

# The Relationship between the European Courts and Integration through Human Rights

*Laurent Scheeck\**

## I. Introduction<sup>1</sup>

Integration through human rights is a phenomenon that is increasingly shaping the emergence of a political Europe. The highly contingent linkage between the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) is at the root of this process by which multiple social institutions get related to each other and encompassed by a common set of evolving supranational norms. More than thirty years ago, the paths of European courts unexpectedly crossed when they were both impelled to figure out a way to deal with a twofold discontinuity in the European system of human rights protection. At that time, the two courts were part of the problem they had to solve. Neither court had the competence to protect human rights at the level of the European Communities. This is precisely where Europe's human rights puzzle can be located. As the European Union has become ever more powerful in terms of political output, it has also turned out to be a potential source of human rights violations. Yet, the Luxembourg-based ECJ did not initially have any jurisdiction to protect human rights at the EU level and the Strasbourg-based ECtHR could not formally impose an external control on EU institutions, because the EU as such is not a party to the European Convention on Human Rights (ECHR) – the Council of Europe's main

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\* Ph.D. candidate at the Institut d'Études Politiques (Sciences-Po – Paris), affiliated with the Centre d'Études et de Recherches Internationales (CERI). He is a graduate of the College of Europe (Bruges) and currently teaches a seminar on European Foreign Policy as a junior lecturer in the "International Careers" Master's program at the Université d'Auvergne, Clermont-Ferrand.

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instrument for the protection of human rights, subject to judicial control by the ECtHR.

As national governments have disagreed on setting up consequential control mechanisms for several decades, the European courts pre-empted intergovernmental choice. Each court actually had to act. For the European judges, not solving the puzzle also meant jeopardising their own role. In order not to be sidelined by the EU, Strasbourg had to get a grip on the EU's increasingly powerful institutions and on EU law, which irresistibly expanded at the national level. For its part, Luxembourg had to guarantee the protection of human rights at the EU level because otherwise some national constitutional courts did not accept the principle of supremacy of EU law, without which integration would not have been possible.

Faced with these challenges, the two European courts effectively circumvented the dilemma of non-jurisdiction by reciprocally intruding into their respective legal orders. This also caused some reciprocal puzzlement and triggered reactions. Yet, with time, the courts' increasingly nested linkage has given rise to new forms of judicial diplomacy among supranational judges. The European judges engaged into strategic inter-institutional interactions when they perceived the potential benefits and risks for the protection of human rights and for their own courts. Whereas both courts stubbornly pursue their institutional priorities, conflict and co-operation between European judges are transversal: there appear to be as many tensions within the courts than between the courts when it comes to protecting human rights at the EU level. Rather unexpectedly for all involved actors, the two courts not only anticipated, but also diminished intergovernmental choice, as their interaction has paved the way towards the EU's accession to the ECHR. A very awkward situation has emerged as a result of the courts' interaction and such an accession meanwhile has more advantages than disadvantages for member states. The latter recently agreed to make the EU accede to the ECHR and laid down their commitment in the constitutional treaty and in the ECHR's new protocol 14. For the time being, upholding or unravelling this very fragile process of integration through human rights heavily depends on the European judges' linkage, which is simultaneously underpinned by competitive and cooperative dynamics.

The aim of this study is twofold. Firstly, it seeks to demonstrate that the European courts' linkage has become a parameter of European governance. Human rights have changed the course of European integration, as they have progressively been superimposed on most EU and national activities by the two courts. One court could not have done this alone. It is only as a result of the interaction between Europe's two supranational courts that the protection of human rights and economic integration are no longer irreconcilable and that the EU's rising power in non-economic policy areas is rather tightly framed by enforceable human rights standards. Secondly, the paper investigates the underlying social mechanisms of inter-jurisdictional interactions. In a first part we explain why the European courts unexpectedly met. A second part shows how the courts have been trying to solve Europe's binary human rights puzzle by intruding into each other's legal orders. Part three deals with the diplomatic and sometimes not-so-diplomatic interactions

between European judges. In a fourth part, we assess the wider impact of the courts' linkage on European integration.

## II. Supranational Courts and the Evolution of European Integration

The ECJ's fundamental role in the process of European integration is widely known.<sup>2</sup> The ECtHR's role in this regard has not been investigated to the same extent by political scientists. When it comes to European integration studies, political scientists have overwhelmingly dealt with the EU and often neglected the role of other organisations.<sup>3</sup> However, as Marie-Claude Smouts put it "the European institutional system is a big construction game of awkwardly nested organisations which have nor the same history, nor the same culture, nor the same objectives, but which are yet linked to each other"<sup>4</sup>. Legal scholars have not limited their research to the EU: the Council of Europe's and especially its court's evolution have always been a matter of interest (and practice) for lawyers. The relationship between the ECJ and the ECtHR has almost been a non-subject in political science, while it has been one of the most passionately debated issues among legal scholars for more than thirty years, raising problems of unprecedented complexity for legal theory and practice. International relations scholars and Europeanists have recently rediscovered law and courts in new, more contextual ways that go beyond traditional legal analysis<sup>5</sup> and both European courts have gotten access to political science journals<sup>6</sup>.

<sup>2</sup> K.J. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford 2001; A.-M. Burley/W. Mattli, *Europe before the Court: A Political Theory of Legal Integration*, *International Organization*, 47, 1, 1993; G. Courty/G. Devin, *La construction européenne*, Repères, 326, Paris 2005; R. Dehousse, *La Cour de Justice des Communautés Européennes*, Paris 1997; R. Dehousse, *The European Court of Justice. The Politics of Judicial Integration*, London 1998; P. Maignette, *Le régime politique de l'Union européenne*, Paris 2003; A. Stone Sweet, *The Judicial Construction of Europe*, Oxford 2004; A.-M. Slaughter/A. Stone Sweet/J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context*, Oxford 1998; A. Stone Sweet/J. Caporaso, *La Cour de Justice et l'intégration européenne*, *Revue française de science politique*, 48, 2, 1998.

<sup>3</sup> For a general overview of all international organisation's interlocking relationship in Europe, see Courty/Devin (note 2), 24-28.

<sup>4</sup> M.-C. Smouts, *Les Organisations internationales*, Paris 1995, 150.

<sup>5</sup> G. Devin, *Sociologie des relations internationales*, Collection Repères, 335, Paris 2002; R. Dehousse, *L'Europe par le droit: plaidoyer pour une approche contextuelle*, *Politique européenne*, 1, 2000; A.-M. Slaughter, *A New World Order*, Princeton 2004; J. Comaille, *Introduction: la redécouverte du droit par les sciences sociales*, in: L. Israël/G. Sacriste/A. Vauchez/L. Willemez (eds.), *Sur la portée sociale du droit. Usages et légitimité du registre juridique*, CURAPP, PUF, Paris 2005; K.J. Alter/R. Dehousse/G. Vanberg, *Law, Political Science and EU Legal Studies. An Interdisciplinary Project?*, *European Union Politics*, 3, 2002.

<sup>6</sup> *Pouvoirs*, Les cours européennes. Luxembourg et Strasbourg, 96, Seuil, 2001.

This paper mainly focuses on the combined effects of the courts' (inter)actions (seen as the output of highly contingent systems of collective actions) on the process of European integration. It draws on symbolic interactionism<sup>7</sup> and organisational sociology,<sup>8</sup> rather than on institutionalist approaches that often fail to explain social change.<sup>9</sup> Instead of deducing some sort of unavoidable pre-eminence of the judiciary over intergovernmental institutions, it aims to put the relationship between the many actors involved in a socio-historical perspective.<sup>10</sup> The study is clearly output-oriented. Our main interest goes to long-term effects of judicial and political decisions, reactions and interactions.<sup>11</sup> In short, the paper demonstrates

<sup>7</sup> H.S. Becker, *Outsiders*, Paris 1985.

<sup>8</sup> M. Crozier/E. Friedberg, *L'acteur et le système. Les contraintes de l'action collective*, Paris 1977.

<sup>9</sup> Our study rather focuses on the specific effects of inter-jurisdictional interactions on politics than on the relationship between law and politics – which has already been extensively dealt with (M. Shapiro/A. Stone Sweet, *On Law, Politics & Judicialization*, Oxford 2002; J. Commaille/L. Dumoulin/C. Robert (eds.), *La juridicisation du politique. Leçons scientifiques, Droit et Société. Recherches et Travaux 7*, L.G.D.J., Paris 2000). The scope of this study is limited to the relationship between the two supranational courts and it only indirectly deals with the role of national institutions. The two European courts' relationship with national courts and national institutions in general is an important aspect of the general evolution of integration through human rights. The present approach thus risks giving the impression to understate the role of national (constitutional) courts and especially the well-known role of the *Bundesverfassungsgericht* in upholding the quality of human rights protection at the European level. Although the paper deals with *Karlsruhe's* fundamental role in furthering integration by requiring higher supranational standards, developing its function in this respect in more detail would go beyond the scope of this paper.

<sup>10</sup> N. Elias, *Qu'est-ce que la sociologie?*, La Tour d'Aigues 1991.

<sup>11</sup> This paper's approach is indebted to old and new (neo-)functionalist approaches (D. Mitraný, *The Functional Theory of Politics*, London School of Economics & Political Science, New York 1975; E. Haas, *The Uniting of Europe. Political, Social and Economic Forces, 1950-1957*, Stanford 1968; Stone Sweet (note 2); P.C. Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts*, in: G. Marks/F. Scharpf/P.C. Schmitter/W. Streeck (eds.), *Governance in the European Union*, London 1996; Burley/Mattli (note 2)). The assumptions of their intergovernmentalist opponents, who hold that international institutions at the most provide for increasing co-operation and interdependence between member states, but who do not consider international institutions as actors in their own right, do not apply to our object (see A. Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, *European Journal of International Relations*, 1, 2, 1995; A. Moravcsik, *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*, London/Ithaca, 1998). Incremental change is not seen as an automatic but as an interactive process. We do not aim to reiterate the traditional cleavages dividing supranationalist and intergovernmentalist approaches of European integration or to study integration for the sake of integration, without looking at political content and political effects. The paper rather analyses the linkage between non-majoritarian institutions (G. Majone, *La Communauté européenne: un Etat régulateur*, Paris 1996, 123-150), defined as "those governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials" (M. Thatcher/A. Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, *West European Politics* 25, 1, 2002, 2). It then assesses how this linkage influences intergovernmental choice (i.e. decisions taken by the European Council and the Council of the EU and which are seen as – ever more – supranational in nature, as opposed to purely national decision-making) and the process of regional integration in Europe.

how incremental integration has occurred as a result of both courts' linkage. In order to study inter-institutional relations, it is thus necessary to overcome institutional compartmentalisation and to assess the transversal interaction of a number of non-monolithic actors who, in a very contingent and perfectly reversible manner, evolve "from interdependence to integration".<sup>12</sup>

The study relies on a "hypothetico-inductive" research method.<sup>13</sup> On the one hand, it builds on the tools and hypotheses provided by the sociology of international relations (which is itself based on political sociology (of law), interactionist and organisational studies) as well as (compatible) theories of European integration. For its demonstrative purpose it is based on empirical observations, interviews with lawyers, court officials and judges of the two European courts<sup>14</sup> and on an analysis of the evolution and impact of their respective case law. In this sense, this study relies on an inductive (as opposed to theory testing) variant of "process tracing" defined as a method which "generate[s] and analyze[s] data on the causal mechanisms, or processes, events, actions, expectations, and other intervening variables, that link putative causes to observed effects".<sup>15</sup>

Few are the lawyers in Europe who are unaware of the issues surrounding the EU-ECHR linkage. Yet, not all European judges and court officials have a special interest in the ECJ-ECourtHR relationship. In each court, only some actors take the lead when it comes to their relationship with the other European court. Whereas we tend to refer to "the Court(s)" and "the judges"<sup>16</sup> we not only assume that courts are not monolithic institutions, but we will also try to show that "judicial arenas" are organisational environments which are characterised by multiple transversal interactions.<sup>17</sup> Institutions "don't think" in a literal way – whether the

<sup>12</sup> G. Devin, Norbert Elias et l'analyse des relations internationales, *Revue française de science politique* 45, 2.

<sup>13</sup> Crozier/Friedberg (note 8).

<sup>14</sup> This study is based on interviews conducted in Strasbourg, Luxembourg and Brussels in April 2002 (European Commission, Permanent Representation of the Council of Europe to the EU – 4 interviews), in June 2002 (10 interviews with court officials at the ECourtHR and officials at the Secretariat and Committee of Ministers of the Council of Europe), in June 2004 (ECJ – interviews with 5 court officials, one ECJ judge and one Court of First Instance (CFI) judge), in February 2005 (ECourtHR, interviews with 5 judges and 5 court officials) and in June 2005 (ECJ – interviews with one ECJ judge and one CFI judge, 2 advocate generals and 5 court officials).

<sup>15</sup> A. Bennett/L. George, *Process Tracing in Case Study Research*, paper presented at the MacArthur Foundation Workshop on Case Study Methods, Belfer Center for Science and International Affairs, Harvard University, October 17 – 19, 1997, <<http://www.georgetown.edu/faculty/bennetta/PROTCG.htm>>.

<sup>16</sup> In both courts unanimity between the judges is not required. In Strasbourg, the judges can express dissenting opinions if they disagree with the majority of their colleagues (unlike in Luxembourg). In both institutions, decisions are always pronounced by "the Court". Unless clarification is required, we use this term when talking about the courts' jurisprudential actions for reasons of semantic simplicity, but keeping in mind that rulings are the result of multiple interactions and negotiations and often combine contradictory interests.

<sup>17</sup> B. Latour, *La fabrique du droit. Une ethnographie du Conseil d'Etat*, Paris 2002; A. Vauchez, *Introduction: Les arènes judiciaires dans la construction des problèmes sociaux et politiques*, in: Israël/Sacriste/Vauchez/Willemez (note 5).

term refers to institutions in their general sociological sense as legitimate systems of rules<sup>18</sup> or whether it refers to institutions taken as organisational systems of collective action.<sup>19</sup> Given that the disagreement between the judges in each court is proportional to the political importance of their cases, it would be a methodological hazard to deduce any “institutional intentionality” from a court’s action. In this vein, individuals or systems of collective action are certainly capable of strategic action, but they obviously don’t control the wider systemic effects of their actions.

The cases brought before the judge are the most important raw material for the courts. Indeed, courts would remain completely silent if there were no plaintiffs. Courts can also be instrumentalised as institutional vectors for collective action.<sup>20</sup> Both European courts have been identified as such by not necessarily representative, but mobilised public and private actors, which go to court in order to “get justice” and/or tend to influence case law with respect to their own interests (such as human rights NGO’s, lawyer associations, business corporations, syndicates, minorities, individuals and governments). In Strasbourg, there is still a traditional opposition between private and public actors, as private actors sue governments for human rights violations. In Luxembourg, supranational institutions can also sue governments<sup>21</sup> and governments go to court in order to influence the course of law and, hence, of politics.<sup>22</sup> The two European courts have become another gateway for private and public actors to emerge on the supranational side of European politics. As these actors march into the courts, they also tend to boost the social function of “third party dispute resolution” in rule-of-law based societies,<sup>23</sup> in which social and political conflicts can also be resolved in courtrooms. The reason why this paper mainly focuses on judges is because they link society to political institutions. The European courts play a crucial role in European governance as they continuously produce a synthesis of national and transnational social contingencies. As the concept of law has evolved from a pyramidal to a networked model,<sup>24</sup> – probably as a result of institutional inflation at multiple levels and ensuing interaction – courts remain important institutional channels for (transnational) social networks from an organisational point of view.

<sup>18</sup> M. Douglas, *Comment pensent les institutions*, Paris 1999; E. Durkheim, *Les règles de la méthode sociologique*, Paris 1988.

<sup>19</sup> G. Allison/Ph. Zelikow, *Essence of Decision. Explaining the Cuban Missile Crisis*, 2<sup>nd</sup> ed., New York 1999; Crozier/Friedberg (note 8).

<sup>20</sup> S.A. Scheingold, *The Politics of Rights. Lawyers, Public Policy and Political Change*, New Haven/London 1974; Vauchez (note 17).

<sup>21</sup> Dehousse, 1998, (note 2), 97-103.

<sup>22</sup> M.-P.F. Granger, *When Governments Go to Luxembourg ...: The Influence of Governments on the Court of Justice*, *European Law Review* 29, 2004.

<sup>23</sup> A. Stone Sweet, *Judicialization and the Construction of Governance*, *Comparative Political Studies* 31, 1999; Stone Sweet (note 2).

<sup>24</sup> F. Ost/M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Publications des Facultés universitaires Saint-Louis, Brussels 2002.

