



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

**Judicial Dialogue:  
Fundamental Rights Issues in National Court Judgments**

*Trilateral Meeting with the Court of Justice of the European Union and the  
Network of the Presidents of the Supreme Judicial Courts of the European  
Union*

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**I - Introduction**

President De Groot,  
President Lenaerts  
Judges,  
Dear colleagues and friends,

My warm thanks to President De Groot for the enormous work undertaken as rapporteur.

It is a pleasure to participate in this morning's panel, whose purpose is to reflect on the contribution of national courts to access to justice and the effective protection of human rights, looking at how you integrate the judgments of the two European courts and the difficulties you may encounter in this regard.

In order to feed into that discussion, I thought it useful to first share some reflections, from the perspective of the European Court of Human Rights, on the relationship between the Convention and EU law.

It is now over thirty years since the first major EU competence expansion in the Maastricht Treaty with implications for fundamental rights protection and not far from fifteen years since the EU Charter was recognised as having equal legal value to the EU Treaties.

Added to these developments is the continued centrality of the common constitutional traditions, of which the European Convention on Human Rights and EU law are both expressions,<sup>1</sup> and the adoption of what can best be described as EU fundamental rights legislation which, more often than not, codifies existing and sometimes extensive Convention case-law.<sup>2</sup>

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<sup>1</sup> See further S. O'Leary, 'EUited in Diversity II – The Rule of Law and Constitutional Diversity Perspectives from the European Court of Human Rights', The Hague, the Netherlands, 31 August – 1 September 2023 (publication forthcoming).

<sup>2</sup> See, for example, the EU procedural rights directives which codify the essential elements of Article 6 of the European Convention. On the phenomenon of EU fundamental rights legislation, see E. Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' *Common Market Law Review*, 2014, 219-245; Y. Lorans, 'Le législateur européen et la protection des droits fondamentaux dans l'Union : vers une concrétisation législative de la Charte', *Revue Trimestrielle des droits de l'Homme*, 2019, 59-86.

You are thus faced with a proliferation of sources and arbiters of fundamental or human rights within the EU-27.

As I indicated earlier this morning, the Convention system is based on the legal principle of shared responsibility. This implies that national courts, particularly supreme courts, must remain the central actors and driving force behind human rights protection.

Shared responsibility further implies that the protection of human rights at national level can be subject to external supervision by the Court. In this regard, the Court has repeatedly stated that its judgments:

“[...] serve not only to decide those cases brought before [it] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties”<sup>3</sup> and ensure that the “living instrument” is adapted to present day conditions.<sup>4</sup>

Of course, when discussing the relationship between the two European Courts and their case-law, one must not forget the key features that distinguish the two systems.<sup>5</sup>

The mission of the Strasbourg court is to establish a minimum standard for human rights protection across the 46 heterogeneous member states of the Council of Europe.

The mission of the CJEU, on the other hand, is broader in that it seeks to ensure the uniform interpretation of EU law *generally*. To date its jurisdiction over fundamental rights has been limited by the scope of application of EU law and by the all-important principle of conferral.

In terms of the different scope of protection and breadth of case-law we see these differences reflected in President De Groot’s report, compiling answers to the questionnaire.

Nevertheless, as the scope of EU law expands, jurisdiction over fundamental rights has grown accordingly, and the CJEU enters terrain previously occupied by national supreme and constitutional courts and, as a last resort, the European Court of Human Rights. In addition, in the words of President Lenaerts at the opening of the Strasbourg judicial year in 2018, given the key characteristics of EU law:

“[T]he EU system of fundamental rights protection is an *internal* component of the rule of law within the EU”.<sup>6</sup>

However, and I think this is really worth stressing, while the two European systems may differ, the universality and indivisibility of the human rights and fundamental freedoms which they both seek to protect is clearly stated in both the TEU<sup>7</sup> and the EU Charter and is central to their effective protection within Europe’s legal space.

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<sup>3</sup> See, for example, *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX.

<sup>4</sup> See *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26 and, for a more recent example, *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 122, 14 January 2020.

<sup>5</sup> See S. O’Leary, ‘The EU Charter Ten Years On: A View from Strasbourg’, in M. Bobek and J. Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, Oxford: Hart Publishing, 2020, 37-68.

