DIALOGUES

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CONVENTION CONTROL OVER THE APPLICATION OF UNION LAW BY NATIONAL JUDGES: THE CASE FOR A WHOLISTIC APPROACH TO FUNDAMENTAL RIGHTS

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ABSTRACT: Legal acts performed by EU Member States applying Union law come within the scope of the Convention and can give rise to adjudication by the ECtHR. A long series of judgments illustrate the ECtHR's approach regarding the application of Union law by the courts of EU Member States. The Convention and Union law are not two autonomous systems separated by a watertight fence. Both European Courts should therefore adopt a wholistic approach in this area, because only a wholistic view takes full account of the legal reality which is one of interaction and intertwining. The ECtHR makes abundant use of EU law sources, thereby always explicitly referring to them. Three different categories of cases can be identified in how the CJEU goes about the Convention in its case-law.

KEYWORDS: ECHR – EU-Charter – legal clarity – duality of norms – methodology – wholistic approach.

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I. Convention control over the application of Union law by domestic courts

I.1. The principle

National judges play an essential role in the protection of fundamental rights today, as they are the ones entrusted with the difficult task of combining and translating into viable solutions the multiple sources of such rights which are being produced by today's complex multipolar and multilayer legal world. They are the ones who, at the end of the day, apply these multiple legal sources to the citizens in the most coherent possible way. In other words, the proof of the pudding, i.e. the real interaction between those sources takes place at domestic level, nowhere else. This is why this paper will address the relationship between the European Convention on Human Rights ("the Convention") and Union law from the perspective of the national judges.

The starting point for this consideration will be the simple fact that legal acts performed by EU Member States applying Union law come within the scope of the Convention and can give rise to adjudication by the European Court of Human Rights ("the ECtHR").[1] EU Member States indeed remain liable under the Convention for any acts performed under Union law. This is a direct consequence of the principle according to which the responsibility of the Contracting States to the Convention extends to their entire jurisdiction within the meaning of art. 1 of the Convention.[2] As regards the EU Member States, this jurisdiction also includes Union law as part of their respective domestic legal systems.

Thus, the creation of the EU[3] did not remove the responsibility of the Member States under the Convention for their application of Union law. Rather, since the Member States did not withdraw from the Convention when creating or joining the EU and, consequently, remain bound by it, they also remain under a Convention obligation to apply Union law in a manner which is compatible with the Convention. As the Court stated in *Bosphorus*, EU Member States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.[4] By contrast, the EU itself, being a separate legal entity with its own legal personality,[5] is not subject to the Convention as long as it does not formally accede to it.

In short, national judges have a double European status, as EU judge and as Convention judge. When applying Union law, they must also apply the Convention. They cannot be EU judges only.

[1] See, among many others, ECtHR *M.S.S. v. Belgium and Greece* App n. 30696/09 [21 January 2011]; ECtHR *Avotiņš v. Latvia*, App n. 17502/07 [23 May 2016].

[2] ECtHR *Matthews v. the United Kingdom* App n. 24833/94 [18 February 1999] para. 29; ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* App n. 45036/98 [30 June 2005] para. 153.

[3] The reference to the EU here includes all its predecessor organisations.

[4] *Bosphorus v. Ireland* cit. para. 154.

[5] Art. 47 TEU.

I.2. Applications

A long series of judgments, reaching as far back as 1996, illustrate the ECtHR's approach regarding the application of Union law by the courts of EU Member States.[6]

In *Cantoni*, in which a criminal conviction of the manager of a supermarket for unlawfully selling pharmaceutical products was found not to have violated the principle, laid down in art. 7 of the Convention, that criminal law should be foreseeable in its effects, the ECtHR ruled that the mere fact that a provision of the French Public Health Code was based almost word for word on EU Directive 65/65 did not remove it from the ambit of art. 7 of the Convention.[7]

In *Matthews*, which concerned the exclusion of Gibraltar from European Parliamentary elections, the ECtHR applied to EU primary law a previously established principle according to which art. 1 of the Convention makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' jurisdiction from scrutiny under the Convention. It also stated that while acts of the former European Community as such could not be challenged before the ECtHR because the European Community was not a Contracting Party, the Convention did not exclude the transfer of competences to international organisations provided that Convention rights continued to be secured. Member States' responsibility under the Convention therefore continued even after such a transfer.[8]

These principles were later confirmed and applied to secondary Union law in *Bosphorus v Ireland*, which examined the compatibility with the Convention of the seizure of an aeroplane which had been carried out in conformity with EU Regulation 990/93. They were complemented by a presumption according to which if an international organisation can be considered to provide a fundamental rights protection at least equivalent to that provided by the Convention, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of that organisation.[9]

Subsequent judgments relying on these principles cover cases concerning the application at domestic level of a variety of different EU legal instruments, including the Dublin

[6] These cases are to be distinguished from the many cases in which Union law or case-law is used as a mere source of inspiration in interpreting the Convention. For an overview of these cases, please turn to www.echr.coe.int.

[7] ECtHR *Cantoni v France* App n. 17862/91 [15 November 1996] para. 30.

[8] ECtHR *Matthews v the United Kingdom* App n. 24833/94 [18 February 1999] paras 29 and 32.

[9] *Bosphorus v Ireland* cit. para. 156.