In this vein, courts contribute to give a direction to politics as they produce a synthesis of opposing trends and, in return, judicial outcomes can have wider societal and political consequences.<sup>25</sup> Since supranational courts act beyond the State, their case law circulates on a cross-border basis and produces transnational effects. Even if a case might only concern a single state or private actor, case law applies to all involved actors. Change is also produced as the courts (the judges and their bureaucratic machineries) adapt case law and written law to the social realities they are confronted with in the courtrooms, as they adapt their institutional interests with the evolution of the wider organisational frameworks they are part of and as they are confronted with the influence of external actors. In other words, if courts influence the course of politics and if social change can be traced back through the evolution of jurisprudence, the evolution of a given society cannot be reduced to, deduced from or explained by the normative contents of case law or any legal text.<sup>26</sup>

## 1. An Unexpected Encounter

### a) Courts in Context

The European courts were never supposed to meet. Not only do they belong to clearly distinct organisational settings, but they also have different vocations and working methods. The Luxembourg-based ECJ (and its Court of First Instance – CFI) is an EU institution and its original assignment is to uphold a process of economic integration among states. The ECourtHR (and its now extinct European Commission of Human Rights – EComHR) belongs to the Strasbourg-based Council of Europe. Its mission is to protect human rights within states. The main common point between the two European courts is their supranationality. The EU and the Council of Europe were assuredly created for similar political goals (European integration) and their membership increasingly overlaps. However, the means both organisations have been attributed to pursue this goal are so different and their institutional history is so closely tied that inter-institutional rivalry became just as unavoidable as the classic opposition between an “economic Europe”, embodied by the EU, and a “human rights Europe”, symbolized by the Council of Europe.

From a historical perspective, the creation of two separate supranational courts was not to be expected. Upon its creation in 1949, the Council of Europe was meant to become the main framework for regional integration, until two years later six more federally-minded governments<sup>27</sup> decided to deepen their co-opera-

<sup>25</sup> As the courts’ fragile institutional position requires the European judges to make constant articulations between existing rules and new or at least previously undisclosed social phenomena, radical change is structurally impossible if not supported by at least some, preferably elected, actors.

<sup>26</sup> E. D u r k h e i m, *De la division du travail social*, Paris 1994, 29.

<sup>27</sup> France, Germany, Italy, Belgium, Luxembourg and the Netherlands.

tion within the more functional framework of the European Coal and Steel Community (ECSC) – the cornerstone of the EU.<sup>28</sup> After the Schuman plan, which suggested to integrate the economies of European states in a specific economic sector, had been presented on 9 May 1950, the Council of Europe’s parliamentary assembly and the subsequent “Eden plan” presented by the British government tried to incorporate the ECSC into the Council of Europe. Both plans aimed to preserve the role of the Council of Europe and to avoid the multiplication of and rivalry between European organisations. They failed because of the resistance of the Six and Jean Monnet himself, who did not want to dilute the ECSC in a wider intergovernmental framework.<sup>29</sup> From this point of view, the creation of the ECSC appears to be an early form of “reinforced co-operation” or differentiation: it took place outside the intergovernmental Council of Europe framework, while the Six also remained members of the Strasbourg-based organisation. Since then, the relationship between the two organisations has mainly been characterised by rivalry and mutual distrust. By the end of the Cold War, their relationship has improved<sup>30</sup> and both organisations are now mostly considered to be complementary.<sup>31</sup> The EU and the Council of Europe also cooperate in some specific areas.<sup>32</sup> Yet, their relationship remains complicated. At the Council of Europe summit in May 2005, Luxembourg’s Prime Minister and exercising president of the EU J.-C. Juncker qualified their persisting rivalry as “stupid”.<sup>33</sup>

The two European courts work differently. The ECJ is not a human rights court, in the sense that few of its cases are human rights related, while the ECourtHR exclusively deals with human rights. The two courts also relate to the national level in rather different ways, for instance. Strasbourg is much more isolated than Luxembourg, since its main role consists in verifying whether or not there have been violations of the Convention at that level. Every time the Strasbourg judges sanction a state, they also reject a national court’s decision, since applicants only have access after their claim has been reviewed by all instances in the national system. Yet, the ECourtHR also depends on national courts to enforce the Convention at that level. Luxembourg has a similarly complex relationship with national courts. Whereas Strasbourg is a subsidiary “court of last appeal” for

<sup>28</sup> J. Gillingham, *Coal, Steel, and the Rebirth of Europe, 1945-1955. The Germans and French from Ruhr to Conflict to Economic Community*, Cambridge 1991; M.P.J. Lazzaro, *Les rapports entre la Communauté européenne et le Conseil de l’Europe*, Université Robert Schuman (Strasbourg III), Ph.D. thesis directed by J.-P. Jacqué, 1994.

<sup>29</sup> Gillingham (note 28), 232; D. Dinan, *Ever Closer Union. An Introduction to European Integration*, London 1999, 11-15.

<sup>30</sup> Council of Europe, *Recueil des textes régissant les relations entre le Conseil de l’Europe et l’Union européenne*, 4<sup>th</sup> ed., Strasbourg 2001.

<sup>31</sup> A. Clapham, *On Complementarity: Human Rights in the European Legal Orders*, *Human Rights Law Journal* 21, 8, 2000.

<sup>32</sup> See also the Joint Programmes between the Council of Europe and the European Commission, <<http://jp.coe.int/>>.

<sup>33</sup> *Le Monde*, *Le Conseil de l’Europe charge M. Juncker de réfléchir sur ses relations avec l’Union européenne*, 19.05.2005.

applicants, direct individual access to the ECJ is restricted and this court's relation with the national level is mostly based on less hierarchical court-to-court mechanisms. National courts can, and sometimes must, follow the preliminary ruling procedure. This procedure not only allows for a more coherent EU law, but Luxembourg can also give shelter to national courts, which sometimes forward those cases to Luxembourg which have reached deadlock on their level or which are politically too sensitive to be decided by them alone. In this vein, asking for obligatory advice at a supranational level is a means to circumvent judicial impasses. The ECJ is very eager for preliminary rulings. It is traditionally cautious in proceedings against member states for failure to fulfil an obligation, actions for annulment or actions for failure to act. Most of its history-making decisions are preliminary rulings. Thus, Luxembourg also depends on national courts and their willingness to forward cases, to accept the ECJ's decisions and to act as guardians of EU law in their countries. On the other hand, the ECJ has also been put under considerable pressure by national constitutional courts. In 1964, the ECJ declared the supremacy of European law over national law in the *Costa v. Enel* case (15.07.1964), after having imposed the principle of direct effect a year earlier (*Van Gend en Loos*, 05.02.1963). In 1970 the supremacy of European law over national constitutions in the *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* case (17.12.1970).<sup>34</sup> Many constitutional courts did not easily accept this principle. For instance, the German Constitutional Court, in its well-known *Solange I* decision of 29 May 1974 decided to retain the power to control all EU-related acts with regard to the question of whether or not they violate fundamental principles of the German Constitution. Similarly, Strasbourg has increasingly come under pressure to maintain highest standards of human rights protection in recent times. The European courts unexpected encounter took place when they were impelled to deal with a twofold discontinuity in the protection of human rights at the EU level.

## b) Europe's Binary Human Rights Discontinuity

With the progressive expansion of its competences, the EU has also become a potential violator of human rights. The European Commission, the Council of the EU, the European Parliament (EP), the ECJ and all other EU bodies now intervene in most areas of social life. As policy-making in Europe has been raised to another level, the protection of human rights has been slow to catch up. The European system of fundamental rights protection has two major limitations. Both can be located precisely at the EU level. First, there is a human rights deficit, as the treaties for a long time did not provide for an "internal" judicial control of fundamental rights at the EU level and this control remains limited even today. Secondly, in the absence of the EU's accession to the ECHR, there is also a human

<sup>34</sup> Alter (note 2); Dehousse, 1997, (note 2), 44-51.

rights gap, as there are no formal arrangements for an “external” human rights control of all EU institutions.

Europe’s binary human rights discontinuity has become increasingly evident as the EU’s competences have multiplied over the last twenty years. It is a consequence of the evolution of an integration process by which a political project was to be achieved through economic means. Experience of this functional way of organising regional integration has shown that this approach did not consider that the protection of fundamental rights applies to all spheres of governance.<sup>35</sup> Traditionally, some EU member states have also been reluctant to establish a general legislative and judicial competence with respect to human rights at the European level. Such a move would indeed give the EU a *droit de regard* on human rights in all areas of social life (e.g. prisons, armies, churches, police) and the prospect of bringing alleged violations before the European Court of Justice.<sup>36</sup>

By now, the EU has improved its “internal” fundamental rights record. For example, provisions on fundamental rights have been inserted into the EU treaties.<sup>37</sup> The treaties have also been increasingly subjected to the judicial control of the ECJ. Moreover, a Charter of Fundamental Rights has been drafted, directives related to fundamental rights have been issued,<sup>38</sup> European norms contain ever more fundamental rights clauses<sup>39</sup> and a fundamental rights agency is about to be set up. Yet, the expansion of the protection of fundamental rights should not lead to the conclusion that the EU has become a paragon of human rights virtue. The recent improvement of the protection of human rights at the EU level has to be assessed in the light of the point of departure of human rights at this level and in the light of its new political competences. Moreover, non-EU citizens tend to be excluded from the fundamental rights granted by the EU and some “new” liberties, such as the freedom of circulation of persons, paradoxically appear to be incompatible with the rights of foreigners.<sup>40</sup> Whereas European integration has transformed the perception of otherness in Europe, the EU now tends to apply the opposite standards to most foreigners, so that most human rights actors now call attention to the fact that the “remaining others”, whether they live in Europe or not, are paying the price of the success of the new Europeans’ freedom.

<sup>35</sup> J.-P. Jacqué, *Droit institutionnel de l’Union européenne*, Paris 2004, 54.

<sup>36</sup> J.-P. Jacqué, *Droits fondamentaux et compétences internes de la Communauté européenne*, in: *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, Brussels II 2004, 1010-1011.

<sup>37</sup> For instance, article 6 § 2 TEU states that “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 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”.

<sup>38</sup> For example, in 2000, the EU adopted two directives on anti-discrimination measures on the basis of article 13 TEC, which bans all discrimination based on sex, racial or ethnic origin, religion, disability, age and sexual orientation.

<sup>39</sup> Jacqué (note 36).

<sup>40</sup> D. Bigo/E. Guild, *La mise à l’écart des étrangers. La logique du Visa Schengen*, Cultures et Conflits – L’Harmattan, Paris 2003.

The fact that the EU now comes up with political and judicial guarantees of fundamental rights does not necessarily imply that EU institutions will not violate them while legislating, executing or adjudicating. Despite the rapid evolution of the ECJ's jurisdiction in recent times, it has not yet gained full access to the review of legislation in some areas – especially with regard to Justice and Home Affairs (JHA). Transnational co-operation in JHA is still in its early days, but police and judicial co-operation is one of the most rapidly developing policy areas since 9/11. Whereas the cross-border dimension led to suspicion on the side of national sovereignty defenders, recent political discourse and the ingredients of JHA policies have increasingly given rise to protests on the side of human rights organisations.<sup>41</sup> Contrary to fundamental rights as protected in the EU, new security policies apply to all persons. As Didier Bigo has pointed out, “because this freedom is endangered by the actions of others, it has to be secured, even if it could imply an un-freedomisation of others through the momentary suspension of their rights. In that view, strengthening our freedom is an action to stop and limit the freedom of others”.<sup>42</sup> Furthermore, individual access to the ECJ remains severely limited in general. As Ingolf Pernice has put it “whatever may be the reasons, based on sovereignty considerations or other, it does not seem tolerable to have European legislation or binding acts without appropriate judicial review”.<sup>43</sup>

This is also what brings about the systemic human rights gap at the EU level. The fact that the EU has committed itself to respecting those human rights granted by the ECHR does not imply that the Convention, though ratified by all EU member states, also legally binds the EU.<sup>44</sup> In contrast, all EU member states have now incorporated the Convention into domestic law. Consequently, acts that emanate from EU institutions appear to escape Strasbourg's control. Whereas Council of Europe membership used to be a certificate of good democratic behaviour and, as such a prerequisite for joining the EU, the EU now paradoxically shelters all member states from the Council of Europe's human rights court.

As the EU's powers have evolved beyond initial intent, the absence of adequate external judicial control has become increasingly problematic. Hence the usefulness of internal and external human rights guarantees. The intergovernmental agreement to make the EU adhere to the ECHR and its control mechanisms, as

<sup>41</sup> The main issues of content are the control of participants in manifestations to protect public order, automated access by law enforcement agencies to DNA, fingerprints and vehicle registration, armed “sky marshals” on flights, retention centres for immigrants and (joint) deportation flights.

<sup>42</sup> D. Bigo, *Liberty, Whose Liberty? The Hague Program and the Conception of Freedom*, paper presented at the conference *Implementing the Hague Program: Operational and Legislative Functions on Justice and Home Affairs*, CEPS, Brussels, 30 June and 1 July 2005, <<http://www.libertysecurity.org/article339.html>>.

<sup>43</sup> House of Lords, *The Future Role of the European Court of Justice. Report with Evidence*, European Union Committee, 6<sup>th</sup> report of session 2003 – 2004, London, The Stationary Office Limited, 2004, 37.

<sup>44</sup> J. Rideau, *Les garanties juridictionnelles des droits fondamentaux dans l'Union européenne*, in: S. Leclerc/J.-F. Akandji-Kombé/M.-J. Redor (eds.), *L'Union européenne et les droits fondamentaux*, Brussels 1999, 216.

laid down in the EU's constitutional treaty (article I – 9 § 2), is another important political step to deal with Europe's human rights conundrum. Whereas the European Parliament and Commission have regularly called for such accession from 1979 onwards,<sup>45</sup> EU member states have now finally provided for this step. While it is not sure if or under what form the constitutional treaty will be eventually ratified, both European courts, for their part, were already impelled to deal with Europe's binary human rights puzzle long before the governments agreed to do so.

### c) Working Out a Path

While the European courts are both trying to find a way to protect fundamental rights at the EU level, they reciprocally intrude into each other's legal order and initially did so rather clumsily. In order to reduce the human rights deficit, the ECJ reaches far beyond the shores of its legal order and fishes for inspiration in the ECHR, since human rights were absent from the EC treaties. Despite the absence of formal links between the ECHR and the EU, the ECourtHR throws out its nets way further than it was ever meant to in order to pull in the EU and close the human rights gap.

Although the European courts' actions created inter-jurisdictional tensions, they had no alternative. For its part, the ECJ has been pressed to guarantee the protection of fundamental rights at the EC level, as private litigants complained about the lack of protection of human rights at this level, but most importantly as national constitutional courts only accepted the supremacy of the European legal order under the condition that the latter ensure basic rights.<sup>46</sup> Put differently, the EU's painfully constructed legal order and the supremacy of EU law heavily depend on the ECJ's ability to protect human rights. In order to do so, Luxembourg borrowed out human rights in Strasbourg, but it initially did so without asking the ECourtHR.

As the EU grows larger in terms of competences and space, the ECourtHR's own influence mechanically declines since the rights protected by the ECHR only concern domestic law. If worst comes to worst, Strasbourg would run the risk of being sidelined by the EU, and with it the supranational protection of human rights. With the rise of the EU's role in the area of fundamental rights, fears arouse in Strasbourg that the ECJ could replace the ECourtHR as a human rights court. In this case, the universality of human rights would also be at risk. But, one thing is for sure: since the EC has been created, the ECourtHR has been confronted with the problem of an automatic loss of its jurisdiction over many areas of public activity whenever the EC/EU expanded its competences and created new legislation.

<sup>45</sup> O. de Schutter, L'adhésion de l'Union européenne à la convention européenne des droits de l'homme comme élément du débat sur l'avenir de l'Union, in: M. Dony/E. Briboš (eds.), L'avenir du système juridictionnel de l'Union européenne, Brussels 2002, 205.

<sup>46</sup> See the German constitutional court's above-mentioned *Solange* decision (29.05.1974) and the Italian constitutional court's *Frontini* decision (18.12.1973).

The only possibility to avoid such a scenario, where a new set of institutions not only escapes from the ECourtHR's control, but also sets up new norms that apply at the national level – thus risking to sideline Strasbourg's control even there –, was to gain access to the control of European law. So, in thirty years of careful jurisprudential work, the European judges tried to seize the EU and annex it to the Convention *via* EU related applications that were brought before their court.<sup>47</sup> Yet, in doing so, they also invited themselves to an area where some ECJ judges thought to be the only actors.

In Luxembourg, the ECourtHR's interest for the EU raised the question of whether its judges would agree to be subordinated by Strasbourg and run the risk of seeing their rulings be sanctioned by Strasbourg if they did not respect rights guaranteed by the Convention. Nothing is feared more in Luxembourg than the scenario of a disavowal of one of its judgements by Strasbourg. Such a sanction would imply that the ECJ is not up to the requirements of the national constitutional courts and that the latter could put into question the supremacy of EU law. Thus, the two courts have the same objective, i.e. to protect human rights at the EU level, but, from an institutional point of view, they do so for very different reasons.

## 2. Reciprocal Intrusions

### a) Borrowing Rights from the ECHR

The ECJ's emergence as a human rights actor was not to be expected at first. Confronted with the complaints of private litigants and the *r serve constitutionnelle* of the German and Italian constitutional courts, it was impelled to fill these gaps in a praetorian way in order to endorse the supremacy of EU law. In the *Stork* case (04.02.1959) the ECJ still refused to take into account human rights.<sup>48</sup> Under the pressure of national constitutional courts, the ECJ subsequently in-

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<sup>47</sup> In the mid-1970s the judges of the ECourtHR were for the first time confronted with applications directed against the European Communities. Apart from jurisprudential action, the Strasbourg court does not hesitate to intervene directly in political debates in the absence of a formal EU accession to the ECHR. For example, in January 2003, the ECourtHR's president called for the European Union to accede to the ECHR, after the European Council failed to sign the Draft Constitutional Treaty in December 2003.<sup>47</sup> The Court reiterated its call to accession on 27 April 2005, when it issued a memorandum with regard to the third summit of the Council of Europe on 16-17 May 2005. In this memorandum, the Court emphasised the importance of a fast EU accession to the ECHR, calling "on the Council of Europe, the European Union and the various member states to open negotiations in the near future on the EU's accession to the ECHR" in order to "minimise the period between the Charter's entry into force and the EU's accession to the ECHR". (Council of Europe, Third Summit of the Council of Europe. Memorandum by the European Court of Human Rights, <<http://www.echr.coe.int/Eng/EDocs/SummitCourtMemo.htm>, 27 April 2005>).

