 2/13[1] forecloses any real possibility for accession in the near future, despite it being a legal obligation under Article 6(2) TEU, and the question of which court has a final say in fundamental rights cases remains open. In the meantime, national courts are struggling in cases involving EU and ECHR law, since divergences between the two European courts have become more frequent. The EU today acts in fields which directly impact on peoples' lives, in areas such as criminal law, asylum law, immigration law, and family matters, and therefore the fields in which the jurisdiction of the CJEU and the ECtHR overlaps is only growing. Chapter 4 of this book has illustrated the tensions in the case law of the two European courts in those fields, which at times have led to real conflicts.

While it is true that some divergences may disappear over time and that the CJEU and the ECtHR may be able to find ways ultimately to avoid conflicts, one should not forget that there is a time frame between divergence and convergence in the case law. Even if the two European Courts are ultimately able to avoid or resolve conflicts, what should the national courts do in the meantime? They are in the eye of the storm and the dilemma continues to exist as long as there are divergences. Moreover, what does this mean for individuals whose rights may be at stake?

What is important to realise, in an attempt to create and safeguard common minimum standards in Europe, is that all actors have their share of

[1] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:48.

responsibilities. For the ECtHR, it is ensuring that the minimum level of protection, as required in the Convention, is always provided in 47 Contracting States. The story is different for the CJEU, whose main responsibility has always been to ensure that the law is observed in the interpretation and application of the Treaties.[2] In this book, however, the argument has been made that the role of the Court has been changing in recent years, alongside the change in the nature of the EU and EU law. Today, even the most sensitive questions concerning fundamental rights come within the purview of the Court.[3] The Court has become a court that parties may turn to have their fundamental rights protected. Consequently, the CJEU is faced with a pressing task of finding a better balance between what used to be its role and the reality of the EU and EU law today.

This brings us back to the starting point of this book, namely, to the point of advocating for the accession of the EU to the ECHR. Accession remains important and necessary, because it would tell us which court has a final say in fundamental rights cases – something that remains unclear in the eyes of most national judges. This would be highly valuable from the perspective of national courts, because they are used to working in hierarchical systems and sometimes they simply need a clear answer. It would also be valuable for the Strasbourg Court, which in its own way has been struggling with cases involving EU law, as seen most recently in *Avotiņš*.[4] It could even be beneficial for the CJEU. The CJEU's role as a human rights court has proven problematic in certain fields and the Court itself keeps repeating that it is not a human rights court.[5] This is not surprising, given the nature and the position that the CJEU has always had, but it also reaffirms the need for the EU's accession to the ECHR. Finally, accession would

[2] Article 19(1) of the Treaty on the European Union (TEU).
[3] Some of the most recent examples include C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* [2018] ECLI:EU:C:2018:335 (ritual slaughtering); C-157/15 *G4S v Achbita* [2017] ECLI:EU:C:2017:203 and C-188/15 *Bougnaoui* [2017] ECLI:EU:C:2017:204 (non-discrimination at work on religious grounds).
[4] *Avotiņš v Latvia*, App no 17502/07 (ECtHR, 23 May 2016).
[5] As remarked by the former President Skouris during the FIDE conference in 2014. See also the speech of the current President Lenaerts during the opening of the judicial year in Strasbourg 'The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection', 26 January 2018, available at https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf [last accessed 14 May 2018].

allow for the external (human rights) supervision of acts of all EU institutions – something that can only be achieved with accession.

In the absence of accession,[6] however, national courts can fill in the missing link between the EU and the ECHR legal systems. They should realise that they have a special role to fulfil – perhaps a crucial one – in completing the architecture of fundamental rights in Europe. National courts should take on a more proactive role in their decision-making by referring questions to the CJEU and questioning its choices in fundamental rights cases. When faced with conflicts between EU and ECHR law, national courts should remind the Luxembourg Court that, in fact, there should never be a conflict between EU and ECHR law, because of the interpretative rule in Article 52(3) of the EU Charter.[7] This provision states that the corresponding Charter and Convention rights shall have the same meaning and scope. It thus aims at consistency between the two and arguably also requires it. While this provision is not written as a conflict rule, the national courts may decide to use it as such. The CJEU has given it a different interpretation, however, refusing to acknowledge the ECHR as part of EU law or as an instrument that can be used as a yardstick for EU action. It went as far as to state – in response to a question about the role of the ECHR in EU law – that the compliance of EU law with fundamental rights should be checked 'solely on the basis of the Charter'.[8] While the ECHR is indeed not part of EU law as a matter of international law (this would require accession), EU law itself puts an obligation on the CJEU to check compliance with the ECHR and the Strasbourg case law. In that sense, the statement that the compliance of EU law with fundamental rights should be checked solely on the basis of the Charter is misguided and some recent references to the CJEU in this context show that the national courts are also not