Regulation (e.g. in *M.S.S.*[10] and *Tarakhel*[11]), the Procedures Directive (e.g. in *Ilias and Ahmed*,[12] *S.H.*[13]), the Brussels I Regulation (e.g. in *Avotiņš*[14]), the Brussels IIbis Regulation (e.g. in *Šneersone and Kampanella*,[15] *Royer*,[16] *OCI and Others*,[17] *Michnea*,[18] *Veres*[19]), the Framework Decision on the European arrest warrant (e.g. in *Stapleton,*[20] *Pirozzi,*[21] *Romeo Castaño,*[22] *Bivolaru and Moldovan*[23]), art. 267 TFEU (e.g. in *Ullens de Schooten,*[24] *Vergauwen,*[25] *Sanofi Pasteur,*[26] *Rutar and Rutar Marketing D.O.O.*[27]), the Common Fisheries Policy (*Spasov*[28]), Directive 76/207 on equal treatment of men and women in matters of employment and occupation (e.g. in *Moraru*[29]). In several of these cases the ECtHR found violations of the Convention, for a variety of different reasons.

The one recently found in *Bivolaru and Moldovan* is certainly one of the most significant of all. It concerned the execution of a European arrest warrant ("EAW") which, in spite of the application of the *Bosphorus* presumption,[30] the ECtHR considered to have given rise to a manifest deficiency in the application of art. 3 of the Convention.[31]

It can be assumed that out of all cases of domestic application of Union law qualifying for scrutiny under the Convention, those which come before the ECtHR are only the tip of the iceberg.[32] In any event, and in response to the concerns expressed by eminent scholars such as Romain Tinière,[33] it should be stressed that the ECtHR's scrutiny in this area is not

[10] ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011].
[11] ECtHR *Tarakhel v Switzerland* App n. 29217/12 [4 November 2014].
[12] ECtHR *Ilias and Ahmed v Hungary* App n. 47287/15 [21 November 2019].
[13] ECtHR *S.H v Malta* App n. 37241/21 [20 December 2022].
[14] *Avotiņš v Latvia* cit.
[15] ECtHR *Šneersone and Kampanella v Italy* App n. 14737/09 [12 July 2011].
[16] ECtHR *Royer v Hungary* App n. 9114/16 [5 March 2018].
[17] ECtHR *O.C.I. and Others v Romania* App n. 49450/17 [21 May 2019].
[18] ECtHR *Michnea v Romania* App n. 10395/19 [7 July 2020].
[19] ECtHR *Veres v Spain* App n. 57906/18 [8 November 2022].
[20] ECtHR *Stapleton v Ireland* App n. 56588/07 [4 May 2010].
[21] ECtHR *Pirozzi v Belgium* App n. 21055/11 [17 April 2018].
[22] ECtHR *Romeo Castaño* App n. 8351/17 [9 July 2019].
[23] ECtHR *Bivolaru and Moldovan* App n. 40324/16 and 12623/17 [25 March 2021].
[24] ECtHR *Ullens de Schooten and Rezabek v Belgium* App n. 3989/07 and 38353/07 [20 September 2011].
[25] ECtHR *Vergauwen and Others v Belgium* App n. 4832/04 [10 April 2012].
[26] ECtHR *Sanofi Pasteur v France* App n. 25137/16 [13 February 2020].
[27] ECtHR *Rutar and Rutar Marketing D.O.O. v Slovenia* App n. 21164/20 [15 December 2022].
[28] ECtHR *Spasov v Romania* App n. 27122/14 [6 December 2022].
[29] ECtHR *Moraru v Romania* App n. 64480/19 [8 November 2022].
[30] *Bosphorus v Ireland* cit.
[31] On this judgment, see J Callewaert, 'The European Arrest Warrant Under the European Convention on Human Rights: A Matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility' (2021) Zeitschrift für Europarechtliche Studien 105.
[32] For more relevant case-law, please go to www.johan-callewaert.eu.
[33] R Tinière, 'The Use of ECtHR Case-law by the CJEU: Instrumentalisation or Quest for Autonomy and Legitimacy?' (2023) European Papers www.europeanpapers.eu 323.

to be understood as challenging the autonomy of Union law. It is simply drawing the consequences of the EU Member States being at the same time Contracting States to the Convention, but doing so according to the *Bosphorus* principles, i.e. with special attention being given to the particularities of Union law, notably through the application of a presumption of conformity with the Convention, combined with a lower threshold.[34] Besides, the very idea that the application of Union law should be the subject of an external control by the ECtHR was since confirmed by the EU legislature himself when enacting art. 6(2) TEU which provides, in its first sentence, that the EU shall accede to the Convention.[35] This is without prejudice to the fact that pending this accession, the Convention does not constitute a legal instrument which has been formally incorporated into EU law.[36]

II. The case for a wholistic approach to fundamental rights: state of the Play

The Convention liability incurred by domestic judges when they apply Union law, as illustrated by the examples described above, amply shows that the Convention and Union law are not two autonomous systems separated by a watertight fence. This is because Union law is to be applied at domestic level by judges who are themselves subject to the Convention and, consequently, must combine these two legal sources.