<sup>6</sup> K. Lenaerts, ‘The ECHR and the Court of Justice: Creating Synergies in the Field of Fundamental Rights Protection’, Opening of the Judicial Year at the ECHR, 26 January 2018.

<sup>7</sup> Article 21 § 1 TEU.

I do not have time today to give an exhaustive account of all areas in which Strasbourg and Luxembourg jurisprudence now overlaps.

Instead, I will limit myself to giving an overview, from the perspective of the Court, of the evolving relationship and dynamics between the two Courts, highlighting three main points:

- Firstly, in recent years a remarkable level of convergence has been achieved in human rights protection across several legal areas.
- Secondly, on questions which may previously have suggested divergence in the approaches of the two European courts, we are witnessing different forms of what could be described as reconciliation.
- And finally, I will reflect on future avenues for judicial dialogue by highlighting a couple of issues which may require further attention going forward.

Like the rapporteur, I have long contested the thesis that the two European Courts are in competition or that their case-law is repeatedly and significantly divergent.<sup>8</sup>

This is simply not borne out by an overview of our output in recent years. Nor, given the origins of the Convention and EU law's underpinning values – namely common constitutional traditions – or the DNA of EU fundamental rights law as evidenced in CJEU case-law or the EU Charter, would this be possible, never mind desirable.

## **II - Areas of strong convergence between ECtHR and CJEU case-law**

The human rights dialogue between Luxembourg and Strasbourg is long-standing.

As President Lenaerts mentioned, from the 1970s onwards, the CJEU has referred to the European Convention on Human Rights in its judgments.<sup>9</sup> This relationship was formalised with the adoption of the EU Charter of Fundamental Rights, particularly Article 52(3). The Strasbourg Court also frequently refers to EU law in its judgments, and this has become increasingly common in recent years.<sup>10]</sup>

What I'd like to zoom in on is the logic behind the alignment we have witnessed in recent years and the direction of travel from which it flows.

Where EU legislation explicitly codifies fundamental rights as contained in the Convention and interpreted by the Strasbourg Court, the flow is understandably more pronounced in one direction. This is well-illustrated by the judgments of the CJEU on EU directives on minimum guarantees in

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<sup>8</sup> See, for example, S. O'Leary, 'Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU', *Irish Jurist*, 2016, 4.

<sup>9</sup> The first reference to the European Convention was made in CJEU, *Rutili*, 28 October 1975, C-36/75, EU:C:1975:137. In the 1989 *Hoescht* case, the ECJ stated that 'fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 is of particular significance in that regard' (CJEU, *Hoescht*, 21 September 1989, C-46/87 and 227/88, EU:C:1989:337).

<sup>10</sup> See T. Lock, 'The Influence of EU law on Strasbourg Doctrines', *European Law Review*, 2016, 804-825; S. O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg', in M. Bobek and J. Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, Oxford: Hart Publishing, 2020, 37-68; J. Callewaert, 'Convention Control Over the Application of Union Law by National Judges: The Case for a Wholistic Approach to Fundamental Rights', *European Papers*, 2023, 337.

criminal procedure which explicitly refer to the Convention and the Court's case law on Article 6 as the benchmark.<sup>11</sup>

Conversely, there are domains which are strongly developed in EU law, while historically, they have received less attention within the Convention framework. In these areas, the flow may predominantly stem from Luxembourg to Strasbourg.

Equality law is a prime example here: it is deeply ingrained in the EU project and has been extensively fleshed out in its primary and secondary law for decades.<sup>12</sup> In contrast, Article 14 of the European Convention has been described in the past as 'second-class'<sup>13</sup> or 'a Cinderella provision',<sup>14</sup> although it has gained greater significance in the case-law of the Strasbourg court over the past two decades.<sup>15</sup>

In the realm of data protection, we see the impact of Article 8 case-law on the early development of EU data protection law and the case-law of the CJEU. Here one needs to distinguish between Convention "articles" and Convention "rights", the latter being broader than the former. The Strasbourg Court has a long record of cases dealing with data protection and continues to develop it, thereby responding to technological progress, institutional developments and present-day conditions in digitalised societies which have to deal with organised and cybercrime and the threat of terrorism. As such, it has laid down standards for lawful and human-rights compatible surveillance practices which have in turn influenced, at least in part, the CJEU.<sup>16</sup>

For instance, the strict approach towards the legality requirement, as enshrined in Article 8 and adopted by the Court in *Huvig*<sup>17</sup> regarding the issue of telephone surveillance, was adopted by the CJEU, from *Digital Rights Ireland* onwards,<sup>18</sup> with regard to electronic surveillance practices.<sup>19</sup> In certain regards of course the case-law of the two courts on surveillance may differ, with the Strasbourg Court not looking at data protection rights in isolation and attributing more prominence to the positive obligations of States under other Convention provisions, according them, in line with one of the basic tenets of the system, a wider margin of appreciation.