[6] This seems to be the most likely scenario for the coming years. There seems to be very little to no discussion about accession, even though the Commission and the Parliament have repeated their continued commitment to achieving accession in the future.

[7] The exception would be the rights in the Charter and the Convention that do not correspond.

[8] See e.g. Case C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 46. More recently, see Joined Cases C-217/15 and C-350/15 *Orsi and Baldetti* [2017] ECLI:EU:C:2017:264, para 15.

convinced.[9] One of the main arguments made in this book is that national courts may even decide unilaterally to give priority to the ECHR in case of a conflict between EU and ECHR law by relying on Article 52(3) of the Charter, not because the ECHR takes priority, but because this allows for simultaneous compliance with the Convention and with the Charter, the latter requiring consistency between the two. However, as argued in Chapter 7, the more preferred scenario would be the one which also includes the CJEU, i.e. a reference for preliminary ruling. This should not be misinterpreted as national courts subjecting themselves to the authority of the CJEU – it would mean participating in a 'multilogue' with both Luxembourg and Strasbourg Courts in search for a viable fundamental rights architecture in which they are called upon to operate in the years to come.

[9] See e.g. C-73/16 *Puškár* [2017] ECLI:EU:C:2017:725. Paticularly interesting in this case is Opinion of AG Kokott ECLI:EU:C:2017:253, paras 118-127. The judgment is discussed in detail in Chapter 7.

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Summary

The legal architecture of European fundamental rights has become complex. This complexity is caused by the co-existence of at least three legal systems, each with their catalogue of fundamental rights and their own enforcement system. At the national level, fundamental rights are mainly to be found in constitutions, sometimes complemented by international treaties, and, in some cases also EU law. Secondly, at the international level, individuals can bring individual complaints before the ECtHR, alleging violations of their fundamental rights as protected by the ECHR. Thirdly, fundamental rights are also protected in the context of EU law, where they derive from the Charter, common traditions and the ECHR. Legal action based on the infringement of EU fundamental rights may involve the CJEU as well as national courts.

The legal relationships between these component parts of the European human rights architecture and between the actors belonging to each of these systems are contested and are still evolving. Recently, the most important catalyst for change in the context of the EU is the entry into force of the Lisbon Treaty. This Treaty gives the EU a binding Charter of Fundamental Rights and obliges the EU to accede to the ECHR, necessitating a new conception of the relationship between the CJEU and the ECtHR.

The increased focus on fundamental rights in the European space poses multiple political and legal challenges for the EU as well as for its Member State courts. It is particularly problematic for national courts, since they are at the crossroads between three legal systems: as state organs, they must uphold national Constitution while, at the same time, ensuring compliance of their state with the ECHR and with EU law and EU fundamental rights. Consequently, national courts may be confronted with competing and conflicting obligations for the protection of fundamental rights. After all, the catalogues may not require the same level of protection and are interpreted by different highest courts, while clear rules governing their mutual relationship are lacking.

This book examines different ways for national courts to deal with and overcome conflicts between EU and ECHR law. It starts with a discussion on the role and place of fundamental rights in the EU, showing how and why the EU, having become a human rights actor in its own right, is different from other more natural human rights actors in Europe, such as the ECHR and the national constitutional systems (Chapter 1). It then analyses the relationships between the different actors in order to understand how they relate to each other exactly and how the system works as a whole (Chapter 2). The analysis has shown that the CJEU and the ECtHR have been engaging in various types of judicial dialogue over the years, most notably by citing each other's case law, and they have generally managed to avoid conflicts that could arise as a consequence of the divergent interpretation and application of fundamental rights. While the Courts have certainly done a good job overall, the risk of divergences continues to exist because of the lack of a formal mechanism between the Strasbourg and Luxembourg courts, and the more recent developments have borne this out.