<sup>48</sup> *Stork*, a coal importer, took action against the High Authority on the basis that one of its decisions infringed fundamental rights protected by the German constitution.

creased the level of protection of fundamental rights and progressively became a jurisdictional protector of fundamental rights in the EU's legal order.<sup>49</sup>

Since the beginning of the 1970's, the ECJ has in particular borrowed the rights guaranteed in the framework of the ECHR in order to protect fundamental rights and (hence) assert its own role. By a "process of incremental valorisation",<sup>50</sup> the Convention's status has become increasingly prominent at the EU level. After having declared that Community acts should be compatible with the fundamental rights "enshrined in the general principles of community law and protected by the court" (*Stauder*, 12.11.1969, point 7), it confirmed this approach in *Internationale Handelsgesellschaft* (17.12.1970), when it declared the supremacy of European law over national constitutions. In this judgement the ECJ added that the protection of fundamental rights at the European level is "inspired by the constitutional traditions common to the member states" (point 4). The ECJ waited for France to sign the European Convention on Human Rights, on 3 May 1974, before mentioning the "various international treaties, including in particular the Convention for the protection of human rights and fundamental freedoms" eleven days later and that "international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law" (*Nold* decision, 14.05.1974, points 12 and 13). The *Nold* decision preceded the German Bundesverfassungsgericht's first *Solange* decision by two weeks. Since Karlsruhe did not take it into account, the ECJ judges had to push even further their guarantees for the protection of human rights.

Individual articles of the ECHR have been mentioned explicitly from 1975 onwards (since the *Rutili* decision, 28.10.1975, point 32). The ECJ has confirmed this move, for example, in the *Johnston* case (16.05.1986) when it noted that the principle of effective judicial control "is laid down in articles 6 and 13" of the ECHR (point 2), as well as in its *Heylens* judgement (15.10.1987) when it also referred to the same articles. On 22 October 1986, the German Constitutional Court abandoned its role as guardian of fundamental rights when it ruled that the guaranteed protection of German citizens' fundamental rights could be withdrawn "as long as" (*solange* in German) the ECJ provides equivalent protection.

<sup>49</sup> G. Cohen-Jonathan, Les rapports entre la Convention européenne des Droits de l'homme et les autres traités conclus par les Etats Parties, in: R. Lawson/M. de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers*, 3, Dordrecht 1994, 90-91; F.G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, *Texas International Law Journal* 38, 2003; Jacqué (note 35), 53-59; J.A. Frowein, *Der Straßburger Grundrechtsschutz in seinen Auswirkungen auf die nationalen Rechtsordnungen und das Gemeinschaftsrecht*, in: F.-J. Hutter, *Das gemeinsame Haus Europa*, 1998; J.A. Frowein, *Die Verklammerung der Europäischen Union als Verfassungsgemeinschaft mit der EMRK*, in: A. Donatsch/S. Trechsel, *Strafrecht, Strafprozessrecht und Menschenrechte*, Zürich 2002; G. Res, *Das Europarecht vor dem Europäischen Gerichtshof für Menschenrechte in Straßburg*, in: *Die europäische Verfassung im globalen Kontext*, 2004.

<sup>50</sup> D. Simon, *Des influences réciproques entre CJCE et CEDH: Je t'aime, moi non plus?*, in: *Pouvoirs* (note 6), 35.

Subsequently, the ECJ continued to emphasise the importance of fundamental rights. In 1989, the ECJ judges added that the European Convention on Human Rights has a “particular significance” (*Hoechst*, 21.09.1989). More recently, in the *P/S and Cornwall County Council* case (30/04/1996) the ECJ for the first time made a reference to the ECtHR’s case law. In the *Baustahlgewebe GmbH* case (17.12.1998), the ECJ also referred to the ECtHR’s case law on the right to a fair trial enshrined in article 6 of the ECHR. According to Gérard Cohen-Jonathan, the *Baustahlgewebe* decision is one of the most prominent examples where the court “directly and expressly relies on” Strasbourg’s jurisprudence and where the judges in Luxembourg “acted as genuine human rights judges”.<sup>51</sup>

Furthermore, the much commented *Schmidberger, Internationale Transporte und Planzüge* case (12.06.2003),<sup>52</sup> which confirmed the direction taken by the ECJ in its earlier *Familiapress* judgement (26.06.1997), is a good example of Luxembourg’s favouring of rights as protected by the ECHR – more specifically, freedom of expression – over economic rights – freedom of movement of goods – as granted by the EU treaties.<sup>53</sup> In the recent *Omega Spielhallen- und Automatenaufstellungs-GmbH* case of 14 October 2004, the ECJ also had to seek an equilibrium between fundamental liberties and human rights and opted for the latter.<sup>54</sup> Although, strictly speaking, the ECJ treats economic and fundamental rights as complementary, rather than establishing a hierarchy of rights,<sup>55</sup> there now exists a “*de facto* hierarchy” in favour of fundamental rights, according to an ECJ official.<sup>56</sup>

On 16 June 2005, the ECJ extensively used the ECtHR’s case law in making its already famous *Pupino* judgement, which introduced a direct effect of EU decisions in criminal matters. The judgement relies heavily on the Convention and its court’s work to justify its groundbreaking decision, which not only confirms the

<sup>51</sup> G. Cohen-Jonathan, *Aspects européens des droits fondamentaux*, Paris 2002, 184.

<sup>52</sup> See A. Alemanno, *À la recherche d’un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur. Quelques réflexions à propos des arrêts Schmidberger et Omega*, *Revue du Droit de l’Union européenne*, 2004; S. Kadelbach/N. Petersen, *Europäische Grundrechte als Schranken der Grundfreiheiten. Anmerkung zum EuGH-Urteil in der Rs. C-112/00, Schmidberger/Republik Österreich (Brennerblockade)*, *Europäische Grundrechte-Zeitschrift* 30, 22/23.

<sup>53</sup> T. Tridimas, *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?*, Social Science Research Network, Working Paper Series, 2004, <<http://ssrn.com/abstract=490603>>.

<sup>54</sup> Alemanno (note 52).

<sup>55</sup> In its decision, the Court argues that freedom of expression and freedom of movement are of equal constitutional ranking, but decided that the Austrian authorities could not be held responsible for a perturbation of international exchange of goods when it allowed an environmental association to organise a manifestation at the Brenner pass, which had the effect of blocking the circulation between Italy and Austria for 30 hours. The international transport company *Schmidberger* was among those who were blocked on the motorway linking Germany and Italy and sought damages from the Austrian authorities for their alleged failure to guarantee freedom of circulation.

<sup>56</sup> Interview at the ECJ (June 2005).

supremacy of EU law in Justice and Home Affairs, but also that the ECJ has an eye on the protection of fundamental rights in that area.<sup>57</sup>

Yet, on 18 July 2005 the German constitutional court, which in its 1993 *Maas-tricht* decision insisted that it still had jurisdiction to challenge EU acts if they extend the EU's competence or violate fundamental rights and reaffirmed its *Solange II* case law on 7 July 2000, chose to ignore the *Pupino* judgement when it declared void the European Arrest Warrant in a case where a German national was facing an extradition request from Spain on al-Qaida terrorist charges.<sup>58</sup> Karlsruhe did so on the grounds that the protection of fundamental rights was not sufficiently guaranteed. Although the ECJ went very far in its *Pupino* judgement, where it made an unusually wide interpretation of the treaties and where it used unusually careful formulations (direct effect in JHA is explicitly excluded by the EU treaty) for the sake of protecting human rights, it has not been able to temper the judges in Karlsruhe. The capsizing of the European Arrest Warrant in Germany, which also put a big question mark on this new judicial instrument all over Europe (and especially in Spain) is a reminder how much national constitutional courts can put the EU under pressure with regard to its ability to protect human rights, and explains why the ECJ has to apply the highest standards in this area.<sup>59</sup>

Generally, references to ECHR articles and case law are now quite commonplace in Luxembourg and the judges are much less cautious than they were a couple of years ago. For the 1974-1998 period, Elspeth Guild and Guillaume Lesieur referenced more than 70 ECJ judgements and opinions in which the ECHR appears.<sup>60</sup> Meanwhile, the ECHR's status has continued to evolve considerably in the EU's legal order. For the 2001-March 2003 period, Allan Rosas counted 37

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<sup>57</sup> The main issue was whether or not the Italian courts are obliged to interpret the national legislation on the procedure for taking testimonies from children who were victims of a crime in conformity with the EU's framework decision regarding the treatment of particularly vulnerable victims in criminal proceedings.

<sup>58</sup> According to the German constitutional court, "the Act encroaches upon the freedom from extradition (Article 16.2 of the Basic Law (*Grundgesetz – GG*)) in a disproportionate manner because the legislature has not exhausted the margins afforded to it by the Framework Decision on the European arrest warrant in such a way that the implementation of the Framework Decision for incorporation into national law shows the highest possible consideration in respect of the fundamental right concerned. Moreover, the European Arrest Warrant Act infringes the guarantee of recourse to a court (Article 19.4 of the Basic Law) because there is no possibility of challenging the judicial decision that grants extradition. Hence, the extradition of a German citizen is not possible as long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law" (Bundesverfassungsgericht, Press release no. 64/2005 of 18 July 2005 on the judgement of 18 July 2005 – 2 BvR 2236/04, Press office (2005) <[http://www.bundesverfassungsgericht.de/bverfg\\_cgi/pressemitteilungen/frames/bvg05-064e.html](http://www.bundesverfassungsgericht.de/bverfg_cgi/pressemitteilungen/frames/bvg05-064e.html)>).

<sup>59</sup> The German judges were clearly aware of the *Pupino* judgement. See the dissident opinion of judge Gerhardt, <[http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604)>.

<sup>60</sup> E. Guild/G. Lesieur, *The European Court of Justice on the European Convention on Human Rights. Who Said What, When?*, London 1998.

judgements of the ECJ and 22 judgements of the CFI that explicitly referred to fundamental rights.<sup>61</sup>

In short, the ECJ's use of the ECHR has evolved from very general references to an expanding integration of the Conventional *acquis* into its own case law. The ECJ has helped considerably in putting an end to the debate on the clash between the "Europe of human rights" and the "Europe of trade" by relying on the ECHR and the ECtHR's case law. It has shown that business does not trump fundamental rights and that these two supposedly separate "Europes" increasingly overlap, and can do so to the benefit of human rights. If the ECJ's eagerness to rely on the ECHR in order to improve the protection of fundamental rights sounds like good news, its application of the Convention has happened to be a source of some bewilderment in Strasbourg. Indeed, whereas the judges in Luxembourg are overzealous in their use of the ECHR they do not, however, feel bound by the Convention.

## b) Instrumentalising the ECHR

According to Denys Simon, the ECHR's status with regard to the European legal order has evolved from a situation of "gentle integration towards absorption, or [from a situation] of borrowing, towards appropriation".<sup>62</sup> In the absence of any formal EU accession to the Convention, the ECJ judges make a rather selective use of the ECHR. Rather than acknowledging they are bound by it, they frame the ECHR as a mere "source of inspiration", taken from the "general principles of law". This formulation, which the ECJ has introduced in its early fundamental rights-related decisions and which has subsequently been taken over by the EU treaties, is of strategic value. The ECJ always specifies that the observance of the general principles of law is ensured by itself. A direct reference to the ECHR would imply recognition of the pre-eminence of the ECtHR – which is to ensure the observance of the ECHR – whereas an indirect use of the ECHR is a way of keeping Strasbourg outside of its legal order. In this vein, the ECJ also refers to Strasbourg's case law "by analogy". This expression implies that the ECJ merely draws comparisons for the purpose of clarification and explanation and that the cases in Luxembourg remain clearly different from those in Strasbourg.

The ECJ might of course not have had the choice to do otherwise. It arguably has no obligation to bind itself to the ECHR, since the EU is not a contracting party to the ECHR. Strictly speaking, the EU need not subject itself to the obligations of the ECHR as long as it is not a contracting party to this convention.<sup>63</sup> As a result, the Court of Justice has always interpreted the Convention and its case law

<sup>61</sup> A. Rosas, Fundamental Rights in the Luxembourg and Strasbourg Courts, in: C. Baudenbacher et al. (eds.), *The EFTA Court: Ten Years on*, Oxford, 15 p., forthcoming.

<sup>62</sup> Simon (note 50), 37.

<sup>63</sup> *Ibid.*, 34.

rather freely.<sup>64</sup> The ECJ's increasing and ever more precise use of the Convention has rapidly turned out to be problematic. It has led to a situation where two supra-national courts interpret the same text in different contexts and, sometimes, in different ways, without possessing any formal instruments for coordination.

Because of the absence of formal links between the European Community and the Convention, the ECJ has occasionally ignored the Convention or pre-empted Strasbourg's case law when referring to (and thus interpreting) the ECHR.<sup>65</sup> Yet, there are no cases where Luxembourg did not respect Strasbourg's case law. For many lawyers, however, this situation of constant uncertainty is highly unsatisfactory.<sup>66</sup> Divergence of the two courts' case laws can notably lead to confusion at the national level.<sup>67</sup> National courts must apply communitarian and conventional law and case law. As both legal orders are superior to national law, some authors consider divergent case law to be a serious legal problem since in that case national judges face two different interpretations on similar issues without knowing which one to apply.

The above-mentioned *Hoechst* judgement is, for instance, a typical example of the risks inherent to Luxembourg's use of the ECHR. In its judgement, the ECJ gave an interpretation on individual dispositions of the European Convention on Human Rights before the European Court of Human Rights could make its opinion heard<sup>68</sup> and without, of course, consulting Strasbourg. Luxembourg also decided that respect for private life and home, as protected under articles 8 and 9 of the ECHR, does not apply to business companies, whereas Strasbourg later ruled that it does (*Niemietz v. Germany*, 16.12.1992). Similarly, regarding article 6(1) of the Convention and the right to a fair trial, the European Commission of Human Rights held that this article includes a right to protection against self-incrimination (*Saunders v. United Kingdom*, 14.05.1994, § 30), whereas the ECJ, in the *Orkem v. Commission* case, had already ruled the other way in 1989, in the absence of existing case law from Strasbourg. Later, the ECtHR confirmed the European Commission of Human Rights' decision in *John Murray v. United Kingdom* (08.02.1996), in *Saunders v. United Kingdom* (17.12.1996) and in various other

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<sup>64</sup> R. Lawson, Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg, in: R. Lawson/M. de Blois (eds.), *Essays in Honour of Henry G. Schermers*, 3. The Dynamics of the Protection of Human Rights in Europe, Dordrecht 1994, 227; G. de Kerchove, *Débats. Le contenu de la Charte*, *Revue universelle des droits de l'homme* 12, 1-2, 2000, 13; D. Spielmann, *Jurisprudence des juridictions de Strasbourg et de Luxembourg dans le domaine des droits de l'homme: conflits, incohérences et complémentarité*, in: P. Alston/M. Bustelo/J. Heenan (eds.), *L'Union européenne et les droits de l'homme*, Brussels 2001, 806.

<sup>65</sup> Spielmann, *ibid.*, 796-802.

<sup>66</sup> C. Turner, *Human Rights Protection in the European Community: Resolving Conflict and Overlap Between the European Court of Justice and the European Court of Human Rights*, *European Public Law* 5, 3, 1999, 453.

<sup>67</sup> E. Bribosia, *Le dilemme du juge national face à des obligations contradictoires en matière de protection des droits fondamentaux issus des deux ordres juridiques européens*, in: Dony/Bribosia (note 45), 265.

<sup>68</sup> Lawson (note 64), 234-235.

judgements.<sup>69</sup> On the whole, conflicting case law not only remains relatively rare,<sup>70</sup> but divergences have also diminished in recent years as a result of Luxembourg's readjustments.

For a couple of years, the ECJ has, however, shown motivation to avoid diverging case law with Strasbourg. In its "*PVC II*" judgement of 15 October 2002, the ECJ brought its case law into line with Strasbourg's jurisprudence on the right to protection against self-incrimination.<sup>71</sup> After a long development on the *Orkem* case, the ECJ notably stated that there "have been further developments in the case-law of the European Court of Human Rights which the Community judicature must take into account when interpreting the fundamental rights" (§ 274). Furthermore, in the *Roquette Frères* case (22.10.2002), the ECJ put an end to 13 years of diverging case law on the protection of the home with the ECourtHR by explicitly referring to Strasbourg's jurisprudence.<sup>72</sup>

Yet, the streamlining of the ECJ's case law did not necessarily entail that the ECJ would acknowledge any form of dependence on the ECourtHR. For a long time, the ECJ did not at all refer to individual dispositions and case law, precisely because it did not want to jeopardize its autonomy. Subsequently, it only made very careful use of Strasbourg's case law, framing it as general principles of law and multiplying rhetorical precautions in its judgements. It is only by these principles that the ECHR has indirectly been incorporated into the EU's legal order.