That being so, the two European Courts have the responsibility to make every effort to help and support domestic judges in fulfilling that difficult task, by providing *legal clarity* as regards the way their respective legal orders interact. In other words, they should not leave it to the national judges to sort this out by themselves. Rather, they should explicitly take into consideration the full picture of the interplay between the Convention and Union law when interpreting their respective provisions. This includes addressing the impact of that interplay at domestic level and indicating how it is meant to play out, notably in terms of whether the respective levels of protection involved are the same or not. In short, both European Courts should adopt a wholistic rather than an autonomistic approach in this area, because only a wholistic view can take full account of the legal reality which is one of interaction and intertwining rather than separate worlds.

Such an approach goes both ways. It requires on the one hand that in cases involving Union law, the Convention be interpreted by the ECtHR having regard to the interests of

[34] On how this scrutiny is being carried out in practice, see V Davio, 'Le droit de l'Union européenne dans la jurisprudence de la Cour européenne des droits de l'homme' (2023) *Journal de droit européen* 46.

[35] According to art. 1 of Protocol No 8 relating to art. 6(2), the modalities of EU accession to the Convention must be such as to preserve the specific characteristics of the Union and Union law.

[36] As repeatedly stated by the CJEU, e.g. in Case C-511/11 P, *Schindler Holding and Others / Commission* ECLI:EU:C:2013:386 para. 32.

European integration and the specificities of Union law, for which the ECtHR has repeatedly expressed support,[37] and that there is communication about how these specificities play out in the application of the Convention. Moreover, it requires adequate communication whenever the ECtHR draws on Union law for the purpose of simply enriching its own case-law and/or achieving convergence between the two.

On the other hand, it means that Union law should be interpreted by the CJEU having regard to the fact that, as suggested notably by art. 52(3) of the EU-Charter and confirmed by numerous rulings of the CJEU,[38] the Convention represents also under Union law a minimum standard, which can however be raised. This requires not only that Union law be interpreted so as to avoid falling below the Convention protection level, but also that there be clear communication about the relationship between both, with a view to enabling domestic judges to correctly evaluate the legal situation. Failure to do so amounts to exposing national judges to being found liable under the Convention.

Indeed, as already suggested by the *Bosphorus* presumption instituted by the ECtHR,[39] domestic judges are entitled to trust that when applying Union law as interpreted by the CJEU, they will automatically comply also with the Convention as interpreted by the ECtHR. Thus, as the main actors in the combined application of Union and Convention law, national judges should, as a matter of decency, be enabled to understand from the relevant judgments whether there are any differences between the standards applied in Strasbourg and Luxembourg.

As Chief Justice Clarke put it:

> "Whatever the influence of international instruments within the national legal order and however those instruments interact with national human rights measures, the net result at the end of the day has to be a single answer. It is in those circumstances that the existence of an increasing range of international instruments which, to a greater or lesser extent, potentially influence the result of individual cases within the national legal order needs to be debated. We may not need to harmonise our human rights laws in the strict sense of that term but can I suggest that we do need a coherent and harmonious human rights order".[40]

The following observations will try and take stock of the extent to which the wholistic approach described above has been followed so far by the two European Courts.

[37] Notably in ECtHR *Waite and Kennedy v Germany* App n. 26083/94 [18 February 1999] para. 72; *Bosphorus v Ireland* cit. para. 150; and ECtHR *Avotiņš v Latvia* cit. para. 113.

[38] See, as illustrations, the rulings mentioned below under the heading "common norms".

[39] *Bosphorus v Ireland* cit.

[40] F Clarke, Chief Justice at the Supreme Court of Ireland, Opening of the Judicial Year of the ECtHR, (31 January 2020) www.echr.coe.int. In the same sense: B Deconinck, 'Le métier de juge' (2019) Journal des tribunaux 847.

II.1. The European Court of Human Rights

In contrast with the double function of the Convention under Union law, where it operates both as toolbox and benchmark (see below), Union law and jurisprudence are only used as toolbox under the Convention, i.e. as source of inspiration when interpreting the latter. This is because, the Convention being itself the minimum protection level open to being raised in the Contracting States,[41] there is no obligation for it to comply with Union law standards.

That said, the ECtHR makes abundant use of Union law, and in particular of the EU-Charter,[42] as source of inspiration, including as an argument in favour of raising its own protection level, as in *Scoppola (No. 2)*[43] or in *Schalk and Kopf*.[44] The wholistic approach thereby adopted is reflected not only in the act of taking on board Luxembourg case-law but also in the fact that the ECtHR as a rule always explicitly refers to Union law sources relied upon on this occasion. This not only has the consequence of giving pan-European effect to such sources but it also, in the interest of coherence in the application of fundamental rights, signals convergence in the area concerned.

At the same time, the ECtHR has shown itself willing to adapt the Convention standards to the needs of European integration and the specificities of Union law flowing from them. This is reflected in such landmark judgments as *Bosphorus*,[45] which sets up a presumption of conformity with the Convention, combined with a lower threshold, and *Avotiņš*,[46] which expressed principled support for the creation of the area of freedom, security and justice and the mechanisms of mutual recognition designed to facilitate its functioning.

II.2. The Court of Justice of the European Union

When considering the use made of the Convention by the CJEU, one should differentiate between the two different functions of the Convention under Union law: as toolbox and as benchmark. Both functions are explicitly addressed by Union law but at different degrees.