The narrative in the second part of the book focuses on the tensions, divergences and conflicts between EU and ECHR law and the case law of the Luxembourg and Strasbourg courts in the post-Treaty of Lisbon period. Chapter 3 first explores the new state of affairs in order to grasp, in particular, the impact that the new institutional setting has had on the relationship between the CJEU and the ECtHR. It takes a more systematic approach in examining the changes that have triggered the tensions, with a special focus on Opinion 2/13, before going into the substantive rulings of the two European courts. It shows that the post-Lisbon period is characterised by a number of new developments in the case law of the CJEU – most prominently the almost exclusive focus on the Charter coupled with the sharp decline in references to the ECHR and the negative Opinion 2/13 on the EU's accession to the ECHR – that have had an impact on its relationship with the Strasbourg Court, causing tension and providing grounds for more divergence. Chapters 4 and 5 identify the two areas in which the tensions have materialised, namely, the Area of Freedom, Security and Justice (AFSJ), in which mutual trust and recognition comes into play, and the field of fundamental social rights. The outcome in these two chapters is an in-depth analysis of the

relevant case law of the Strasbourg and Luxembourg courts which points to the incompatibilities and discusses why and the extent to which they are problematic.

The centrepiece of this book is its third part, which critically explores different ways for national courts to deal with and overcome conflicts – or what they may perceive to be conflicts – between EU and ECHR law. Chapter 6 examines different rules of conflict available to national courts when trying to find a solution for a conflict between EU and ECHR law. It concludes that international law does not offer adequate rules capable of resolving conflicts between EU law and the ECHR, due to their special nature and status in international law. The only rules that could be used are those found in the treaties themselves. In this regard, an argument has been made that Article 52(3) of the EU Charter of Fundamental Rights, even though not written as a conflict rule, can be seen as such. Article 52(3) of the Charter states that corresponding Charter and ECHR rights shall have the same meaning and scope, while the exact meaning and scope of the Convention rights, pursuant to the explanatory notes on this provision, is not only determined by the wording of the Convention, but also by the case law of the Strasbourg Court. Therefore, when there is a conflict between EU law (which must be interpreted in light of the Charter) and the ECHR, the latter should be followed. The seventh and final chapter develops different scenarios using actual cases of national courts in order to examine ways in which national courts have dealt with the issue so far. This final chapter has a normative dimension, in that it not only discusses how national courts have dealt with conflicts but also how they should deal with what they perceive to be conflicts between their obligations under EU law and under the ECHR. The first identified scenario is national courts seeking conform interpretations. Indeed, some national courts will go to great lengths to find that the jurisprudence of the Luxembourg and Strasbourg courts is consistent and avoid the conflict altogether. However, conform interpretation can also be problematic, because national courts may present the outcome of the case as a conform interpretation, while in fact they give priority to one or to the other. The second scenario refers to situations in which national courts give priority to the ECHR, without sending the question to the CJEU for preliminary ruling, even though this may mean failing to comply with the EU law obligations. As a result, a State could face infringement proceedings for breaching EU law. The third

scenario features cases in which national courts have decided to reframe the conflict between EU and ECHR law to a conflict between EU law and the national constitution, which is then interpreted in light of the ECHR. The fourth and last scenario concerns sending the questions of compatibility between EU law and the ECHR to the CJEU for a preliminary ruling to Luxembourg. This has been identified as a preferred scenario, but only when national courts actively engage in a dialogue with the CJEU, questioning the interpretation of EU law, as well as the choices of the CJEU made in that regard, and suggesting their own interpretation of the provisions of EU law in light of the Charter (which should then be interpreted in conformity with the ECHR). This should be supported by a reference to Article 52(3) of the Charter, which clearly and convincingly states that corresponding Charter and ECHR rights shall have the same meaning and scope. Hence, there should never be an incompatibility between the two sources if the rights correspond (and they do in the majority of the cases), because complying with the ECHR minimum standards, as interpreted by the ECtHR, would also mean compliance with primary law of the EU.