For example, in the *Baustahlgewebe* case, where the ECJ referred to the ECourtHR's case law for the first time, it made sure to do so only "by analogy" (point 29). In the *Roquette Frères* case, the ECJ directly referred to the ECourtHR's case law (point 29), but it did so only after having mentioned that the rights established in the ECHR are fundamental rights that form an integral part of the general principles of law protected by the ECJ (points 23 and 26). In its point 52, the judgement then refers to further ECHR case law "by analogy" again. In the *Orfanopoulos* judgement of 29 April 2004, Luxembourg has referred to an

<sup>69</sup> For example: *Servès I.J.L. and Others v. United Kingdom* (19 September 2000); *Heaney and McGuinness v. Ireland* (21 December 2000); *Quinn v. Ireland* (21 December 2000); *J.B. v. Switzerland* (3 May 2001,); *P.G. and J.H. v. United Kingdom* (25 September 2001); *Beckles v. United Kingdom* (8 October 2002); *Allan v. United Kingdom* (5 November 2002).

<sup>70</sup> Spielmann (note 64); F. Tulkens/J. Callewaert, La Cour de justice des Communautés européennes, La Cour européenne des droits de l'homme et la protection des droits fondamentaux, in: Dony/Bribosia (note 45).

<sup>71</sup> Joined Cases C-238/00 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P. *Limburgse Vinyl Maatschappij (LVM) and Others v. Commission*.

<sup>72</sup> "For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgement in *Hoehst*. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgement of 16 April 2002 in *Colas Est and Others v. France*, not yet published in: Reports of Judgements and Decisions, § 41) and, second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case (*Niemietz v. Germany*, cited above, § 31)."

ECourtHR case without using this safeguard (see point 99). Yet, the ECJ judges explicitly recalled their established case law on the Convention's place in the European Community. The recent *Omega Spielhallen- und Automatenaufstellungs-GmbH* case is a good example of the cautious wording the ECJ uses in most of its judgements when referring to the ECHR:

It should be recalled in that context that, according to settled case-law, fundamental rights form an integral *part of the general principles of law the observance of which the Court ensures*, and that, for that purpose, the Court draws *inspiration* from the constitutional traditions common to the Member States and from the *guidelines* supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has *special significance* in that respect (see, *inter alia*, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 *P Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71). [author's emphasis]

So, whereas the ECJ now *de facto* applies ECHR case law, it has not specified whether this is a binding endeavour. The evolution of Luxembourg's use of the ECHR is underpinned by two distinct, seemingly contradictory logics, which the ECJ has to balance out constantly. It is torn between its obligation to protect fundamental rights and its aspiration for institutional independence. Its current use of the ECHR is the solution to this problem. The balancing act consists in using the ECHR to guarantee the protection of fundamental rights while simultaneously blocking off the ECourtHR – which normally comes unavoidably with the ECHR. When the ECJ merely “draws inspiration” from the ingredients of the “general principles of law”, it tries to ensure itself of remaining the only court to interpret EU law. In Strasbourg, the ECJ's use of the ECHR is watched closely.<sup>73</sup> There is an increasing contentment with the recent evolution of Luxembourg's case law and some actors have noticed that the ECJ has become less painstaking when it frames its references to their case law. Yet, the ECJ is still far away from annexing itself to the Convention.

To wrap it up, whereas the ECJ invented the protection of fundamental rights at the EU level by instrumentalising (but surely not manipulating) the ECHR in order to ensure the supremacy of EU law (and thus the pre-eminence of its own role), it did not go too far because this would have endangered its institutional autonomy. Enthusiastic when it comes to drawing on the ECourtHR's work, it is equally careful not to get trapped as it fishes for inspiration beyond its territorial waters. As Lawson put it in his metaphor: “Ulysses may have tied himself to the mast, but this time he has made sure that the knots remain within his own reach.”<sup>74</sup>

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<sup>73</sup> Interview at the ECourtHR (February 2005).

<sup>74</sup> Lawson (note 64), 227.

Hence, the ECJ does not merely borrow from the ECHR. It also instrumentalises it for its own institutional needs, while simultaneously sneaking away from the ECourtHR's control, arousing fears in Strasbourg that the ECJ was not ready to give back the Convention. Seeing that the ECJ increasingly uses the ECHR and seemingly helpless judges in Strasbourg, some observers have already predicted the sudden death of a human rights court deprived of its normative foundations. Others have envisaged a complete separation of the EU and its member states from the Council of Europe.<sup>75</sup> Yet, Luxembourg's "à la carte" use of the ECHR<sup>76</sup> has not passed unnoticed in Strasbourg. During a joint interview with the ECJ judge Puissechet, J.-P. Costa, the Vice-President of the ECourtHR mentioned that the ECJ's dedication to the Convention caused some "perplexity"<sup>77</sup> in Strasbourg. Whereas the ECJ "vampirises"<sup>78</sup> the Convention, the ECourtHR has not remained inactive though.

### c) Domesticating the EU

While the ECJ has been careful not to draw the ECourtHR into its legal order, Strasbourg has penetrated the EU by means of its own case law. It has continuously retightened "Ulysses' knots" and tries to "domesticate" the EU, i.e. it increasingly treats it as if it were an internal politico-legal order on which it applies an external control. The EU has attracted Strasbourg's attention as it received applications alleging violations of the ECHR by the European Community. In almost thirty years of jurisprudential construction, the human rights judges have put the EU under considerable pressure. The ECourtHR has indeed not shied away from controlling human rights at the EU level. Yet, Strasbourg's interference in the EU's constitutional space has been a slow and gradual process, as the judges did not want to upset EU authorities and as EU-related requests dribbled in gradually.<sup>79</sup>

It was by the end of the 1970's that Strasbourg was confronted with an EC-related question for the first time. In 1978, in the *CFDT v. the EC and, in a subsidiary manner, the collective of their Member States and the Member States taken individually* case (10.07.1978), the applicants simultaneously directed their request against the EC as such, but also against all EC member states taken collectively and individually. The European Commission of Human Rights decided not to have ju-

<sup>75</sup> A.G. Toth, *The European Union and Human Rights: The Way Forward*, *Common Market Law Review* 34, 1997; for an overview of all possible scenarios see J.-Y. Carlier, *La garantie des droits fondamentaux en Europe: pour le respect des compétences concurrentes de Luxembourg et de Strasbourg*, *Revue québécoise de droit international* 13, 1, 2000.

<sup>76</sup> F. Tulkens, *L'Union européenne devant la Cour européenne des droits de l'homme*, *Revue universelle des droits de l'homme* 12, 1-2, 2000.

<sup>77</sup> J.-P. Puissechet/J.-P. Costa, *Entretien croisé des juges français*, in: *Pouvoirs* (note 6), 164.

<sup>78</sup> Simon (note 50).

<sup>79</sup> M. Delmas-Marty, *Désordre mondial et droits de l'homme*, in: *Libertés, justice, tolérance* (note 36), I, 2004, 645.

risdiction because the EC is not a contracting party to the ECHR. In its decision it also stated that the “collective of the EC’s member states” is an unknown notion and specified that the Council of Ministers is not an institution that falls under its jurisdiction. While the Commission was more hesitant with regard to the individual responsibility of the EC member states, it also rejected this way of approaching EC acts on the grounds that France had not yet accepted the right to individual recourse with regard to the ECHR at that moment (France only did so in 1981). Subsequently, the EComHR reiterated this jurisprudence in various cases related to the EC.<sup>80</sup>

In the *Etienne Tête v. France* case (09.12.1987) concerning the European elections, the Commission clarified its positions with regard to the EC member states’ responsibility for EC acts by stating that the contracting parties could not escape the ECHR provisions as they accede to other international organisations. The Commission more precisely argued that the conclusion of international treaties could not set the EC member states free from obligations previously contracted in the framework of the ECHR. Whereas it did not exclude the transfer of competences to international organisations, it held that the rights granted by the ECHR must continue to be respected.<sup>81</sup>

In the *M & Co. v. The Federal Republic of Germany* case (09.02.1990), the Commission confirmed its jurisprudence by stating that the EC member states remain responsible for the implementation of Community acts and cannot escape the guarantees foreseen by the ECHR. It also declared it was incompetent to examine procedures and decisions of EC institutions. In this affair, the Commission brought in a new principle with regard to the hierarchical relationship between the two legal orders. It introduced a “*solange*” (i.e. a principle of equivalent protection comparable to the German constitutional court’s 1986 *Solange* decision) in which it declared that a transfer of competences to the EC is not excluded “as long as” fundamental rights receive an equivalent protection at the EC level. Whereas the German court does not exclude to control EU acts on their respect of fundamental rights, the EComHR gave the impression of having slightly “amputated its role”<sup>82</sup>

<sup>80</sup> *Dalfino* (8 Mai 1985); *Dufay* (19 January 1989); *De la Fuente* (29 Mai 1991).

<sup>81</sup> A part of the legal doctrine backs the Commission’s move by referring to article 30 of the Vienna Convention on the Law of Treaties which states that “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” (see A. Bultrini, *La responsabilité des Etats membres de l’Union européenne pour les violations de la Convention européenne des droits de l’homme imputables au système communautaire*, *Revue trimestrielle des droits de l’homme*, 2002). Jean-Paul Jacqué nevertheless recalls that France, for instance, had ratified the Treaties of Rome long before it ratified the ECHR in 1974 (J.-P. Jacqué, *La Cour de Justice, la Cour européenne des droits de l’homme et la protection des droits fondamentaux. Quelques observations*, in: *Dony/Briosia* (note 45)). So, although the EComHR forcefully puts forward this argument, its attempt to affirm its legal pre-eminence has lacked conviction. Nevertheless, Strasbourg has regularly reiterated its claim, maybe because most EU member states ratified the ECHR before the treaties of Rome.

<sup>82</sup> Bultrini (note 81), 16.

– although other observers consider that the Commission's decision should not be interpreted too restrictively.<sup>83</sup>

The European Court of Human Rights only entered the game during the mid-1990's and considerably reinforced the interaction between Strasbourg and the EU. In the *Procola v. Luxembourg* case (01.07.1993) the Court did not refrain from controlling if Luxembourgish texts about milk quotas based on two EC regulations violate the right of property granted in the first article of the first additional protocol to the ECHR. Later on, in *Cantoni v. France* (15.11.1996), the European Court of Human Rights was confronted with the control of the conformity of an EC directive, with the ECHR. It decided that a national regulation taking up word for word the phrasing of an EC directive does not escape the influence of article 7 of the European Convention on Human Rights (§ 30) and the Court rejected the "Communitarian exception" proposed by the defence.<sup>84</sup>

Besides, in this affair the ECourtHR also found itself obliged to decide over a potential conflict between a norm originating from the Community system and a norm established by the ECHR. Had the court discovered an incompatibility of article L.511 of the French Public Health Code, which replicates the EC directive 65/65 with article 7 of the European Convention on Human Rights, it would probably have censored this directive and would have indirectly carried out a control over the conventionality of an EU directive.

Hence, Strasbourg has not refrained from having a very interested look into Community matters. A general feature of the evolution of Strasbourg's approach with regard to the EU is its tendency to monitor EU activities in an increasingly detailed manner, before concluding that EU-related applications were inadmissible. Recently, however, the Court has become more insistent and switched from virtual control to intrusion.

#### d) Annexing the EU

By the end of the twentieth century, the ECourtHR made it clear that it had no intention of waiting until the EU finally adhered to the European Convention in Human Rights. In 1999, Strasbourg made a decisive move with its *Matthews* judgement (18.02.1999). The case was about deciding whether the United Kingdom could be held responsible for not having organised European elections in Gibraltar in 1994. The British government considered that it could not be held responsible for the acts adopted by the Community, especially since the case involved an EU institution. However, the Court concluded that the United Kingdom (as well as all the other EU member states) was responsible for the consequences of the Maastricht Treaty (point 33 of its judgement). The *Matthews* case not only shows that Strasbourg feels responsible for controlling EU legal acts, but

<sup>83</sup> J.-P. Jacqu e, Communaut  europ enne et Convention europ enne des droits de l'homme, in: L'Europe et le droit. M langes en hommage   Jean Boulois, Paris 1991, 339.

<sup>84</sup> Tulkens (note 76), 54.

also that it is able to condemn a member state (in *Cantoni* the court did not find a violation of the ECHR). Whereas Strasbourg had been hesitant on the member states' individual responsibility since the *CFDT* affair, the *Matthews* case is the first one where an EU member state has effectively been sanctioned for an EU-related issue.<sup>85</sup>

In *Matthews*, the incriminated acts are not ordinary European acts. As Françoise Tulkens – a judge at the ECourtHR – put it, the Court “clearly established its jurisdiction to control the respect of fundamental rights in the texts of constitutional nature”.<sup>86</sup> As the Court indicates in its point 33, the act in question is a treaty concluded by the member states in the framework of the EC and the treaty of Maastricht is not a Community act either, but a treaty by which the revision of the existing treaties was realised. Besides, the Court did not neglect to specify that neither the Maastricht Treaty, nor the 1976 act regarding the elections of the European Parliament could be subject to judicial control by the Court of Justice.<sup>87</sup>

Subsequently, in the *T.I. v. United Kingdom* decision (07.03.2000 – inadmissible), the ECourtHR reiterated that the EU member states have to stay in line with the ECHR when they apply the EU's Dublin Convention on asylum policy – an area where member states “give the impression that they wish to re-write the rules to get rid of inconvenient human rights issues”.<sup>88</sup> Lately, the ECourtHR has seen an inflation of applications for alleged EU-related violations of the ECHR. According to a court official in Strasbourg, more or less twenty EU-related cases are still waiting to be decided on.<sup>89</sup> As a consequence of the *Matthews* judgement, EU-related requests are now increasingly directed against the EU member states taken collectively, on the basis that the latter are responsible for the acts of international

<sup>85</sup> O. de Schutter/O. L'Hoest, La Cour européenne des droits de l'homme juge du droit communautaire : Gibraltar, l'Union européenne, et la Convention européenne des droits de l'homme, Cahiers de droit européen, 36<sup>e</sup> année, 1-2, 2000, S. Winkler, Der Europäische Gerichtshof für Menschenrechte, das Europäische Parlament und der Schutz der Konventionsgrundrechte im Europäischen Gemeinschaftsrecht, Europäische Grundrechte-Zeitschrift 28, 1/3, 2001, 18-27; C. Busse, Die Geltung der EMRK für Rechtsakte der EU, Neue juristische Wochenschrift 53, 2000, 15.

<sup>86</sup> Tulkens (note 76), 55.

<sup>87</sup> The Amsterdam treaty, which reinforces the competences of the Court of Justice, was not yet into force at that moment. Since the Amsterdam treaty the jurisdiction of the European Court of Justice (ECJ) under the Treaty of the European Community (TEC) applies explicitly to Article 6(2) TEU with regard to the action of the EU institutions (article 46 TEU). Yet, the ECJ still does not have the capacity to rule invalid primary law.

<sup>88</sup> E. Guild, Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures, European Law Review 29, 2004, 218.

<sup>89</sup> Interview at the ECourtHR (February 2005). See for example: *Lau v. Germany and CEE* (request no. 62298/00); *Connolly v. 15 EU Members States* (request no. 73274/01); *Biret International SA v. 15 EU Members States* (request no. 13762/04); *West and Hunter v. United Kingdom* (request no. 338/03); *Orme and others v. Belgium* (request no. 38063/02); *MacDonald v. United Kingdom and others* (request no. 338/03); *Gasparani v. Belgium and Italy* (request no. 10750/03); *Delbos and others v. France* (request no. 60819/00); *Behrami v. France* (request no. 71412/01). Moreover, in April 2005, the former Stern reporter H.M. Tillack made public his intention to take Belgium to Strasbourg, after the Belgian police searched his office on the request of the European Commission's anti-fraud office OLAF.

institutions to which they have delegated political and legal authority. In the absence of an EU accession to the ECHR, “directing the requests against the fifteen member states is without a doubt a way to show that there is some kind of uneasiness [...] for the lack of being able to direct these requests against the Community”.<sup>90</sup>

To this day, the ECtHR has not sanctioned any of these acts. Yet, the Court has not pronounced itself on its jurisdiction *ratione personae* either, i.e. on the question whether or not the court can accept a request related to a violation by a party that has not adhered to the ECHR as such. Like *Cantoni* and *Procola*, all cases directed against the EU member states taken collectively have been rejected on the grounds that the requests were unfounded *ratione materiae*, i.e. on the grounds that the ECHR did not apply to this matter – either because there was no violation or because the alleged act did not fall under the scope of the Convention.