The Convention operates as a toolbox when it is relied upon by the CJEU for the sake of filling some gaps in Union law, as was recently the case in *Dorobantu*,[47] on minimum standards as regards conditions of detention, or in *Spetsializirana prokuratura (trial of an absconded suspect)*,[48] on the impact of a waiver of procedural rights. This approach finds

[41] Art. 53 of the Convention.

[42] On the use of the EU-Charter in the Strasbourg case-law, see P Lemmens and M Piret, 'The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, from the Perspective of the European Court of Human Rights' (2021) Cahiers de droit européen 183.

[43] ECtHR *Scoppola v Italy (no. 2)* App n. 10249/03 [17 September 2009] paras 105-109.

[44] ECtHR *Schalk and Kopf v Austria* App n. 30141/04 [24 June 2010] paras 60-61.

[45] *Bosphorus v Ireland* cit.

[46] ECtHR *Avotiņš v Latvia* cit.

[47] Case C-128/18 *Dorobantu* ECLI:EU:C:2019:857 para. 71, in which the CJEU specified that it was relying on *Muršić v Croatia* "in the absence, currently, of minimum standards in that respect under EU law".

[48] Case C-569/20 *Spetsializirana prokuratura (trial of an absconded suspect)* ECLI:EU:C:2022:401 paras 52-53.

support in art. 52(3) of the EU-Charter which provides that as regards the rights which the Convention and the EU-Charter have in common, their "meaning and scope" shall be the same as under the Convention, without prejudice to the possibility for Union law to provide for a more extensive protection. Under these premises, it does indeed make a lot of sense, as a contribution to legal harmony, to draw inspiration from the Convention in interpreting fundamental rights.

But the Convention is also designed to operate as a benchmark under Union law. This is explicitly stated in the Explanations to art. 52(3) of the EU-Charter, according to which "In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR". This benchmark function of the Convention, which is also underpinning art. 6(2) TEU and the standstill clauses included in several pieces of secondary law enshrining fundamental rights,[49] is obviously designed not only to acknowledge the pan-European relevance of the Convention minimum level, including under Union law, but also to protect domestic judges from incurring Convention liability when applying Union law.

In simple terms, the toolbox function is about the *content* of fundamental rights and helps ensure *substantive harmony* between the Convention and Union law, whereas the benchmark function is about the respective *levels of protection* between the two and their *compatibility*. Both are needed but the benchmark function is more essential to national judges applying Union law, as it is their safety net against breaching the Convention. That said, the two functions can easily be combined, as the CJEU did e.g. in *Orde van Vlaamse Balies and Others*, by indicating that in applying rights of the EU-Charter, the corresponding rights of the Convention, as interpreted by the ECtHR, must be taken into account, as the minimum threshold of protection.[50]

Against this background, three different categories of cases can be identified in how the CJEU goes about the Convention in its case-law. Depending on how the CJEU handles the toolbox and the benchmark functions, these cases will generate, with different consequences as regards the resulting legal clarity, either common norms (a), or a duality of norms (b) or indeed a duality of methodologies (c). Examples of cases belonging to each of these categories are described below.[51]

Generally speaking, while it would appear that the use of the Convention's benchmark function is on the rise when compared with the CJEU's practice following the entry into force of the EU-Charter, it is still far from sufficient to reach in all relevant areas the requisite level of legal clarity.

[49] E.g. in the directives on procedural rights in criminal proceedings (see footnote 62 below).

[50] Case C-694/20 *Orde van Vlaamse Balies and Others* ECLI:EU:C:2022:963 para. 26.

[51] For an overview of recent case-law of the ECtHR and CJEU considered in terms of their interplay, please turn to www.johan-callewaert.eu.

a) Common norms

There will be sufficient legal clarity whenever the CJEU makes clear that it "imports" Strasbourg case-law into Union law as a common (minimum) norm, i.e. with the same "meaning and scope" and the same – or an increased – level of protection, as it did for instance in *Aranyosi and Căldăraru*, where it stated:

> "That the right guaranteed by Art. 4 of the Charter is absolute is confirmed by Art. 3 ECHR, to which Art. 4 of the Charter corresponds. As is stated in Art. 15(2) ECHR, no derogation is possible from Art. 3 ECHR. Articles 1 and 4 of the Charter and Art. 3 ECHR enshrine one of the fundamental values of the Union and its Member States. That is why, in any circumstances, including those of the fight against terrorism and organised crime, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see judgment of the ECtHR in Bouyid v. Belgium, No 23380/09 of 28 September 2015, § 81 and the case-law cited)".[52]

Another way for the CJEU to achieve legal clarity vis-à-vis the Convention is by explicitly referring to the Convention as benchmark under Union law, as was recently done in *Orde van Vlaamse Balies and Others*:

> "In accordance with Art. 52(3) of the Charter, which is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law, the Court must therefore take into account, when interpreting the rights guaranteed by Articles 7 and 47 of the Charter, the corresponding rights guaranteed by Art. 8(1) and Art. 6(1) ECHR, as interpreted by the European Court of Human Rights ("the ECtHR"), as the minimum threshold of protection [...]".[53]

Similar indications are to be found e.g. in *Al-Chodor and Others*,[54] *Lanigan*,[55] *HN*,[56] *DD*[57] and *Politsei- ja Piirivalveamet.*[58] Such language is very helpful as it provides assurance that the Convention's minimum threshold has been taken on board by the CJEU in its interpretation, thus allowing national judges to be satisfied that by applying the CJEU ruling at issue they will not encroach on the Convention[59].