Samenvatting

De juridische structuur van de Europese grondrechten is complex geworden. Deze complexiteit wordt veroorzaakt door het naast elkaar bestaan van ten minste drie rechtssystemen, elk met hun eigen grondrechtencatalogus en hun eigen handhavingssysteem. Op nationaal niveau zijn de grondrechten vooral te vinden in grondwetten, soms aangevuld met internationale verdragen en, in sommige gevallen, ook EU-wetgeving. Verder kunnen individuen op internationaal niveau individuele klachten voor het EHRM brengen, wanneer zij beweren dat hun grondrechten zoals beschermd door het EVRM zijn geschonden. Ten slotte, worden grondrechten ook beschermd in de context van EU-recht, waar ze voortvloeien uit het Handvest en gemeenschappelijke constitutionele tradities en het EVRM. De juridische verhoudingen tussen deze componenten van de Europese mensenrechtenarchitectuur en tussen de actoren die bij elk van deze systemen horen, worden betwist en evolueren nog steeds. Een cruciale katalysator voor verandering was de inwerkingtreding van het Verdrag van Lissabon. Dit Verdrag geeft de EU een bindend Handvest van de grondrechten en verplicht de EU tot het EVRM toe te treden, waardoor de onderlinge verhoudingen opnieuw tegen het licht gehouden worden.

De toegenomen aandacht voor de grondrechten in de Europese ruimte stelt zowel de EU als nationale rechters voor een aantal uitdagingen. Nationale rechters bevinden zich als het ware op het kruispunt van drie rechtsstelsels: als staatsorganen moeten zij de nationale grondwet handhaven en tegelijkertijd ervoor zorgen dat hun land voldoet aan het EVRM en aan EU-wetgeving en EU-grondrechten. Die catalogi vereisen niet altijd hetzelfde beschermingsniveau en worden door verschillende hoogste rechtbanken geïnterpreteerd, terwijl eenduidige regels voor hun onderlinge verhoudingen ontbreken. Bijgevolg kunnen nationale rechters worden geconfronteerd met tegenstrijdige verplichtingen ter bescherming van de grondrechten.

Dit boek analyseeert dergelijke conflicten tussen EU- en EVRM-recht en onderzoekt manieren om ze op te lossen. Het onderzoek begint met een discussie

over de rol en plaats van grondrechten in de EU, die laat zien hoe en waarom de EU een mensenrechtenactor is geworden, maar van een ander karakter dan bestaande traditionele mensenrechtenactoren in Europa, zoals het EVRM en de nationale constitutionele actoren (hoofdstuk 1). Vervolgens analyseert het de relaties tussen de verschillende actoren om goed inzicht te krijgen in hun onderlinge verhoudingen en in de manier waarop het systeem werkt als geheel (hoofdstuk 2). Uit de analyse blijkt dat het HvJEU en het EHRM in de loop der jaren verschillende vormen van rechterlijke dialoog hebben gevoerd, met name door te verwijzen naar elkaars jurisprudentie, en dat zij er over het algemeen in geslaagd zijn conflicten die konden ontstaan als gevolg van uiteenlopende interpretaties en de toepassing van fundamentele rechten te voorkomen. Toch blijft het risico van verschillen bestaan vanwege het ontbreken van een formeel mechanisme tussen de rechtbanken in Straatsburg en Luxemburg, en een aantal recente ontwikkelingen bevestigt dit.

Het tweede deel zoemt in op de spanningen, verschillen en conflicten tussen EU en EVRM-wetgeving en de jurisprudentie van de Luxemburgse en Straatsburgse rechters in de periode na de inwerkingtreding van het Verdrag van Lissabon. Hoofdstuk 3 verkent de nieuwe stand van zaken om in het bijzonder de impact te begrijpen die het nieuwe institutionele kader heeft op de relatie tussen het HvJEU en het EHRM. Het vergt een meer systematische benadering bij het onderzoeken van de veranderingen die de spanningen hebben veroorzaakt, met een bijzondere nadruk op Advies 2/13, alvorens de inhoudelijke uitspraken van de twee Europese hoven te bespreken. Het laat zien dat de post-Lissabon-periode wordt gekenmerkt door een aantal nieuwe ontwikkelingen in de jurisprudentie van het HvJEU. Het meest prominent zijn de bijna exclusieve focus op het Handvest, de scherpe daling in verwijzingen naar het EVRM en het negatieve Advies 2/13 over de toetreding van de EU tot het EVRM, die alle van invloed zijn geweest op de relatie met het Straatsburgse Hof, tot spanningen leidden en aanleiding gaven tot meer divergentie. In de hoofdstukken 4 en 5 worden de twee gebieden genoemd waarop de spanningen zich het duidelijkst hebben gemanifesteerd, namelijk de ruimte van vrijheid, veiligheid en rechtvaardigheid (RVVR), met de beginselen van wederzijds vertrouwen en wederzijdse erkenning, en het gebied van fundamentele sociale rechten. Deze twee hoofdstukken bieden een

diepgaande analyse van de relevante jurisprudentie van de Straatsburgse en Luxemburgse hoven, die wijst op de onverenigbaarheden en bespreekt waarom en de mate waarin ze problematisch zijn.