In the *Soc. Guérin Automobiles v. the 15 EU Member States* case (04.07.2000), as well as in the *Segi e.a.* and *Gestoras Pro Amnestia* joint cases – on the EU’s policy with regard to “terrorist organisations and persons” – (23.05.2002) and *Senator Lines* (10.03.2004), which were also directed against all EU member states taken collectively, the court also declared the requests inadmissible *ratione materiae*, without going into the question of whether or not it was actually allowed to deal with EU-related questions. Moreover, as Nino Karamoun has pointed out, Strasbourg explicitly refuses to exclude the possibility of holding EU member states responsible for EU acts in the *Guérin Automobiles* affair (see point 69 of the judgement).<sup>91</sup>

In the longstanding *Emesa Sugar N.V. v. The Netherlands* case, where an ECJ decision and the role of its advocate general were questioned and had to face a rather unfavourable jurisprudence,<sup>92</sup> the ECtHR declared the application incompatible *ratione materiae* in January 2005 and did “not find it necessary” to deal with the *ratione personae* aspect of this affair in which the Netherlands had to answer for a supranational act. So, the Court no longer pronounces itself on its “intentions”, before rejecting requests *ratione materiae* and leaves open the question

<sup>90</sup> Tulkens (note 76), 56.

<sup>91</sup> N. Karamoun, Le contrôle effectué par le juge de Strasbourg sur le droit communautaire: d’un paradoxe à l’autre ..., in: O. Delas/ R. Cote/F. Crepeau/P. Leuprecht (eds.), *Les juridictions internationales: complémentarité ou concurrence?*, Brussels 2005, 95.

<sup>92</sup> F. Benoît-Rohmer, L’affaire *Emesa Sugar*: L’institution de l’avocat Général de la Cour de justice des Communautés européennes à l’épreuve de la jurisprudence Vermeulen de la CEDH, *Cahiers de droit européen* 401, 2001. The company complained that it had been deprived of a fair hearing because in the proceedings before the ECJ on a request for a preliminary ruling it had not been allowed to respond to the opinion of the advocate general. M. Breuer, *Offene Fragen im Verhältnis von EGMR und EuGH. Zur Entscheidung des EGMR im Fall Emesa Sugar*, *Europäische Grundrechte-Zeitschrift* 8/10, 2005; J. Kott, *Die Institution des Generalanwalts im Wandel – Auswirkungen der Rechtsprechung des EGMR zu ähnlichen Organen der Rechtspflege in den Mitgliedstaaten*, in: *Internationale Gemeinschaft und Menschenrechte – Festschrift für Georg Ress zum 70. Geburtstag am 21. Januar 2005*, Köln 2005.

of whether or not it could eventually hold the 15 (now 25) responsible for human rights violations emanating from the EU level.

What it does in all its EU-related decisions is to undertake a very detailed scrutiny of EU law.<sup>93</sup> Above and beyond the question of Strasbourg's jurisdiction, it appears that its judges have been scanning the EU for human rights violations for a very long time already and that they do so in all policy areas.

On 30 June 2005, the *Bosphorus Airways v. Ireland* made its latest move forward. In this case the applicant maintained that the manner in which Ireland implemented the sanctions regime against the FRY, which was based on an EC regulation, had violated its rights as guaranteed under the Convention. Although the court unanimously decided to a non-violation of the ECHR, it seized the occasion to refine its *M & Co* jurisprudence. Even if the judges never comment on pending cases, the debates preceding their decision appear to have been characterised by a disagreement on whether or not the *M & Co* jurisprudence should be overturned or whether or not the *Matthews* jurisprudence is extendable to all other EU-related cases.<sup>94</sup> The final judgement appears to be a compromise between these two approaches. In point 155 of its judgement, the court decided to maintain its "presumption of equivalent protection" as elaborated in *M & Co*, but that "any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection". In point 156, the court states that it presumes that an EU member state will not depart from the Convention when it implements EU acts and that "any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient". In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Loizidou v. Turkey*). Put differently, the ECtHR is willing to wait until the EU has formally adhered to the ECHR before treating it in the same way as the Convention's contracting parties, but it has also declared that it could sanction member states for EU-related acts if they violate the ECHR. Furthermore, in their joint concurring opinion the judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki "clarify" that the judgement

"concludes that the applicant company's complaint is compatible not only *ratione loci* (which was not contested) and *ratione personae* (which was not in issue) but also *ratione materiae* with the provisions of the Convention. Thus, the Court clearly acknowledges its jurisdiction to review the compatibility with the Convention of a domestic measure adopted on the basis of a European Community Regulation and, in so doing, departs from the decision given in *M. & Co. v. the Federal Republic of Germany* (...) It has now been accepted and confirmed that the principle that Article 1 of the Convention "makes no distinction as to the type of rule or measure concerned and does not exclude any part

<sup>93</sup> D. Spielmann, Un autre regard: la Cour de Strasbourg et le droit de la Communauté européenne, in: Libertés, justice, tolérance (note 36), 1458.

<sup>94</sup> Interviews at the ECtHR (February 2005).

of the member States' 'jurisdiction' from scrutiny under the Convention" (*United Communist Party of Turkey and Others v. Turkey* (...)) also applies to European Community law. It follows that the member States are responsible, under Article 1 of the Convention, for all acts and omissions of their organs, whether these arise from domestic law or from the need to fulfil international legal obligations."

Even though they emphasise that the presumption of equivalent protection can be rebutted if the human rights protection is "manifestly deficient", they also regret that Strasbourg tends to limit itself to an *in abstracto* review of the EU's fundamental rights protection system<sup>95</sup> – especially because "the Union has not yet acceded to the European Convention on Human Rights and that full protection does not yet exist at the European level" (point 3). In conclusion, they maintain that Strasbourg has to "remain vigilant".<sup>96</sup> From now on, the EU no longer enjoys what has previously been qualified as a "total immunity" with regard to the ECHR.<sup>97</sup>

At the end of the day, it appears that an external actor has invited itself into the EU's legal order. The ECtHR has managed to get the EU exactly where it wants it to be: it has been tied to the ECHR. Strasbourg has been able to express itself on all possible EU matters. Besides institutional questions, it had to deal with the EU's economic and social policies, with questions of democracy and asylum policy in the EU, with the way it deals with terrorism and how it applies international sanctions. Moreover, the ECtHR not only feels responsible when its member states incorporate EU law into domestic law, but also for purely supranational acts. Strasbourg meticulously scrutinizes the EU's activities and it has also proved to be able to rule on the conformity of EU acts with the ECHR. Thus, the ECtHR has played an important part in solving Europe's binary human rights puzzle. With the *Bosphorus* judgement, Strasbourg has found a way to wait for a formal EU accession, while confirming at the same time that it can intervene at the EU level. In Strasbourg, it is now sometimes argued that the ECtHR has carried out a "*de facto* annexation" of the EU to the Convention.<sup>98</sup>

The ECtHR judges have been patient enough to avoid a scenario of a "forced accession". Whereas they don't have to wait for the EU to join, ferocious incursions into the EU would indeed have been counterproductive. As a result of the two courts' "reciprocal actions"<sup>99</sup> on their respective legal orders, they also came to interact more directly. As each court's respective mission intersects with

<sup>95</sup> "From this procedural perspective, the judgement minimises or ignores certain factors which establish a genuine difference and make it unreasonable to conclude that "equivalent protection" exists in every case." (point 3).

<sup>96</sup> "Thus, in order to avoid any danger of double standards, it is necessary to remain vigilant. If it were to materialise, such a danger would in turn create different obligations for the Contracting Parties to the European Convention on Human Rights, divided into those which had acceded to international conventions and those which had not." (point 4).

<sup>97</sup> F. K r e n c, La décision Senator Lines ou l'ajournement d'une question délicate, *Revue trimestrielle des droits de l'homme* 61, 2005, 124.

<sup>98</sup> Interviews at the ECtHR (June 2002 and February 2005).

<sup>99</sup> G. S i m m e l, *Sociologie. Etudes sur les formes de la socialisation*, Paris 1999.

the other court's institutional priorities, any court case related to the EU and fundamental rights immediately turns into an inter-institutional challenge. As jurisdictional guardians of their legal orders, the European courts are wary of their sovereignty and they are both highly armed to protect their respective *chasse gardée* against any trespassers. However, their relationship has considerably changed in recent years because it turned out that, despite remaining tensions, the two courts have common interests as well.

### 3. Entangled Courts

#### a) A Contingent Linkage

The EU legal order is a hard nut to crack. The European Court of Human Rights has regularly given the ECJ opportunities to worry by progressively interfering into its legal order, thus questioning its monopoly on the interpretation of Community law. Since applicants increasingly drag EU member states to Strasbourg, the ECtHR is now likely to intervene on all EU matters. As a second supranational court marches in at the EU level, the ECJ no longer remains the sole interpreter of EU law. The ECJ did not let this happen without resistance though. Luxembourg has been confronted twice with issues directly linked to the ECtHR and the role this court plays within the EU. Intentionally or not, its decisions have had the effect of blocking the ECtHR's access to the EU each time. For its part, Strasbourg has been inclined to retighten the knots somewhat more firmly afterwards.

In the ECJ's famous "opinion 2/94" (28.03.1996) on the question of whether or not the EC could accede to the ECHR, Luxembourg deemed that in the "actual state of the Community law, the Community does not have the competence to adhere [to the ECHR]" and that such an accession requires a revision of the treaties by the member states "because of its constitutional scope". It had been asked to issue this opinion by the Council of Ministers. The latter was unable to reach an agreement on this question, which had been put on the agenda by the Commission in 1990, and referred the question to Luxembourg.<sup>100</sup> Because governments did not agree, the ECJ had the occasion to intervene directly in an ongoing political debate in which its own fate was at stake. Importantly, the EU treaties hold that a negative opinion by the Court obligatorily requires a treaty revision if the policy in question is to be adopted.<sup>101</sup>

<sup>100</sup> O. de Schutter/Y. Lejeune, L'adhésion de la Communauté à la Convention européenne des droits de l'homme. A propos de l'avis 2/94 de la Cour de justice des Communautés, Cahiers de droit européen 32, 5-6, 1996; de Schutter (note 45).

<sup>101</sup> In its article 300 § 6 (formerly article 228 § 6), the EC treaty establishes a co-operation procedure between the ECJ and the other EU institutions, where "the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion

Given that the ECJ judges' deliberations remain secret, it is impossible to find out whether or not those judges who voted in favour of opinion 2/94 consciously intended to protect their legal order from the ECourtHR's interference. For a judge in Luxembourg who was not among the judges who made that decision "the underlying intention [of opinion 2/94] was very clearly to avoid being subjected to Strasbourg".<sup>102</sup> On the one hand, the ECJ seems to have favoured its institutional interests over the improvement of the protection of human rights in Europe. Given that several member states, and predominantly the United Kingdom at that moment, openly resisted the EU's accession,<sup>103</sup> the judges must have known that they did not issue a letter of invitation to Strasbourg when they imposed a treaty revision on this issue. The ECJ came under heavy attack from the doctrine where it was criticised for being a political judgement<sup>104</sup> – at least by those legal scholars who were in favour of such an accession.

On the other hand, it is also clear, however, that the judges might not have been able to act differently. A positive opinion 2/94 would have been a political judgement as well. The ECJ might not have wanted to decide on an issue where member states did not take responsibility when they could have. Very symbolically, the judges handed the question back to the governments, when they issued their opinion a day before the opening of the Intergovernmental Conference (IGC) leading to the Amsterdam treaty. It is rare to see non-majoritarian institutions anticipate political decisions at a moment where governments are preparing to take important political steps. On the eve of an IGC, which was to considerably enhance the ECJ's power, no different outcome was to be expected.

In the absence of political agreement, the Amsterdam and the Nice treaties subsequently ignored the question of an EU/EC accession to the ECHR. Intentionally or not, the ECJ played an important role in this episode, which left the ECourtHR standing outside of the EU's front door. Although it is not sure whether this door was slammed or whether it merely remained closed as it was before, the ECHR had, for its part, already been received with honours in the EU and the ECJ's own autonomy remained intact. Opinion 2/94 did not hold Strasbourg back from seeking a better hold on Community law though. On the contrary, Strasbourg sneaked in by the backdoor when it issued two major rulings right after Luxembourg had given its opinion. From an inter-institutional point of view, the *Cantoni* and *Matthews* cases appear to be Strasbourg's retort to the ECJ's decision that severely blocked the ECourtHR's control and access to the EU. Only a couple of months after the ECJ had issued its decision on the impossi-

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of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union" (article 48 establishes the conditions for Treaty revisions).

<sup>102</sup> Interview at the ECJ (June 2005).

<sup>103</sup> de Schutter/Lejeune (note 100); de Schutter/L'Hoest (note 85).

<sup>104</sup> P. Wachsmann, L'avis 2/94 de la Cour de justice relatif à l'adhésion de la Communauté européenne à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, *Revue trimestrielle de droit européen* 32, 3, 1996.

bility for the EU to accede to the ECHR in March 1996, Strasbourg “marked a decisive point”<sup>105</sup> with *Cantoni* in November 1996. Similarly, Dean Spielmann has interpreted this judgement as a “warning shot”.<sup>106</sup> A couple of months later, the ECJ very symbolically referred to Strasbourg’s case law a third time in its *Familiapress* judgement (after it had already done so the above-mentioned *P/S and Cornwall County Council* and *Procédure pénale v. Ruiz Bernaldez*, 28.03.1996) by referring to Strasbourg’s case law in (28.03.1996). In February 1999, Strasbourg made another “key judgement”<sup>107</sup> with *Matthews*, one of the court’s first judgements after Protocol 11 came into effect in November 1998, strengthening the Court’s autonomy and powers and abolishing the EComHR.<sup>108</sup> With the *Matthews* judgement, which was rather controversial even for the judges in Strasbourg (i.e. the UK and Czech judges dissident opinion), Strasbourg gave its own opinion on the ECJ’s opinion by annexing the EU via its member states. At the ECJ, an official admits that “*Matthews* was an annoying judgement round here”.<sup>109</sup> Right after Strasbourg’s *Matthews* judgement, the ECJ made its *Baustahlgewebe* decision in December 1998. Taking the initiative into its own hands, the European judges in Strasbourg extended their dominion at a moment when the EU member states disagreed on the EU’s accession to the ECHR.

The second example of the two courts’ direct jurisprudential interaction has been a facedown between the ECourtHR and the ECJ’s Court of First Instance in the *Senator-Lines* affair. The “long awaited”<sup>110</sup> ruling of the Strasbourg court on *Senator-Lines*, a request which was directed against the 15 member states, ended in a rather unexpected way. In this case, the ECourtHR had to deal with a fine inflicted by the European Commission and to verify if there was a violation of the articles 6 and 13 of the ECHR.<sup>111</sup>

Before even being able to rule on its admissibility, the ECourtHR was forced to cancel the hearing,<sup>112</sup> because on 30 September 2003, three weeks before the

<sup>105</sup> Interview at the ECourtHR (June 2002).

<sup>106</sup> Spielmann (note 64), 805.

<sup>107</sup> Interview at the ECourtHR (June 2002).

<sup>108</sup> O. de Schutter, La nouvelle Cour européenne des droits de l’homme, Cahiers de droit européen 34, 3-4, 1998.

<sup>109</sup> Interview at the ECJ (June 2005).

<sup>110</sup> D. Calonne, En attendant Senator Lines ... Réflexion sur une protection plurielle des droits de l’homme en Europe, Institut européen de l’Université de Genève, Publications euryopa, Geneva, 2003; also see L. Burgorgue-Larsen, *Senator Lines c. les 15 Etats de l’Union européenne*, DR, du 10 mars 2004, in: Chronique de la Cour européenne des droits de l’Homme (J.F. Renucci, ed.), Recueil Dalloz 35, 7 octobre 2004.

<sup>111</sup> The shipping company Senator Lines alleged a violation of article 6 of the ECHR (access to court), since it had to pay a fine before a decision was taken in the substantive proceedings before the Court of First Instance in Luxembourg. It claimed that this would have resulted in the insolvency and liquidation of the company before the issues were determined by Luxembourg.

<sup>112</sup> Council of Europe, Cancellation of hearing in the case, *Senator Lines GmbH v. the 15 Member States of the European Union*, Press release issued by the Registrar, 16.10.2003, <<http://www.echr.coe.int/Eng/Press/2003/oct/SenatorLinescancelled.htm#fn>>.

ECourtHR's planned decision, which was due to take place on 22 October 2003, the European Court of First Instance in Luxembourg decided to set aside the fine of 273 million euros imposed on *Senator-Lines* (and 15 other companies) by the European Commission (*Atlantic Container Line and Others v. Commission*, joined cases T-191/98 and T-212/98 to T-214/98). A couple of months later, on 10 March 2004, Strasbourg came back to the *Senator Lines* case. It then decided that the application was inadmissible by declaring that the applicant company could not claim to be a victim of a violation of the ECHR as there was now clearly no violation left, after the annulment of the fine. As a result of the tensions between the judges in Strasbourg, the *Senator Lines* decision is written in ambiguous terms. In its final assessment the court points out that "the facts of the present case were never such as to permit the applicant company to claim to be a victim of a violation of" the ECHR. Yet, because of the CFI decision of 30 September 2003, it also rejects the arguments of the applicant "whatever the merits of the other arguments in the case".<sup>113</sup>

Once again, it is hard to tell if this last minute fine quashing by the CFI was meant to avoid a further move from the ECourtHR to enhance its grip on the EU or if this was an unintentional side effect. In Strasbourg, the judges immediately switch from legal to diplomatic mode when questioned about *Senator Lines*. Out of four judges who took part in the *Senator Lines* affair in Strasbourg, all consider that they have "no problem at all" with Luxembourg. A first judge admitted that he felt "relieved" by the CFI's "*deus ex machina*" decision. Then again, he considered that it could also have been a unique opportunity to overturn the *M & Co* jurisprudence as there "clearly was a governmental responsibility". Another judge stated that "a political interpretation of the CFI's decision could be made" and that "some judges were satisfied, but others did not appreciate the decision which led to some frustration" in Strasbourg. A court official considered that "it is clear that the CFI took the decision to spare the Court from the heavy task of ruling on this case". "With time passing", another judge "now acknowledges the fact that it might have been a coincidence. But, coincidence or not coincidence, the decision did not make much impression." A judge who took part in the judgement at the CFI in Luxembourg did not want to answer the author's – admittedly intrusive – question whether or not this ruling might have had anything to do with Strasbourg.<sup>114</sup> For a legal scholar it is obvious that this case had become "too politi-

<sup>113</sup> Whereas the English version uses the word "merits" – which in common law is synonymous to "propriety", the French version of the judgement is also very explicit when it employs the word "*bien-fondé*" – (*indépendamment du bien-fondé des autres arguments énoncés en l'espèce*).