[52] Joined Cases C 404/15 and C 659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 paras 86-87.

[53] *Orde van Vlaamse Balies and Others* cit. para. 26.

[54] Case C-528/15 *Al-Chodor and Others* ECLI:EU:C:2017:213.

[55] Case C-237/15 PPU *Lanigan* ECLI:EU:C:2015:474.

[56] Case C-420/20 *H.N (Procès d'un accusé éloigné du territoire)* ECLI:EU:C:2022:679.

[57] Case C-347/21 *D.D (Réitération de l'audition d'un témoin)* ECLI:EU:C:2022:692.

[58] Case C-241/21 *Politsei- ja Piirivalveamet (Placement en rétention - Risque de commettre une infraction pénale)* ECLI:EU:C:2022:753.

[59] On this approach, see J Callewaert, 'The Recent Luxembourg Case-Law on Procedural Rights in Criminal Proceedings: Towards Greater Convergence with Strasbourg?' (4 May 2023) EU Law Live www.eulawlive.com.

b) Duality of norms

However, things are not always as clear as described above. There are indeed quite a few cases which confront the reader with an apparent *duality of norms*, thereby raising the question whether it also entails a *duality of protection*. The result is a lack of legal clarity about the implications of the interplay between Union law and the Convention.

A first category of cases of that kind are those where key notions are being borrowed from the Convention but slightly modified, for no apparent reason, creating some confusion as to whether they are meant to say the same or not.

An example of such modifications is to be found in *Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)* where the CJEU, referring to the *Paposhvili* jurisprudence of the ECtHR, describes the test to be applied to the expulsion of seriously ill people as being "a real risk of a significant reduction in his or her life expectancy or a rapid, significant and permanent deterioration in his or her state of health, resulting in intense pain".[60] The ECtHR, however, in *Paposhvili* used a slightly different formulation: "a real risk of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy".[61] Why such differences? If the intention is to say the same, why use different formulations? If not, why not be explicit about it?

Of course, any intended substantive differences between these two versions would not appear to be dramatic. But the result is nonetheless some ambiguity instead of legal clarity, leaving national judges guessing whether this apparent duality of norms also entails a duality of protection. For why should lawyers use different words and rebuild phrases if not for referring to a different legal proposition?

Similar questions arise about the wording of some Directives on procedural rights in criminal proceedings when compared with the Strasbourg case-law.[62] Fortunately, the CJEU here seems willing to interpret them in light of the EU-Charter and the Convention, considering the latter as "a minimum threshold of protection".[63]

[60] Case C-69/21 *Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)* ECLI:EU:C:2022:913 para. 66.

[61] ECtHR *Paposhvili v Belgium* App n. 41738/10 [13 December 2016] para. 183.

[62] Such as Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

[63] As in Case C-377/18 *AH and Others* ECLI:EU:C:2019:670 para. 41.

The limitations which can be applied to fundamental rights are another area where an apparent duality of norms can be noted. Whereas under the EU-Charter they are regulated by its art. 52(1), under the Convention they are the subject of specific provisions relating to each of the Convention's articles. They are not entirely identical to art. 52(1), but not entirely different either. The implications of this duality of norms are rarely addressed in the Luxembourg jurisprudence, thus allowing legal ambiguities on this score to persist.

One of the very few exceptions in this respect is *Centraal Israëlitisch Consistorie van België and Others*, in which the CJEU indicated that for the purposes of this case, the limitations provided for by art. 52(1) were "to the same effect" as those allowed under art. 9(2) of the Convention. The CJEU usefully added that the national legislation at stake had to fulfil the conditions of both paras 1 and 3 of art. 52 of the EU-Charter, thus underscoring the relevance of the Convention as benchmark in its examination.[64] This case shows that a more pedagogical approach to this issue is possible.

Another obstacle to legal clarity is created when the CJEU refers to relevant Strasbourg case-law only once, i.e. the first time it is relied on, all subsequent references being made by the CJEU only to its own case-law which has incorporated that piece of Strasbourg case-law. Examples to that effect concern the Strasbourg jurisprudence about the so-called Engel criteria,[65] about the absolute nature of the prohibition of ill-treatment[66] or indeed the right of an accused to be present at the trial.[67] As a result, readers of the Luxembourg follow-up judgments who do not know about the very first reference to that Strasbourg case-law are left in the dark as to its impact in the follow-up cases and the resulting substantive convergence between Strasbourg and Luxembourg on this score. This approach blurs the picture and creates a false appearance of autonomy. In short, it generates missed opportunities to highlight existing convergence and reassure national judges about it.

Similarly, quite a few Luxembourg rulings simply ignore relevant and pre-existing Strasbourg case-law, including on such essential issues as the rule of law and judicial independence, an area where the importance of convergence of European jurisprudence could hardly be over-estimated.[68] However, more recent judgments seem to indicate a different approach in this respect.[69]

[64] Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:1031 paras 58-59.