Het centrale deel van dit boek is het derde deel, dat kritisch kijkt naar verschillende manieren waarop nationale rechters conflicten tussen EU- en EVRM-recht kunnen oplossen. Hoofdstuk 6 onderzoekt de verschillende conflictregels die voor de nationale rechters beschikbaar zijn wanneer zij proberen een oplossing te vinden voor een conflict tussen EU- en EVRM-recht. Het concludeert dat het internationale recht geen adequate regels biedt om conflicten tussen EU-recht en het EVRM op te lossen, vanwege hun speciale aard en status in het internationale recht. De enige regels die kunnen worden gebruikt, zijn die in de verdragen zelf. In dit verband is betoogd dat artikel 52, lid 3, van het EU-Handvest van de grondrechten, hoewel niet geschreven als een conflictregel, als zodanig kan worden beschouwd. Artikel 52 (3) van het Handvest bepaalt dat corresponderende Handvest- en EVRM-rechten dezelfde betekenis en reikwijdte hebben, terwijl de exacte betekenis en reikwijdte van de rechten van het Verdrag, overeenkomstig de toelichting bij deze bepaling, niet alleen wordt bepaald door de bewoordingen van de conventie, maar ook door de jurisprudentie van het Hof van Straatsburg. Wanneer er dus een conflict is tussen het EU-recht (dat moet worden geïnterpreteerd in het licht van het Handvest) en het EVRM, moet minstens dit laatste worden gevolgd. Het zevende en laatste hoofdstuk ontwikkelt verschillende scenario's aan de hand van uitspraken van nationale rechters om na te gaan op welke manieren zij tot nu toe met het probleem zijn omgegaan. Dit laatste hoofdstuk heeft een normatieve dimensie, en bespreekt niet alleen hoe nationale rechters met conflicten zijn omgegaan, maar ook hoe ze moeten omgaan met wat zij beschouwen als conflicten tussen hun verplichtingen krachtens EU-recht en krachtens het EVRM. Het eerste geïdentificeerde scenario is dat nationale rechter proberen conform te interpreteren. Sommige nationale rechters zullen zich namelijk tot het uiterste inspannen om te concluderen dat de jurisprudentie van de rechtbanken van Luxemburg en Straatsburg consistent is en een echt conflict dus voorkomen wordt. Conforme interpretatie kan echter ook problematisch zijn, omdat nationale rechters de uitkomst van de zaak als een conforme interpretatie kunnen presenteren, terwijl ze in feite de ene of de andere

norm prioriteit geven. Het tweede scenario verwijst naar situaties waarin nationale rechters prioriteit geven aan het EVRM, zonder de vraag voor te leggen aan het HvJEU, ook al kan dit betekenen dat de EU-verplichtingen niet worden nagekomen. Als gevolg hiervan zou een staat te maken kunnen krijgen met inbreukprocedures wegens overtreding van de EU-recht. Het derde scenario bevat gevallen waarin nationale rechters besloten hebben om het conflict tussen EU- en EVRM-recht te herformuleren tot een conflict tussen EU-wetgeving en de nationale grondwet, dat vervolgens wordt geïnterpreteerd in het licht van het EVRM. Het vierde en laatste scenario betreft de verzending van de vragen om een prejudiciële beslissing betreffende de verenigbaarheid van EU-recht met het EVRM aan het HvJEU. Dit is aangewezen als een voorkeursscenario, maar alleen wanneer nationale rechters actief een dialoog aangaan met het HvJEU, waarbij de interpretatie van EU-recht ter discussie wordt gesteld, alsook de keuzes van het HvJEU in dat verband, en waarin zij hun eigen interpretatie van de bepalingen van EU-recht in het licht van het Handvest (dat vervolgens moet worden geïnterpreteerd in overeenstemming met het EVRM). Dit moet worden ondersteund door een verwijzing naar artikel 52, lid 3, van het Handvest, waarin duidelijk en overtuigend wordt gesteld dat overeenkomstige rechten op het Handvest en EVRM dezelfde betekenis en reikwijdte hebben. Daarom zou er nooit een onverenigbaarheid tussen de twee bronnen moeten zijn als de rechten overeenkomen (en dat doen ze in de meeste gevallen), omdat naleving van de minimumvereisten van het EVRM, zoals geïnterpreteerd door het EHRM, ook betekent overeenkomst met de primaire wet van de Europese Unie.