<sup>114</sup> It is known that the ECJ and the Commission occasionally support each other to push forward European integration (M a j o n e (note 11), 68-69). Importantly, the ECJ (the EU's "upper court") has a much closer relationship with Strasbourg than the ECJ's Court of First Instance. The latter court's judges never officially met the Strasbourg judges. An analysis of the complex relationship between the ECJ and the CFI, on the one hand, and the ECourtHR and the CFI, on the other, would go beyond the scope of this paper. Generally, the CFI's role with regard to the Luxembourg-Strasbourg relationship has been praised many times, though (J. Rideau/J.-F. Renucci, *Dualité de la protection juridictionnelle européenne des droits fondamentaux: atout ou faiblesse de la sauvegarde*

cal”,<sup>115</sup> whereas another judge in Luxembourg pointed out that this not very elegant fine quashing was probably useful to avoid further conflict between two courts that have an increasingly positive relationship.<sup>116</sup>

## b) Cross-Fertilising Courts

Despite both courts’ competitive position in the European human rights configuration, their relationship cannot be boiled down to unilateral attempts to protect human rights, institutional rivalry and protectionism. Their relationship appears to have another dimension as well. The European courts’ reciprocal actions on each other’s legal order can also have a mutually supportive effect. For its part, the ECtHR has not only intruded into the EU, but some of its judgements have also helped to strengthen its supranational architecture. As for the ECJ, its increasing references to Strasbourg’s case law have given new meaning to its approach to the ECHR – despite the Court’s will for institutional autonomy. Moreover, Strasbourg also increasingly refers to Luxembourg’s case law. These dynamics of cross-fertilisation have not only led to a considerable enrichment of their respective means to protect human rights, but have also increased both courts’ autonomy with regard to the EU and Council of Europe member states.

Intentionally or not, Strasbourg has not only been threatening the supremacy of EU law, it has also been promoting this principle invented by the ECJ as early as 1964, but which sometimes happens to be difficult to enforce on the national level. For instance, in 1993, the European Commission of Human Rights strongly encouraged national courts to make preliminary references to the ECJ in the *Soc. Divagsa v. Spain* (12.05.1993) and *Fritz and Nana S. v. France* (28.06.1993) cases – requests which were all declared inadmissible – when it ruled that a refusal by a national court to seek advice from the ECJ could lead to a violation of the ECHR and could be contrary to article 6 (right to a fair trial), especially when the national court’s refusal is an act of an arbitrary nature. Additionally, Strasbourg supported the system of preliminary references to the ECJ by refusing to take into account the length of the questions addressed to the ECJ by national judges whenever it

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des droits de l’homme, Justices 6, 1997, 115). As already stated, some judges and officials in both Luxembourg courts sometimes feel very close to Strasbourg, while others do not. A CFI judge who did not take part in the *Senator Lines* judgement explained to the author that the CFI is rather known for being much more pioneering with regard to fundamental rights than the ECJ (see the *Jégo-Quéro* affair where the ECJ overturned a CFI judgement which would have put an end to Luxembourg’s restrictive approach with regard to individual access to the ECJ and the right for effective judicial protection – Ch. Brown/J. Morijn, Case C-263/02 P, *Commission v. Jégo-Quéro & Cie SA*, judgement of the Sixth Chamber, 1 April, nyr., *Common Market Law Review* 41, 2004). It was not clear though what a “pioneering” and “less diplomatic approach” means with regard to Strasbourg (interview at the ECJ, June 2005).

<sup>115</sup> The quotations are taken from interviews with 4 judges and one court official in Strasbourg (February 2005), with a judge at the CFI in Luxembourg (June 2004) and a meeting with a legal scholar (July 2004).

<sup>116</sup> Interview at the ECJ (June 2005).

had to control whether or not the length of a trial was contrary to article 6<sup>117</sup> – a condemnation would no doubt have had a discouraging effect on national judges to make preliminary references to the ECJ and would not have been appreciated in Luxembourg.

Furthermore, in 1997, the ECtHR condemned Greece (*Hornsby v. Greece*, 19.03.1997) for not executing a Council of State ruling based on an ECJ preliminary decision,<sup>118</sup> thus strongly reminding the Greek administration of the supremacy of EU law. Similarly, in *Dangeville* and *Cabinet Diot et SA Gras* cases against France (16.04.2002 and 22.07.2003), the ECtHR condemned France for failing to bring French law into line with EU law. So, whereas Strasbourg has partly annexed the EU, it also feels responsible for controlling the EU member states' neglect to apply EU law – thus promoting the implementation and coherence of European law.

The ECtHR judges also have made use of the EU treaties and they have increasingly been referring to Luxembourg's case law in order to fortify their decisions. Although they had already done so very discreetly in the early 1970's, the references have become much more explicit in recent times.<sup>119</sup> Generally speaking, Strasbourg took over several advancements of the ECJ case law, for example, with regard to questions such as self-incrimination, the right of having a name or the right of keeping one's state of physical health secret.<sup>120</sup> The ECtHR has also used references to EU law and the ECJ's case law to operate reversals of case law.<sup>121</sup> The first time it did so was in December 1999 in the *Pellegrin v. France* case.<sup>122</sup> A recent example is the *Goodwin v. United Kingdom* case (11.07.2002), where the ECtHR strengthened its argument by referring to an ECJ decision and quoting the Charter.<sup>123</sup>

The EU's Charter of Fundamental Rights has now become a "major parameter of reference"<sup>124</sup> in several ECtHR judgements. For their part, the ECJ judges, waiting for the Charter to become an enforceable instrument, have not yet made use of it – unlike the CFI judges.<sup>125</sup> When the ECtHR fortifies its decisions by

<sup>117</sup> L. Burgorgue-Larsen (ed.), *Chronique de jurisprudence comparée*, *Revue de droit public* 4, 2004, 1060.

<sup>118</sup> Spielmann (note 93), 1459-1462.

<sup>119</sup> *Ibid.*, 1463.

<sup>120</sup> D. Simon, *Les droits du citoyen de l'Union*, *Revue universelle des droits de l'homme* 12, 1-2, 2000, 44.

<sup>121</sup> L. Burgorgue-Larsen, *L'art de changer de cap. Libres propos sur les "nouveaux" revirements de jurisprudence de la Cour européenne des droits de l'homme*, in: *Libertés, justice, tolérance* (note 36), I, 335-350.

<sup>122</sup> L. Burgorgue-Larsen, *Libertés fondamentales*, Paris 2003, 168-169.

<sup>123</sup> Spielmann (note 93), 1463; Burgorgue-Larsen (note 121), 349; Burgorgue-Larsen (note 122), 168-169.

<sup>124</sup> Burgorgue-Larsen (note 117), 1052.

<sup>125</sup> J. Dutheil de la Rochère, *Droits de l'homme. La Charte des droits fondamentaux et au delà*, 2001, <<http://www.law.harvard.edu/Programs/JeanMonnet/>>, 5-9; A.J. Menéndez, *Legal Status and Policy Implications of the Charter of Fundamental Rights*, *Arena Working Papers*, WP

using the Charter, it simultaneously demonstrates the usefulness of this text, which has not yet become legally enforceable in the EU. Even though the ECourtHR started to refer to the Charter before the ECJ, interviewed judges and court officials at the ECJ clearly welcome these references.<sup>126</sup>

Similarly, in Strasbourg the ECJ's alignment on Strasbourg's jurisprudence is equally appreciated. The ECJ's use of the ECHR took on new meaning since it started to increasingly refer to Strasbourg's case law. Whereas Luxembourg previously gave the impression of snatching the ECHR away from the ECourtHR, its current use of the ECHR's case law looks more like a tribute to the ECourtHR's work, than a vampiric appropriation likely to cause Strasbourg's demise. Given its authority with regard to national courts, the ECJ's recent approach has a legitimizing effect on Strasbourg's activities with regard to the protection of fundamental rights – although the ECJ does not, or cannot, go so far as to feel bound by the ECHR.

At the same time, references to Strasbourg's case law are forms of streamlining, which also have a protective effect from Strasbourg's potential intrusions – i.e. the *Baustahlgewebe* decision was made a couple of months after *Matthews*. The *Schmidberger* case is another example. According to *Takis Tridimas*, Luxembourg “pre-empted Strasbourg”<sup>127</sup> in this case, when it put human rights before fundamental freedoms. According to a judge in Luxembourg, this effect is not strategically sought after, but he acknowledged that the ECJ is very careful not to come into conflict with Strasbourg.<sup>128</sup> Paradoxically, reciprocal references to the other European court's case law and instruments can thus have fortifying and protective internal effects, they can be challenging and supportive for the other court all at once.

As both courts' legal orders increasingly overlap, their relationship has become characterised by a combination of seemingly contradictory dynamics and *Denys Simon's* “*je t'aime, moi non plus*”<sup>129</sup> to describe the courts' relationship takes on all its meaning. On the one hand, each court has hung a Damocles sword over the other court. On the other hand, they uphold their respective work and increasingly depend on each other.

For instance, in Strasbourg, EU-related applications are quite often related to previous ECJ decisions. The ECourtHR has never sanctioned such a case, but if it did, it would suddenly expose Luxembourg as a transgressor of human rights and put into question the supremacy of EU law. The more the ECJ aligns itself on Strasbourg, the more it reduces the risk of being disavowed by the ECourtHR, which could have a delegitimizing effect on its overall institutional position within

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02/07, 2002, <[http://www.arena.uio.no/publications/wp02\\_7.htm](http://www.arena.uio.no/publications/wp02_7.htm)>; Burgogue-Larsen (note 117), 1060.

<sup>126</sup> Interviews at the ECJ (June 2004).

<sup>127</sup> *Tridimas* (note 53), 37.

<sup>128</sup> Interview at the ECJ (June 2005).

<sup>129</sup> *Simon* (note 50).

the EU, especially since its authority with regard to national courts and institutions continues to be questioned by some national actors. Moreover, if Strasbourg had held responsible the 15 (now 25) EU member states for supranational acts, Strasbourg could also have shattered the Commission's supranational role: from the Commission's perspective applications against the 15 are highly problematic since national agents (who usually defend their governments at the ECJ, often against the Commission) are forced to intervene at and to speak for the EC level – a level at which they are not allowed to act according to the EC treaty. Thus, affairs like the *Senator Lines* case in Strasbourg incidentally called for a scenario which Commissioners fear most: the “intergovernmentalisation” of their supranational institution.

Conversely, the less the ECourtHR puts Luxembourg under pressure, the more it reduces the risk of being sidelined by the ECJ. Just as the ECJ's supranational authority is not carved in stone, the ECourtHR has also been increasingly put under pressure by national courts and institutions in recent times. If this is in the nature of things, since Strasbourg spends its time assessing whether or not national institutions might have violated human rights, the ECJ could deal a hard blow to the ECourtHR if its judges (intentionally or unintentionally) supported these national institutions by “vampirising” Strasbourg.

If, however, Strasbourg started to sanction EU acts before the EU's formal accession to the Convention, it would run the risk of reprisals from the ECJ judges though. As the EU grows larger, the ECJ could rapidly sideline the ECHR and its court. It could, for example, stop aligning its case law or exclusively rely on the Charter of Fundamental Rights, which provides a higher level of protection than the ECHR for EU citizens – whether or not the constitutional treaty is ratified.

In Strasbourg and in Luxembourg, judges and court officials regularly insist that there is no need to worry about the Charter, since it only applies to EU law and national law deriving from EU law, but not to national law.<sup>130</sup> However, in Strasbourg an unspoken concern about the EU remains and in Luxembourg some officials like to speculate on what will happen if the Charter enters into force, whereas in Luxembourg everyone fears that one day Strasbourg could declare void an ECJ decision. As they say in Luxembourg, both courts remain “non subordinated”,<sup>131</sup> whereas in Strasbourg it is considered that nothing is equal with an external control of EU acts. For sure, the protection of human rights would be better off if

<sup>130</sup> On the relationship between the Charter and the ECHR also see: J. Callewaert, Die EMRK und die EU-Grundrechtscharta. Bestandsaufnahme einer Harmonisierung auf halbem Weg, Europäische Grundrechte-Zeitschrift 30, 7/10, 2003; C. Busse, Das Projekt der Europäischen Grundrechtscharta vor dem Hintergrund der EMRK, Thüringer Verwaltungsblätter 10, 2001; I. Pernice/R. Kanitz, Fundamental Rights and Multilevel Constitutionalism in Europe, Walter Hallstein-Institut für Europäisches Verfassungsrecht, WHI – Paper 7/04, <<http://www.rewi.hu-berlin.de/WHI/papers/whipapers704/paper0704.pdf>>; G. Reiss, Die Europäische Grundrechtscharta und das Verhältnis zwischen EGMR, EuGH und den nationalen Verfassungsgerichten, in: A. Duschanek/S. Griller (eds.), Grundrechte für Europa. Die Europäische Union nach Nizza, Wien 2002, 196-201.

<sup>131</sup> Interviews at the ECJ (June 2004).

Strasbourg had not to take into account very complex inter-institutional concerns. Consequently, the equilibrium between the two courts remains very fragile.

Although the European judges don't trust each other, the European courts also have a common supranational specificity, as well as comparable objectives, such as their aim to uphold their increasingly overlapping supranational legal orders. The ostentatious references to Strasbourg's case law in Luxembourg and Strasbourg's occasional support of the supremacy of EU law are on everyone's lips in both places and clearly have an appeasing effect on each court's potential to subordinate the other court.<sup>132</sup> Generally, the author's interviews lead to the conclusion that, in both places, there is a lingering uncertainty about the future behaviour of the other court. Thus, the improvement of the relationship between the two courts, which surely has an epistemic underpinning, cannot lead to the conclusion of a supranational conspiracy of judges. On the contrary, the enthusiasm about the European courts' good relationship, exhibited in both places, largely corresponds to a change of discourse motivated by self-interest.

By fighting each other, the courts run the risk of reciprocally unravelling the painfully constructed authority of their respective supranational legal orders to the benefit of those actors that are generally suspicious of the rise of independent supranational institutions. By respecting and referring to each other's work, they uphold their own and the other court's position within their overlapping and enlarging organisations. The latter scenario is now clearly favoured in Strasbourg and in Luxembourg since this discreet solidarity between supranational judges increases their autonomy within their basic organisational units. Conversely, they would themselves be the first victims of a war of European judges. As an ECJ judge confirmed, there are constant pressures from the national level to play one court against the other, but so far all attempts to divide and rule have failed and the "very subtle idea [of some of the involved actors] to create a Charter in order to hurt Strasbourg has been a colossal blunder".<sup>133</sup> The two supranational courts have indeed found a common interest with regard to their relationship with member states, which is more important than anything else. According to an ECJ judge "by quoting other courts we keep together the member states. If a member state does not comply with a certain interpretation, it is important that all international courts have the same analysis."<sup>134</sup> Hence, by joining their forces, the two courts can fulfil their respective objectives much better.

The European courts' relationship has not evolved linearly from conflict to cross-fertilisation. Instead, it has evolved from a situation where they dealt separately with the question of how to tighten the "knots", which allow for the protection of human rights at the EU level, to a situation where, on top of that, they are both entwined into a "Gordian knot". As the relationship between the two courts

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<sup>132</sup> Interviews at the ECJ (June 2004) and at the ECourtHR (February 2005).

<sup>133</sup> Interview at the ECJ (June 2005).

<sup>134</sup> Interview at the ECJ (June 2005).

is characterised by a concatenation of contradictory logics, the European judges have started to conduct a cordial dialogue of constructive ambiguity.

### c) Dialoguing Judges

Since 1998, the judges and court officials of both European courts have been meeting on a regular, but not formally institutionalised basis. After having “talked” to each other for many years through their respective case law, their direct encounters take many different forms: the judges have been holding regular bilateral meetings since the ECtHR became permanent in 1998,<sup>135</sup> they invite each other to make speeches at the other court<sup>136</sup> and, according to an ECJ judge, some of them have regular contact by phone or email and even meet privately.<sup>137</sup> The European judges’ dialogue finds a broader audience when they meet at conferences on European issues<sup>138</sup> or even at colloquia<sup>139</sup> on their own relationship.<sup>140</sup> In the same vein, they jointly give interviews on their courts’ relationship<sup>141</sup> and they contribute to the rather impressive body of literature on the relationship between the two organisations and their courts.<sup>142</sup>

<sup>135</sup> Interview at the ECJ (June 2004). Statement confirmed in Strasbourg (February 2005).