[65] Compare Case C-489/10 *Bonda* ECLI:EU:C:2012:319 paras 36-37 with Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280 para. 35 and Case C-117/20 *bpost* ECLI:EU:C:2022:202 para. 25.

[66] Compare *Aranyosi and Căldăraru* cit. para. 85 with *Dorobantu* cit. para. 62 and *Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)* cit. para. 57.

[67] Compare Case C-420/20 *H.N (Procès d'un accusé éloigné du territoire)* ECLI:EU:C:2022:679 paras 54-57 with Case C-492/22 PPU *CJ (Décision de remise différée en raison de poursuites pénales)* ECLI:EU:C:2022:964 para. 88.

[68] E.g. in Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117; Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:615.

[69] As in Case C-487/19 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* ECLI:EU:C:2021:798.

c) Duality of methodologies

Since the entry into force of the EU-Charter in 2009, it has become clear that if the consistency required by its art. 52(3) is also designed to protect national judges applying Union law from breaching the Convention, it should cover not only the *substance* but also the *methodology* of fundamental rights.

This is because there can also be significant methodological differences between the Strasbourg and Luxembourg case-law, with consequences which cannot just be ignored. Identical rights applied according to different methodologies can indeed produce very different levels of protection from the point of view of the individual. The assessment of whether a fundamental right has been given the same "meaning and scope" under Union law as under the Convention should therefore extend to these methodological aspects.[70]

However, it seems that we are not there yet, since methodological differences can still complicate the task of all those confronted with having to combine the Convention and Union law standards at domestic level, as the following examples illustrate.

i) Ne bis in idem. A first example to that effect is the Luxembourg case-law on *ne bis in idem*. Only a few months after the ECtHR, in *A and B*,[71] had revised its own case-law on the application of *ne bis in idem* on dual proceedings by opening the door to the possibility of considering criminal and administrative proceedings relating to the same criminal conduct as building a "coherent whole", the CJEU too in *Menci* revisited its case-law with the same intention but through a different methodology, based on art. 52(1) of the EU-Charter, and with partly similar and partly different criteria for the assessment of the "proximity" between the two sets of proceedings. In a rare move, though, the CJEU, explicitly referring to the Convention as benchmark, indicated that its approach ensured "a level of protection of the *ne bis in idem* principle which is not in conflict with that guaranteed by art. 4 of Protocol No 7 to the [Convention], as interpreted by the European Court of Human Rights".[72]

Then came on the same topic, in 2022, *bpost* in which the CJEU seemed to try and fill the gap between *A and B* and *Menci*, by relying on both these judgments and taking on board much of the Strasbourg criteria, including its emphasis on the "coherent whole" which the two sets of proceedings had to build in order for them to be considered as one.[73] This ruling, however, was followed only a few months later by *Direction départementale des finances publiques de la Haute-Savoie*[74] which seems to have taken a step back in this respect, by no longer referring to either *A and B* or *bpost*, but rather to *Menci*. The result of this back and forth seems a far cry from legal clarity. The ECtHR, for its part, has been sticking to *A and B.*

[70] On this, see J Callewaert, 'Do We Still Need Art. 6(2) TEU? Considerations on the Absence of EU Accession to the ECHR and Its Consequences' (2018) CMLRev 1685, 1699.

[71] ECtHR *A and B v Norway* App n. 24130/11 and 29758/11 [15 November 2016].

[72] Case C-524/15 *Menci* ECLI:EU:C:2018:197 para. 62.

[73] *Bpost* cit. para. 49.

[74] Case C-570/20 *Direction départementale des finances publiques de la Haute-Savoie* ECLI:EU:C:2022:348.

Similar methodological issues arise when *ne bis in idem* is being applied in the context of the Convention implementing the Schengen Agreement (CISA). In *Generalstaatsanwaltschaft Bamberg (Exception to the ne bis in idem principle)*, the CJEU recently validated an exception to the *ne bis in idem* principle which is not included in the list of exceptions allowed under art. 4 para. 2 of Protocol No. 7 to the Convention, i.e. an exception for "offences against national security or other equally essential interests" (art. 55(1)(b) CISA). Moreover, it ruled that the essence of *ne bis in idem* remained preserved in the case at hand, even though the effect of that exception – presented as "limitation" – was to deprive the accused person concerned of the benefit of *ne bis in idem* altogether. According to the CJEU, this was because that exception allowed the Member State relying on it to conduct its own prosecutions against the accused, even though the latter had already been convicted for the same criminal conduct in another Member State.[75]

Thus, according to this reasoning, the preservation of the essence of *ne bis in idem* can be for the benefit of the State concerned rather than for that of the accused. By contrast, when the ECtHR examines whether the essence of a fundamental right has been preserved by an interference with that right, it does so from the perspective of the applicant only, thereby inquiring whether the latter enjoyed at least part of his or her fundamental right in the circumstances.[76] For if a fundamental right is to be enjoyed by an individual, the preservation of its essence by definition must be in the interest of that same individual, not in that of the State interfering with his or her right. To hold otherwise amounts to suggesting that States can be the beneficiaries of fundamental rights, which is at odds with the very nature of such rights.[77]

ii) The right to property. Another illustration of different methodologies confronting each other at domestic level are two judgments: *BPC Lux 2 Sàrl and Others*,[78] by the CJEU, and *Freire Lopes*,[79] by the ECtHR, both dealing with the same issue, i.e. the Portuguese legislation which organised the rescue of credit institutions by allowing their resolution and the transfer of part of their assets and liabilities to a bridge bank. One of these credit institutions was the Banco Espirito Santo ("BES"). Its resolution was examined in two different proceedings, first by the CJEU and subsequently by the ECtHR, following different legal challenges before the domestic courts by shareholders, account holders and creditors who had suffered heavy losses as a consequence of that measure and complained notably about a breach of their property rights.