Valorisation Addendum

Fundamental rights are used today when discussing almost any political subject, at all levels of governance, international, European and national: immigration, crime, family law and healthcare, to name just a few. The centrality of rights and the trend to translate political issues in human rights terminology inevitably takes issues away from the political arena and leads to a shift in the relationships between political institutions and courts. Europe is no exception to this global trend, and the legal systems governing in Europe have followed suit. Over the past two decades, new bills of rights have been adopted (e.g. EU Charter), old ones have been adapted (e.g. the Dutch bill of rights), European bills have been given effect in domestic legal orders (see e.g. the incorporation of the ECHR in the Nordic countries, Ireland and the UK), while the EU has been developing a human rights policy and now even has a human rights commissioner.

The result is the existence of a highly complex web of partly autonomous, partly interrelated systems of fundamental rights protection in Europe. This complexity is caused by the co-existence of three legal systems, each with their catalogue of fundamental rights and their own enforcement system. At the national level fundamental rights are mainly to be found in constitutions, sometimes complemented with international treaties, and, sometimes also, EU law. Secondly, at the international level, individuals can bring individual complaints before the European Court of Human Rights (ECtHR) alleging violations of their fundamental rights as protected by the ECHR. Thirdly, fundamental rights are also protected in the context of EU law, where they derive from the Charter, common traditions and the ECHR. Nevertheless, human rights protection remains first and foremost a national responsibility, and places national courts and national human rights at the centre. Consequently, national courts may be confronted with competing and conflicting obligations arising from different catalogues of rights. After all, the catalogues may not require the same level of protection and are interpreted by different highest courts, while clear rules governing their mutual relationship are lacking.

The research conducted in this book seeks to provide national judges with much-needed guidance on how they can and should resolve conflicts caused by the co-existence of different human rights mechanisms and standards in Europe. Part I and II deal with the instances of divergences and conflicts between EU and ECHR law, as interpreted by their respective courts, i.e. the Court of Justice of the European Union (CJEU) and the ECtHR. Part III is devoted to national courts. It develops a theoretical construction of possible ways – scenarios – to approach conflicts between EU and ECHR law. It then tests the different scenarios in light of actual practice of domestic courts. The final section of Part III offers guidance for national courts when faced with conflicting obligations arising in EU and ECHR law.

Since many contemporary societal problems involve or are translated into issues of fundamental rights national courts are expected to play a more prominent role in fundamental rights protection – a role that is not always considered entirely legitimate as it is not considered democratic. The same is true for European courts, which are often considered not to be the best placed to strike the balance between fundamental rights and other interests, and impact on national choices. While governments are in principle committed to improve fundamental rights protection, there is growing unease about the legitimacy of relying on courts, especially on European Courts. Finally, the sheer complexity of the current system, which involves national and European Courts further challenges the legitimacy of the system and, as a consequence, of fundamental rights themselves. This book aims to shed light on the functioning of the system, which is necessary for the courts functioning in it, and for the individuals and non-governmental organisations (NGOs) who want to use the system in the development of their litigation strategies. In this latter context, the research is relevant for lawyers and legal professionals too, regardless of their area or type of practice, since human rights issues may arise in any kind of litigation. It may help them in preparing to advise clients, design their litigation strategies, negotiate with opposing counsel, or persuade a judge.

The results are suitable to be communicated to national and European judges, lawyers in the field of human rights protection and beyond, and other

interested parties. The findings can contribute to a better understanding of the national and European systems of human rights protection (independently and in combination) and the interplay between different catalogues of fundamental rights.

The overall aim of this research is to contribute to an enhanced and more effective protection of fundamental rights where minimum level of protection is guaranteed across Europe. In this sense, it is important for every single one of us.

Curriculum Vitae

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