<sup>136</sup> G.-C. Rodríguez Iglesias, Discours à l’occasion de l’audience solennelle de la Cour européenne des Droits de l’Homme, <[www.echr.coe.int/BilingualDocuments/Legal%20Year%202002.htm](http://www.echr.coe.int/BilingualDocuments/Legal%20Year%202002.htm)>, 31 January 2002.

<sup>137</sup> Interview at the ECJ (June 2004).

<sup>138</sup> Workshop with J.-P. Costa (ECtHR judge) and Ph. Léger (advocate general at the ECJ), Constitution européenne, démocratie et droits de l’homme colloquium at the Sorbonne, 13-14 March 2003 (G. Cohen-Jonathan/J. Dutheil de la Rochère (ed.), Constitution européenne, démocratie et droits de l’homme, Brussels 2003, 270-277).

<sup>139</sup> E.g. the Luxembourg symposium on the relationship between the Council of Europe Human Rights and the Convention and EU Fundamental Rights Charter, Schengen, 16 September 2002; the “Globalization and the Judiciary” conference organised by the Texas International Law Journal and the University of Texas School of Law, 4 and 5 September 2003.

<sup>140</sup> With the notable exception of French judges, the European judges are often themselves academics. This is of course another reason why so much has been written on the two courts’ relationship.

<sup>141</sup> Puissochet [the French judge at the ECJ]/Costa [the French judge at the ECtHR] (note 77).

<sup>142</sup> For example: J.-P. Costa (Vice President of the ECHR) La Convention européenne des droits de l’homme, la Charte des droits fondamentaux de l’Union européenne et la problématique de l’adhésion de l’Union européenne à la Convention, EUI Working Paper, 5, 2004; K. Lenaerts (ECJ judge)/E. de Smijter, The Charter and the Role of the European Courts, The Maastricht Journal of European and Comparative Law 8, 2001; K. Lenaerts, Interlocking Legal Orders or the European Union Variant of ‘E pluribus unum’, in: J.A.R. Nafziger/S.C. Symeonides (eds.), Law and Justice in a Multi-State World: A Tribute to Arthur T. von Mehren, New York 2002; F.G. Jacobs (advocate general at the ECJ), Human Rights in the European Union: the Role of the Court of Justice, European Law Review 26, 2001; Jacobs (note 49); P. Pescatore, (former ECJ judge), La coopération entre la Cour communautaire, les juridictions nationales et la Cour européenne des droits de l’homme dans la protection des droits fondamentaux. Enquête sur un problème virtuel, Revue du Marché Commun et de l’Union européenne 466, 2003; F. Tulken (ECtHR judge)/J. Callewaert (legal and executive assistant to the president of the ECtHR), Le point de vue de la Cour européenne des

According to some judges and court officials,<sup>143</sup> the presidents of both courts have played the most important part in the effective rapprochement between the two institutions. Luzius Wildhaber (ECourtHR) and G.C. Rodríguez Iglesias (ECJ) are the main instigators of this special relationship. Since October 2003, the ECJ's new president, Vassilios Skouris, has equally devoted himself to the two courts' special relationship. Advocate general Francis Jacobs, who regularly goes to Strasbourg, has also played a pre-eminent role in this respect. Whereas in both institutions everybody wasn't exactly overjoyed about their presidents' inter-institutional endeavour, Wildhaber and Rodríguez Iglesias have provided leadership that has been crucial to the further evolution of both courts' behaviour with regard to each other. The presidents' most cordial dialogue took place at the solemn opening audience of the ECourtHR in Strasbourg on January 31<sup>st</sup> 2002. President Luzius Wildhaber stated:

"The European Union now intends to consider the future of the Charter and the question of the European Community's accession to the European Convention on Human Rights. The Council of Europe has always regarded those two options as complementary rather than as alternatives. Indeed, it is legitimate to ask whether, in view of the level of interdependence which has naturally evolved between the Convention and European Union law, and which will no doubt continue to grow, it is still justifiable to envisage the future of the two systems and their subsequent developments as if they were completely impermeable, whereas in reality they are not."<sup>144</sup>

In his speech made at this same audience, the president of the ECJ, G.C. Rodríguez Iglesias, further confirmed that his court now pays deeper respect to the ECourtHR's jurisprudence.

"Lastly, the two Courts share an essential commitment to basic values forming an integral part of the common heritage of Europe, founded on democracy and fundamental rights, by virtue of which they contribute, together with the Supreme Courts and Constitutional Courts, to the emergence of what has been termed a "European constitutional area".<sup>145</sup>

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droits de l'homme, in: J.-Y. Carlier/O. de Schutter (eds.), *La Charte des droits fondamentaux de l'Union européenne. Son apport à la protection des droits de l'homme en Europe*, Brussels 2002; A. Rosas (ECJ judge), *The Legal Sources of EU Fundamental Rights: A Systemic Overview*, in: N. Colneric/D. Edward/J.-P. Puissechet/D.R.-J. Colomer (eds.), *Une Communauté de droit. Festschrift für Gil Carlos Rodríguez*, 2003; Rosas (note 61); L. Wildhaber (president of the ECourtHR)/J. Callewaert, *Espace constitutionnel européen et droits fondamentaux. Une vision globale pour une pluralité de droits et de juges*, in: Colneric/Edward/Puissechet/Colomer, *ibid*; Spielmann (ECourtHR judge) (note 64 and 93); J. Callewaert, Paris, Luxembourg, Strasbourg: *Trois juges, une discrimination. L'interaction entre les ordres juridiques national, communautaire et conventionnel à l'épreuve de la pratique (en marge de l'arrêt Koua Poirrez)*, *Revue trimestrielle des droits de l'homme* 61, 2005.

<sup>143</sup> Interviews at the ECJ (June 2004 and June 2005) and at the ECourtHR (February 2005).

<sup>144</sup> L. Wildhaber, *Discours à l'occasion de l'audience solennelle de la Cour européenne des Droits de l'Homme*, <[www.echr.coe.int/BilingualDocuments/Legal%20Year%202002.htm](http://www.echr.coe.int/BilingualDocuments/Legal%20Year%202002.htm)>, 31 January 2002.

<sup>145</sup> Rodríguez Iglesias (note 136).

Speculations on the actual contents of the more confidential discussions between judges are proportional to the culture of secret that surrounds their gatherings. According to interviewed judges in Strasbourg and in Luxembourg,<sup>146</sup> the European judges' bilateral meetings, which are alternately held in Luxembourg and in Strasbourg on a bi-annual basis, are rather informal. Not all the judges from both courts participate in these gatherings. The delegations that are sent to the other court usually comprise the president and the judges who are most familiar with the EU-ECHR relationship.<sup>147</sup>

In the absence of any formal ties between the EU and the Council of Europe, it has been up to the European judges to modulate their relationship. Yet, whereas the European judges will no doubt continue to meet in various ways, their judicial independence makes it impossible to formally institutionalize their relationship and explains why they are so hush about it. Since both courts' case law simultaneously contains the seeds of both scenarios, the judges' direct dialogue has taken the form of high-profile diplomatic consultations.

#### d) A Supranational Judicial Diplomacy

Balancing out opposing internal and inter-institutional dynamics is at the heart of the emergence of a new form of supranational judicial diplomacy. The linkage between the two courts has become a means to coordinate apparently contradictory logics. While norms and institutions proliferate and increasingly overlap, the linkage between institutions has not only become a way to overcome a highly fragmented process of regional integration, but also provides a means for "coherence without uniformity".<sup>148</sup>

The European judges are conscious of the role they have to play in order to deal with Europe's human rights puzzle and of the importance of a *modus vivendi* between the courts. As C.G. Rodríguez Iglesias stated in his Strasbourg speech:

"As regards the protection of fundamental rights, it is well known that there does not currently exist any normative system comprehensively covering the relationship between the European Convention for the Protection of Human Rights and the Community legal

<sup>146</sup> Interviews at the ECJ (June 2004) and at the ECourtHR (February 2005).

<sup>147</sup> The courts' reciprocal actions on each other's legal order are far from being a direct subject matter. According to some judges, they mostly tend to avoid direct confrontation on institutional issues and their encounters do not take the form of direct bilateral conflict-resolution. Instead, presentations and debates on the evolution of their respective case law are an important part of their regular gatherings where the judges also discuss how they responded to comparable judicial problems. Comparisons of recent case law are not only useful for reciprocal inspiration, but also help to avoid divergent case law on analogous affairs (and hence inter-institutional conflict). Interviews at the ECourtHR (February 2005) and at the ECJ (June 2005).

<sup>148</sup> Many thanks to Jürgen Bast for drawing the author's attention to the difference between "coherence" and "uniformity". See: J. Bast, *The Constitutional Treaty as a Reflexive Constitution*, German Law Journal 6, 11, 2005.

order. Because of that lacuna, the two Courts have a special responsibility for organising relations between those two legal orders.”<sup>149</sup>

With regard to their own relationship, the European judges’ diplomatic interactions and jurisprudential gifts have had the double advantage of tempering down each court’s potential for predatory incursion into the other court’s realm and re-directing the European judges’ attention on the beneficial effects of their trust-building linkage and on the common risk of a war of judges for their own institutions.

Given these remaining uncertainties and the courts’ entanglement, the mutually supportive effects of both courts’ reciprocal actions have attracted considerable attention in recent years. They have been “discovered” by those actors who share a common understanding of the risks of non-co-operation and the mutual benefits of the courts’ rapprochement. Some of them emphasise the courts’ inter-jurisdictional “cross-fertilisation”<sup>150</sup> and advocate seeing the ECJ-ECourtHR relationship through different lenses.<sup>151</sup> It is also asserted that the impression of mutual defiance between the two courts is “in fact the opposite of what happens in reality”.<sup>152</sup> For ECJ judge Allan Rosas, “the thesis, often put forward in the legal literature, that there is a tension or even conflict between Luxembourg and Strasbourg case-law is somewhat exaggerated, to put it mildly. Harmony, rather than conflict, is a much more likely scenario.”<sup>153</sup> Whereas the judges of the ECourtHR, and above all its president, have been pleading in favour of the EU accession to the Convention on a regular basis, ECJ judges also multiply their statements on the importance of ECHR case law and EU accession to the ECHR.<sup>154</sup> For Rosas, the EU’s accession to the Convention would “remove an outdated anomaly in today’s European human rights system”.<sup>155</sup> In his “view, the existence of an EU Charter of

<sup>149</sup> Rodríguez Iglesias (note 136).

<sup>150</sup> Jacobs (note 49).

<sup>151</sup> Spielmann (note 93).

<sup>152</sup> Puissechet/Costa (note 77), 164 – ECJ judge Puissechet speaking.

<sup>153</sup> Rosas (note 61).

<sup>154</sup> In his above-mentioned speech, G.C. Rodríguez also stressed the fact that he is personally in favour of the EU’s accession to the ECHR. “Although the Court of Justice has always avoided adopting a position on the desirability of acceding to the Convention, rightly, in my view, some of its members, including myself, have expressed themselves personally to be in favour of such accession, which would reinforce the uniformity of the system for the protection of fundamental rights in Europe.” During his joint interview with the ECourtHR judge Jean-Paul Costa in the political science journal *Pouvoirs*, the ECJ judge Jean-Pierre Puissechet declared that the ECJ is “extremely cautious” not to distance itself from Strasbourg’s interpretation, that diverging case law between the two courts law have been “misunderstandings” and that “the relationship between the two courts has to be seen in the light of a dialogue on principles and not in the light of a struggle for supremacy”. Puissechet/Costa (note 77), 165-166. Also see: K. Lenaerts, *Le respect des droits fondamentaux en tant que principe constitutionnel de l’Union européenne*, in: M. Dony/A. de Walsche (eds.) *Mélanges en hommage à Michel Waelbroeck*, 1, Brussels 1999, 437; M. Wathelet, *Le point de vue d’un juge à la Cour de justice des Communautés européennes*, in: Carlier/de Schutter (note 142).

<sup>155</sup> Rosas (note 61).

Fundamental Rights does not in any way make an EU accession to the ECHR less important or desirable. The Charter is an internal constitutional instrument, while ECHR accession would subject the EU as a body to the same kind of external control that has, since the 1950's, been exercised over its Member States."<sup>156</sup>

The reasons why many actors of this inter-jurisdictional configuration take a positive stand with regard to the EU's accession to the Convention are closely linked to the effects of both courts' previous reciprocal actions. Since Strasbourg has been annexing the EU and since Luxembourg aligned itself on the ECHR and its case law, accession would merely confirm existing practices. In Luxembourg it is now commonly considered that formal accession to the ECHR would not change the current state of affairs. By progressively aligning its case law, the ECJ has anticipated the obligations that come with an ECHR accession and it is argued that there will not be more constraints than there already are.<sup>157</sup> Besides, some judges in Luxembourg feel increasingly charmed by the idea that their institution could be treated as an "internal" court by the ECourtHR.

Yet, if the EU's accession to the ECHR would indeed not change existing practices, it could have a major institutional impact with regard to the relationship between the two courts. Only a formal accession could transform the fragile equilibrium between the two European courts into a more stable linkage. Much uncertainty over the protection of human rights at the EU level and the two courts' role would disappear upon accession. It would once and for all confirm the ECJ's "internal" and the ECourtHR's "external" role with regard to the judicial control of human rights in the EU. Strasbourg would be reassured that the ECJ will stop referring to the ECHR with the possible constitutionalisation of the Charter of Fundamental Rights, which for some actors the Charter was meant to replace the Convention.<sup>158</sup> The Charter would then indeed be more comparable to an "internal" constitutional fundamental rights document, rather than to a second "external" supranational instrument for the protection of human rights comparable to the ECHR. For the moment, actors in both courts will remain on their guard until the EU's accession to the ECHR confirms their courts' respective roles with regard to the protection of human rights in Europe. As the courts entangled themselves and their organisations into a web of constraining relations, it now seems that a formal accession would have more advantages than disadvantages – even for those member states that had been opposing the EU's accession to the ECHR.

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<sup>156</sup> Ibid.

<sup>157</sup> Interviews at the ECJ (June 2004).

<sup>158</sup> Interview at the ECJ (June 2005).

## 4. Paving the Way

### a) Diminishing Intergovernmental Choice

On the 1<sup>st</sup> of May 2004, the European Union embarked upon the most important and challenging enlargement of its history. Yet, another accession process passed largely unnoticed. While the EU is enlarging, it is itself on the verge of adhering to the European Convention on Human Rights. Taking up the exact wording suggested by the Convention for the Future of Europe, the Treaty establishing a Constitution for Europe signed by the EU member states on 29 October 2004 states that “the Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms” (title 2, article I-9, 2). Similarly, the ECHR’s new Protocol 14, which is still under ratification, will insert an article 59 § 2 into the Convention, by which “the European Union may accede to this Convention”. Furthermore, the Council of Europe summit in May 2005 elaborated an action plan, which holds that the preparatory work for such EU accession “should be accelerated so that this accession could take place as soon as possible after the entry into force of the Constitutional Treaty”.<sup>159</sup> It is one of the very rare moments in the history of international organisations when an international body seeks formal accession to an international instrument. As the EU’s “constitutional” moment has become somewhat clouded, the European institutions and their member states will once again have to figure out what to do next and, in the meantime, the European judges will remain in charge.

At first glance, it seems that the decision to make the EU adhere to the ECHR was purely intergovernmental.<sup>160</sup> Yet, the (inter)actions between the ECtHR and the ECJ have led to a considerable diminishing of the range of choices or non-choices governments could have taken, as its judges anticipated the now planned accession and created a very awkward situation in which an accession now has more advantages than disadvantages for member states. In this sense, the rather turbulent relationship between two supranational courts paved the way toward the

<sup>159</sup> Council of Europe, Plan d’action, Délégués des Ministres, CM (2005)80 final, <[http://www.coe.int/t/dcr/summit/20050517\\_plan\\_action\\_fr.asp](http://www.coe.int/t/dcr/summit/20050517_plan_action_fr.asp)>, 17 May 2005.

<sup>160</sup> The European Council’s Laeken Declaration on the Future of the European Union gave the following mandate to the Convention: “Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights” (European Council, The Future of The European Union – Laeken Declaration, 2000, <[http://europa.eu.int/futurum/documents/offtext/doc151201\\_en.htm](http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm)>.) The Convention went a step further when it not only suggested a “first pillar” accession to the ECHR as the Laeken European Council did, but also recommended that the “whole” EU – i.e. all three pillars (the European Communities, the Common Foreign and Security Policy and Justice and Home Affairs) – should adhere to this international human rights convention. The attribution of a formal legal personality to the EU, as proposed by the constitutional treaty, would be a necessary step for the EU’s accession to the ECHR. Similarly, the action plan issued at the summit of the heads of state and government of the member states of the Council of Europe summit calls for rapidly setting up preparations for negotiations on the EU’s accession to the ECHR, as soon as the constitutional treaty has been ratified (Council of Europe (note 159)).

planned EU accession to the ECHR largely pre-established those systemic ties, which their organisations' member states have agreed to set up in the constitutional treaty (even if the EU's accession to the ECHR and the coming into force of the Charter of fundamental rights will now both be delayed).<sup>161</sup>

One important reason why the member states converged on this previously highly contended issue is that the EU has already been linked to the ECHR, when they took over the ECJ's case law on fundamental rights, which is heavily inspired by the Convention, in the treaties (without, of course, creating any obligations either). A second reason is the member states' unfavourable position in Strasbourg with regard to EU-related applications. Indeed, Strasbourg has put the EU's member states in a rather awkward situation. They have been put under pressure by its careful, but insistent rapprochement. As a result, the member states have been suffering from the disadvantages of the EU's "annexation" to the ECHR by the ECtHR, but cannot benefit from the advantages of a formal accession. For instance, as Strasbourg's case law stands to this day, member states can individually be held responsible for collectively established EU acts and they run the risk of being condemned for human rights violations committed by independent supranational institutions. Member states know now that they can be sanctioned by Strasbourg when they implement EU acts. Furthermore, the flow of incoming applications and Strasbourg's silence on its jurisdiction with regard to EU-related affairs have the effect of maintaining constant pressure. As member states increasingly have to stand up before the court in EU-related cases, the EU umbrella is no longer leakproof.