In *BPC Lux*, the CJEU found that the national legislation under which the BES had been resolved was compatible with art. 17(1) of the EU-Charter, which protects the right to

[75] Case C-365/21 *Generalstaatsanwaltschaft Bamberg (Exception to the ne bis in idem principle)* ECLI:EU:C:2023:236 para. 57.

[76] See, e.g. ECtHR *Regner v. Czech Republic* n. 35289/11 [19 September 2017] para. 148.

[77] On this ruling, see J Callewaert, 'A different "ne bis in idem" in Luxembourg? Judgment of the CJEU in Generalstaatsanwaltschaft Bamberg' (22 May 2023) www.johan-callewaert.eu.

[78] Case C-83/20 *BPC Lux 2 Sàrl and Others* ECLI:EU:C:2022:346.

[79] ECtHR *Freire Lopes v Portugal* App n. 58598/21 [31 January 2023].

property and, according to the Explanations to that provision, corresponds to art. 1 of Protocol No. 1 to the Convention. Interestingly, the CJEU did so after following step by step the Strasbourg methodology applied under art. 1 of Protocol No. 1, except for the assessment of the limitations, which it examined under art. 52(1) of the EU-Charter. It concluded in essence that the national law at stake was compatible with art. 17(1).

Yet, the test provided for by art. 52(1) is slightly different from the one applied in Strasbourg under art. 1 of Protocol No. 1, which is based on the "fair balance to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". Thus, it was the latter test which the ECtHR applied in *Freire Lopes* and which led to the finding that, having regard to all the general and individual circumstances of the case, the complaint about a violation of art. 1 of Protocol No. 1 was manifestly ill-founded, because a fair balance had been struck between the competing interests.

While the European Courts came to similar conclusions on the substance, some lessons can nonetheless be drawn from these parallel cases. First, the same fundamental rights can have to be applied to similar cases by each of the European Courts acting at different stages of the respective proceedings involved and from a different perspective: Luxembourg will examine *in abstracto*, Strasbourg *in concreto*. Secondly, the final *ex post* assessment of compliance with fundamental rights in such cases only takes place in Strasbourg, on the basis of the sole Convention. Thus, the liability which may be incurred by domestic judges in Strasbourg is only with respect to their compliance with the Convention, even when the domestic law at stake, as in the present case, is based on Union law. Thirdly, in *Freire Lopes* the ECtHR repeatedly relied on the assessments made by the CJEU on the basis of the criteria which it borrowed from the Convention case-law on property rights. This not only demonstrates the impact on the outcome of a case in Strasbourg of the use by the CJEU of harmonised criteria, it also considerably facilitates the task of national judges.

The fact remains, though, that here again, national judges are (partly) confronted with a duality of norms raising the question of a possible duality of protection.[80]

iii) The "two step" methodology in the implementation of a European arrest warrant. Last but not least, a further methodological issue of increasing importance is the "two step" approach adopted by the CJEU for the assessment of any obstacles to the execution of a EAW flowing from the risk of a serious breach of the fundamental rights of the person concerned if surrendered to the issuing State. This methodology basically comes down to applying a double test, first a general and then an individual one, for the assessment of any such risks.[81]

[80] Another recent example of slightly different methodologies being applied in Strasbourg and Luxembourg on the same issue is Case C-203/21 *Delta Stroy 2003* ECLI:EU:C:2022:865 compared with ECtHR *GIEM S.R.L and Others v Italy* App n. 1828/06, 34163/07 and 19029/11 [28 August 2018].

[81] See, among others, Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* ECLI:EU:C:2020:1033 paras 53-55.

In combining a general with an individual test, this "two-step" methodology seems the result of some commendable efforts by the CJEU in trying to reconcile the Luxembourg system-oriented approach, flowing from the mutual recognition logic, with the Strasbourg person-oriented approach, flowing from an individual justice logic. While it differs from the methodology applied by the ECtHR when assessing the execution of a EAW, which is more focussed on the individual risks, it is not problematic as such, as confirmed by *Bivolaru and Moldovan v France*.

In this case, the ECtHR took note of the Luxembourg "two-step" methodology but focussed straight away on the individual risks incurred by the two applicants, thereby sticking to its own one-step approach.[82] While the latter does not prevent the ECtHR from having regard to the general situation prevailing in a country, it does not make evidence on this score a pre-condition to any findings regarding the individual circumstances of the person concerned and the risks incurred in the event of his/her surrender.

In respect of Mr Moldovan the ECtHR found a "manifest deficiency" resulting in a violation of art. 3 of the Convention because the French courts had surrendered him, even though they had before them sufficient factual elements indicating that he would be exposed to a serious risk of ill-treatment by reason of the detention conditions in the prison in which he would be detained after his transfer. These factual elements only concerned the personal situation of Mr Moldovan, as opposed to any systemic or generalised deficiencies. Thus, regardless of the methodology which the French courts had applied in assessing the lawfulness of the execution of the EAWs concerned, what mattered for the ECtHR was whether their final judgment was compatible with the Convention.