It now also turns out that EU accession to the ECHR could be very advantageous, since it would also put an end to situations in which member states have to engage their responsibility for alleged human rights violations committed by supranational institutions, without necessarily having anything to do with the cases at issue. Indeed, the legal services of national ministries regularly have to send their agents to Strasbourg for EU related issues. At the hearings, they have to explain themselves collectively on issues they do not feel responsible for as such. According to an ECJ judge, "*Senator Lines* might have paved the way to introducing that clause [article I-9, 2] in the Constitution".<sup>162</sup>

The EU's accession to the ECHR would, however, lead to the possibility of making applications against the EU without legal detours and without having to put excessive trust in Europe's promises to protect rights. Finally, accession to the ECHR would have a very symbolic dimension. By meeting the standards it re-

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<sup>161</sup> Of course, if the European courts' (inter)action paved the way toward the planned EU accession and reduced intergovernmental choice, the intergovernmental agreement to do so cannot be exclusively explained by this variable. There have been many other parliamentary, diplomatic and private initiatives, changes of political majorities at the national level, package deals between governments, the role of the Convention leading to the constitutional treaty, etc., which would have to be taken into account if our aim was to fully explain why the member states now committed themselves to such an accession.

<sup>162</sup> Interview at the ECJ (June 2005).

quires from others, accession would make the EU a more legitimate political actor. In this way, an external control of human rights might help to reduce the EU institutions' "accountability deficit".<sup>163</sup>

## b) Inter-Institutional Relations and Transnational Change

The linkage between the supranational judges and their courts has led to the emergence of new ways of judicial lawmaking in the EU. The two supranational courts have been able to influence the process of European integration, watch over their common interests and add force to their own institutional strategies as they related to each other. Most of the courts' strategic actions are channelled through their case law. With time, the European courts have both elaborated specific positions with regard to each other by giving a strategic twist to their decisions. A new feature, which has appeared as a result of the European courts' interaction, is that courts can mutually support each other and legitimately induce change by referring to each other. The European courts' credibility in governance relies on their ability to achieve their goals without outbraving the role they have been attributed by member states and without contradicting themselves by issuing opposing case law.

The European judges are masters in the art of making a case within a case. The European courts' decisions often, if not always, appear to be strategically linked to their institutional interests though. This is a normal process and does in no way mean that they don't take rights seriously.<sup>164</sup> Both courts have considerably extended and enhanced the protection of human rights. Just like any other social institution, courts seek to maximise their institutional power, the most important aspect of which is judicial independence. Yet, judges are not politicians. Courts are institutions of governance in rule of law-based societies<sup>165</sup> and law-making is an inherent function of judicial organs.<sup>166</sup> In this vein, adjudication inexorably produces political effects, but the European judges traditionally remain "within the case" in order to "make a case". They have to "give reasons" and construct complex "argumentation frameworks" (Stone Sweet) in order to justify decisions. Their political influence depends on the relative indeterminateness of European and human rights norms and on the judges' collective willingness to play on their elasticity. A court ruling can only be given a strategic twist in so far as it does not go against original intent and "constitutional" texts. The ECJ's interpretation of the EU trea-

<sup>163</sup> G. M a j o n e, Delegation of Powers and the Fiduciary Principle, paper presented at CONNEX Workshop on Delegation and Multi-Level Governance, Centre européen, IEP de Paris, 11 May 2005.

<sup>164</sup> B. de W i t t e, Le rôle passé et futur de la Cour de Justice des Communautés européennes dans la protection des droits de l'Homme, in: P. Alston/M. Bustelo/J. Heenan (eds.), *L'Union européenne et les droits de l'homme*, Brussels 2001.

<sup>165</sup> A. S t o n e S w e e t, *Governing with Judges: Constitutional Politics in Europe*, Oxford 2000; S t o n e S w e e t (note 2).

<sup>166</sup> D e h o u s s e (note 2), 1998, 71-78.

ties is known to be teleological<sup>167</sup> and to follow the principle “*in dubio pro integratione*”.<sup>168</sup> As Renaud Dehousse has pointed out, “judicial organs, by their very nature, necessarily carry out a creative task, particularly when they have to apply a text of a general nature”.<sup>169</sup> The European judges’ inter-institutional “case law politics” can be useful to protect their jurisdiction (i.e. institutional autonomy), or, conversely, to influence and interfere with other legal orders.<sup>170</sup> Yet, the European courts’ reciprocal upholding is a form of inter-jurisdictional co-operation that is so indirect that the courts cannot be suspected of having violated their obligation of judicial independence.

One important aspect of the European courts’ interaction is the way alien rights (text and/or jurisprudence) are soaked up into their own case law in order to strengthen one court’s institutional autonomy and its institutional position with regard to rival actors. For instance, the ECJ did not shy away from improving the protection of fundamental rights by borrowing and instrumentalising the ECHR to push through the supremacy of European law. The ECJ has nevertheless taken a new stance on human rights. Far from having become less teleological in its interpretation of law, the ECJ’s case law is still imbued with federal objectives. Instead of becoming less instrumental, it has changed the normative direction of its case law by increasingly relying on human rights and notably on the ECtHR’s work. As already stated, cases like the *Schmidberger* or *Pupino* affairs show that the ECJ strengthens its position when it upholds human rights over fundamental

<sup>167</sup> A. von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, *Common Market Law Review* 37, 2000, 1325; *Courty/Devin* (note 2), 61; Dehousse (note 2), 1998, 76.

<sup>168</sup> Spielmann (note 64), 802.

<sup>169</sup> Dehousse, 1998, (note 2), 117. In this vein, the ECHR and the EU treaties also inherently provide for change. In the introductory part of the ECHR the signatory states consider that “the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms”. Similarly, the signatories of the EC treaty state that they are “determined to lay the foundations of an ever closer union among the peoples of Europe”. Despite the European courts’ increasingly inductive approach to decision-making, all court rulings are consistent with written law, since the latter is so vague. Generally, the margin of manoeuvre of the European judges varies according to the complexity of the cases at issue and the precision with which existing law and case law provide guidance. The more existing rules apply, the less a court can or has to legislate, and vice-versa. Given that the European judges base their decisions on vague (or indeterminate) international and human rights norms – which are mostly the result of cumbersome intergovernmental decision-making processes (F. Scharf, *The Joint Decision Trap: Lessons from German Federalism and European Integration*, *Public Administration* 66, 1988) – they have a relatively large margin of manoeuvre for strategic decision-making without falling out of context. If a court’s political influence varies with the precision of the law, accusations of “political activism” (H. Rasmussen, *On Law and Policy in the European Court of Justice*, Dordrecht 1986) can only fall short. As Takis Tridimas has argued “by following a teleological interpretation of the founding Treaties, the Court has not exceeded its judicial function” (T. Tridimas, *The Court of Justice and Judicial Activism*, *European Law Review* 21, 1996, 199).

<sup>170</sup> Case law politics, defined as a given court’s action to pursue its institutional objectives by giving a strategic orientation to case law, can be a means for setting up new forms of trans-organisational co-operation.

liberties enshrined in the treaties and when it imposes the supremacy of EU law through human rights. By doing so, the court not only affirms the constitutional role of human rights, but also its own constitutional role. Since human rights are much more vague, Luxembourg has moreover discovered a new realm in which it can extend its margin of manoeuvre.

For its part, the ECourtHR has made use of applications directed against the EU to “domesticate” an alien organisation and its court, which could otherwise have been threatening for its institutional future. Given Strasbourg’s overall responsibilities, it is obvious that the judges tend to push their control as far as they can to protect human rights when they are impelled to do so as EU-related applications are brought before their court. Yet, when the European judges in Strasbourg try to close the European human rights gap, they also reply to the risk of being ruled out as a consequence of the expansion of the EU. Over the years, their actions on the EU have tipped the hierarchical balance between the two institutions in favour of their own court. The ECourtHR has had many opportunities to frame the EU’s political evolution. On the one hand, Strasbourg could do so directly when dealing with EU related cases. On the other hand, Luxembourg’s alignment on its case law has indirectly introduced the ECourtHR’s interpretation of human rights at that level.

A common aspect of both courts’ cross-referencing is that by referring to each other they increase their autonomy and their capacity to make their case law evolve in a legitimate way. Despite the courts’ rivalry, their actual linkage has improved their position with regard to the organisations they form a part of and their member states. Setting up an inter-institutional linkage has not only become an effective way of dealing with nested interests and reduce inter-institutional tensions. Since multiple actors take contrary positions on the issues at stake within each court, the relative convergence between the two courts also enables some judges and officials to dominate internal opposition. Similarly, the European courts’ reciprocal references also increase their institutional autonomy with regard to governmental actors. As Michel Crozier and Erhard Friedberg have demonstrated, trans-organisational interactions reinforce the power of those organisational segments that engage in a relationship with their organisational environment.<sup>171</sup> To the detriment of opposing logics within the EU and the Council of Europe and even within the courts, this transversal linkage has empowered both institutions’ position – their independence – with regard to member states and other European institutions.

This new way of law-making is mainly characterised by the fact that the courts can generate new sources of law by relying on alien texts and case law. The European courts increasingly rely on the work of other supranational courts to fortify their arguments, especially when it comes to history-making decisions (see the ECJ’s *Internationale Handelsgesellschaft*, *Schmidberger* and *Pupino* decisions or the ECourtHR’s *Pellegrin* and *Goodwin* judgements). It is known that judges not

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<sup>171</sup> Crozier/Friedberg (note 8), 174-175.

only rely on written law, but also on “path-dependent” case law.<sup>172</sup> Case law both carries the courts’ decisions through time and space. But judges are not necessarily captive of written law or their own jurisprudence, as the literature on path-dependency suggests. Inter-jurisdictional interaction is one way to circumvent lock-in effects. As the linkage between the European judges has become stronger, it now appears that reversals of case law that imply any divergence from existing case law (or even written law) can be justified with references to another court’s case law. Thus, as a consequence of the courts’ evolving linkage and their converging human rights case law, they have strengthened their positions in governance and consolidated the European level of governance.

A war of European judges has become very unlikely for all these reasons. Both courts would be the first to lose because of their entanglement. If diverging case law at the European level is usually thought to be a problem for the national courts, it could also have a discrediting effect for the European courts and unravel their institutional position in European governance. Conversely, testifying mutual respect has become a *sine qua non* condition for upholding their supranational stance and the protection of human rights. There might be no European government of judges, but there happens to be a supranational system of governance “with judges” and neither of the European courts wants to endanger a relationship they aren’t completely happy with. Since the questions of supranational competences and human rights have always been linked,<sup>173</sup> the Courts connection in this area has reinforced European integration. Whereas the lack of protection of fundamental rights used to be a means to retain competences for national actors, the coherent improvement of human rights at the European level has become a means to further integration and to impose supremacy of European law.

This is of course no reason to get carried away by the evolution of European integration with regard to human rights. It is mostly in the area of Justice and Home affairs where the fate of human rights in Europe will be decided in the future. “Storm clouds” have gathered over human rights in recent times<sup>174</sup> and it is still to be seen if the *Bosphorus-Pupino-Solange*-“umbrella”, which has been opened up by the European courts and the German constitutional court, will hold and prevent the EU and its member states from transgressing international commitments. Although integration through human rights is an incomplete process, the European courts’ trans-organisational co-operation has decisively contributed to effectively setting up a new normative basis for further political integration.

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<sup>172</sup> Stone Sweet (note 2), 30-35.

<sup>173</sup> A. von Bogdandy, Grundrechtsgemeinschaft als Integrationsziel? Grundrechte und das Wesen der Europäischen Union, in: Duschanek/Griller (note 130).

<sup>174</sup> Guild (note 88).

### c) Conclusion: Turning the EU Around

As they relate to each other, the European courts have produced path-breaking and path-making effects on the process of European integration. Their relationship has been decisive to solve Europe's binary human rights puzzle and provided for change on a transnational scale. The courts' interplay has struck a balance between European politics and human rights in two related ways. Firstly, human rights standards increasingly shape European politics and, secondly, the EU is on the verge to accede to the ECHR. The process of integration through human rights has three broader upshots. First, as supranational institutions relate to each other, their linkage has increasingly influenced governance in Europe. As transnational norms emerge from many sources and international institutions proliferate,<sup>175</sup> the role of those who interpret international norms has become increasingly significant.<sup>176</sup> As courts engage in networking with other courts, they increasingly create the institutional and normative bases for the linkage between those social actors that go through these courts. The burgeoning of norms and institutions in Europe has led to the emergence of dialoguing supranational judges who increasingly have the responsibility to keep in balance multiple and sometimes contradictory interests. As the sources of law multiply, the lawyer's quest for coherence has shifted from the law to the courts and, as legal orders increasingly overlap, upholding this coherence has shifted from the courts to the linkage between courts. In Europe, there are now two supranational courts, which both appointed themselves as constitutional courts.<sup>177</sup> This evolution raises questions about traditional "pyramidal" federal models, since the process of integration through human rights has led to the emergence of a "transnational constitutional space"<sup>178</sup> in which multiple supranational institutions interact, while they belong to overlapping but distinct organisations. For individuals, the actual configuration has the advantage that there are two courts acting above the State – even though access is severely limited and unequal in both cases.<sup>179</sup> Secondly, Europe's supranational institutions are in the process of being held responsible for their acts. As intergovernmental institutions (as opposed

<sup>175</sup> M. Delmas-Marty, *Pour un droit commun*, Paris 1994; M. Delmas-Marty, *Les forces imaginantes du droit. Le relatif et l'universel*, Paris 2004.

<sup>176</sup> R. Badinter/S. Breyer (eds.), *Entretiens de Provence. Le juge dans la société contemporaine*, Paris 2003; Slaughter (note 5); C. Tomuschat, *Das Europa der Richter*, in: *Internationale Gemeinschaft und Menschenrechte* (note 92).

<sup>177</sup> For example, the European Court of Human Rights considers the European Convention on Human Rights as a "constitutional instrument of European public order" (*Loizidou v. Turkey*, 23.03.1995.). The Court of Justice of the European Communities mentions the evolution of the treaty towards a "constitutional charter" (*Commission v. United Kingdom*, 29.03.1979 and decision 1/91, 14.12.1991).

<sup>178</sup> R. Dehousse, *Naissance d'un constitutionnalisme transnational*, in: *Pouvoirs* (note 6).

<sup>179</sup> The ECtHR is overloaded and the ECJ can only accept private applications under very restrictive conditions (for a sociology of individual access to the ECJ, see O. Costa, *Les citoyens et le droit communautaire: les usages élitaires des voies de recours devant les juridictions de l'Union*, *Revue internationale de politique comparée* 9, 1, 2002).

to national institutions) drag along the policy-making processes at the level where they operate, they have become more supranational in character. In the EU, non-majoritarian and majoritarian actors increasingly relate in a polyarchical polity of “supranational governance”<sup>180</sup> and the role of national institutions is fading away at that level. Interestingly, as the multiple levels of government in Europe become steadier, the frontier dividing European and national law becomes increasingly evanescent at the same time. Thirdly, by anticipating intergovernmental choice and paving the way toward the EU’s accession to the ECHR, the European courts’ linkage has had the effect that two European organisations, which separately dealt with economic integration and human rights – the EU and the Council of Europe – converge into one single, but highly fragmented polity. Paradoxically, the EU, which has grown out of the former framework for “reinforced co-operation” of those Council of Europe member states that wanted to take integration a step further, has evolved in a way that the former is about to become a member of the latter’s “constitution”. In this sense, the EU has been “turned around” under the pressure of the courts’ reciprocal actions. At a time when the overall ratification of the EU’s Constitutional treaty is quite uncertain, a possible constitutional adjournment or fragmentation increases the responsibility of the European judges to uphold and enhance the protection of human rights in Europe. While the European judges navigate human rights through overlapping normative systems, they have considerably changed the face of European integration. Institutional rivals and epistemic friends, the European courts are separate but not separable and their judges are autonomous but interdependent. Rather unexpectedly, the linkage between the European courts has become a new driving force of integration. Yet, integration through human rights in Europe is a fragile and incomplete endeavour. Just as in co-operative binary puzzles where two players must solve the game together and where both lose as someone tries to win over the other, solving Europe’s binary human rights puzzle has required of European judges a new way of thinking where it’s not the institutions, but their linkage that matters.

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<sup>180</sup> A. Stone Sweet/W. Sandholtz, *European Integration and Supranational Governance*, *Journal of European Public Policy* 4, 3, 1997.

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