This approach would appear to be more protective for the person concerned, for at least two reasons. First, from a substantive point of view, it does not limit the scope of relevant risks potentially incurred by a person to those which flow from systemic or generalised circumstances. Secondly, from a procedural perspective, because adducing evidence of systemic or generalised deficiencies can represent a heavy and complex burden of proof for an individual, especially in the absence of clear definitions of these notions.

However, in *Puig Gordi and Others* the CJEU recently went one step further in developing its "two-step" methodology, by denying the possibility to examine individualised risks in the event of a surrender if, prior to that, no systemic or generalised deficiencies have been found to exist. The case concerned the refusal by Belgian courts to surrender a Catalan separatist to Spain on account of concerns about the lack of jurisdiction of the court called upon to try that person. In substance, the CJEU ruled *inter alia* that in the absence of systemic or generalised deficiencies in the issuing State to the effect that persons in that State would be generally deprived of an effective legal remedy enabling a review of the jurisdiction of the criminal court called upon to try them, a court of the executing State may not refuse to execute a EAW.[83]

[82] ECtHR, *Bivolaru and Moldovan* App n. 40324/16 and 12623/17 [25 March 2021] para. 114.
[83] Case C-158/21 *Puig Gordi and Others* ECLI:EU:C:2023:57 para. 111.

This comes down to autonomising the general test, to the effect that the application of the individual test is precluded if the result of the prior general test is negative. In that logic, the scale which deficiencies must reach to become relevant under the general test would appear to be of a magnitude which may be seldom reached in practice and which, in the rare cases where it could still be reached, may be difficult to evaluate by domestic judges and even more difficult to prove by the persons concerned by the EAW. It can therefore be assumed that under this methodology, in most cases the assessment by the executing judicial authority will stop, out of convenience, after the first general step, leaving out the second individual step altogether. This would bring us back, *de facto*, to the much-criticised single collective test used in *N.S. and Others*,[84] which would appear to be difficult to reconcile with the individual test being systematically and exclusively applied by the ECtHR, not least because one of the cornerstones of the Convention system is the right of individual petition.

Fortunately, in *Puig Gordi and Others* the CJEU did not go as far as suggested by its Advocate General, who wanted this new version of the "two-step" examination potentially precluding the application of an individual test to be applied to all aspects of the right to a fair trial before a tribunal previously established by law under art. 47(2) of the EU-Charter. The CJEU indeed limited the scope of its ruling to issues relating to the sole lack of jurisdiction of the courts in the issuing State, thereby placing some emphasis on the existence of efficient legal remedies which should avoid "the very occurrence" of the infringement at issue or avoid irreparable damage arising from that infringement.[85]

The fact remains, though, that in this way, a door has again been opened, for the sake of the efficiency of the EAW mechanism,[86] to a general rather than an individual assessment of respect for fundamental rights. One may wonder whether it will be further widened in the future.[87] In this context, it might be useful to recall the following finding by the ECtHR:

> "The Court has repeatedly asserted its commitment to international and European cooperation.... Hence, it considers the creation of an area of freedom, security and justice in

[84] Joined Cases C 411/10 and C 493/10 *N.S. and Others* ECLI:EU:C:2011:865.

[85] *Puig Gordi and Others* cit. para. 113. This consideration, however, seems in contrast with Case C-220/18 PPU *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* ECLI:EU:C:2018:589 para. 74, in which the CJEU ruled that the availability of judicial review in the issuing Member State "is not, as such, capable of averting the risk that that person will, following his surrender, be subjected to treatment that is incompatible with Art. 4 of the Charter on account of the conditions of his detention". To the same effect: *Dorobantu* cit. para. 80. Should *Puig Gordi* need to be distinguished from those cases in this respect, an indication to that effect would have been welcome.

[86] *Puig Gordi and Others* cit. para.116.

[87] In its recent ruling in *C.D.L.* (Case C-699/21 ECLI:EU:C:2023:295), the CJEU adopted a "single step approach" as regards the specific issue of the execution of a EAW concerning a person suffering from a serious disease unrelated to any systemic or generalised deficiencies in the issuing Member State. The future will tell whether this case is to be seen as an exception or a new trend. See also L van der Meulen, 'Leaving the two-step behind? The Court of Justice expands fundamental rights protection for the seriously ill under the EAW in C-699/21' (26 April 2023) EU Law Live www.eulawlive.com.

> Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention. Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Art. 67(1) of the TFEU. However, it is apparent that the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited".[88]

III. Conclusion

The multipolar and multilayer context in which legal systems must operate today makes the correct application of the law an increasingly complex exercise, especially for national judges. The relationship between the Convention and Union law is no exception to that reality.

The only reasonable way to deal with this complexity is not to ignore it but to try and steer it so as to prevent it from turning into confusion and triggering a fragmentation of European fundamental rights. This requires from all concerned a wholistic approach, as a basis for an ever more fruitful legal and judicial dialogue seeking legal clarity and cross-system coherence.

[88] ECtHR *Avotiņš v Latvia* cit. paras 113-114.