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<sup>11</sup> See the recent judgments of the CJEU in Case C-564/19, *IS*, EU:C:2021:949, § 101; Case C-420/20 *HN*, EU:C:2022:679, § 55; Case C-347/21 *DD*, EU:C:2022:692, § 31; Case C-242/22 *PPU TL*, EU:C: 2022:611, § 40 and Case C-348/21, *HYA and Others*, EU:C:2022:965 §§ 39-41, 53-58. For examples in the other direction, see the use made by the Strasbourg Grand Chamber of the more developed language of the EU directive on the right of access to a lawyer in *Ibrahim and others v. the United Kingdom* [GC], n° 50541/08, §§ 210 and 259, 13 September 2016. See further J. Callewaert, 'The Recent Luxembourg Case-law on Procedural Rights in Criminal Proceedings: Towards Greater Convergence with Strasbourg', *EU Law Live*, 4 May 2023 and N. Daminova, 'European Court of Human Rights on the 'Stockholm's Roadmap Directives': the quest for a coherent application of 'due process' rights in Europe?', *EU Law Live Weekend Edition*, 2023, 15-20.

<sup>12</sup> See, for instance, as regards EU primary law, Articles 2, 8 and 10 TEU and Articles 19 and 157 TFEU, and, as regards EU secondary law, the Race Equality Directive (2000/43/EC) and the Equality General Framework Directive (2000/78/EC).

<sup>13</sup> R. O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-discrimination in the ECHR', *Legal Studies*, 2009, 2.

<sup>14</sup> *Ibid.*, 1.

<sup>15</sup> See J. Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', *Human Rights Law Review*, 2013, 99-124, p. 100. See also N. Bamforth, 'Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap' *Cambridge Yearbook of European Legal Studies*, 2006-2007, 1-42, p. 27, on increased synergies and differences between the two systems. Some fairly recent developments in Strasbourg have been overtly influenced by CJEU case law. Think, for example, of our recognition of notions such as indirect discrimination (*D.H. and Others v. the Czech Republic* [GC], n° 57325/00, 13 November 2007) or discrimination by association (ECHR, *Guberina v. Croatia*, n° 23682/13, 22 March 2016) or EU Charter and Equality law references in cases like ECHR, *Molla Sali v. Greece* [GC], n° 20452/14, 18 June 2020.

<sup>16</sup> See further S. O'Leary, 'Balancing Rights in a Digital Age', *The Irish Jurist*, 2018, 59-92 and G. Malgieri and P. De Hert 'European Human Rights, Criminal Surveillance, and Intelligence Surveillance: Towards 'Good Enough' Oversight, Preferably but Not Necessarily by Judges', *Brussels Privacy Hub Working Paper*, 2017, 1-24.

<sup>17</sup> ECHR, *Huvig v. France*, 24 April 1990, Series A no. 176-B.

<sup>18</sup> CJEU [GC], *Digital Rights Ireland*, 8 April 2014, EU:C:2014:238.

<sup>19</sup> The Court has also strongly referred to CJEU case-law in the context of surveillance practices. See e.g., the extensive presentation of applicable EU law, notably GDPR, and CJEU case-law in ECHR [GC], *Centrum för rättvisa v. Sweden* n° 35252/08, 25 May 2021, §§ 92-130 and ECHR [GC], *Big Brother Watch and Others v. the United Kingdom*, n° 58170/13 and others, 25 May 2021, §§ 202-241.

We also see convergence and cross-referencing in other areas of data protection law, such as the right to be forgotten on the Internet, as evidenced in the recent Grand Chamber judgment in *Hurbain v. Belgium*.<sup>20</sup>

What is more, in some instances the Luxembourg court previously handed down preliminary rulings on analogous issues at the behest of the same parties. This was for example the case in *Satakunnan v. Finland* on the mass publication of tax information,<sup>21</sup> or *Jehovah's Witnesses v. Finland* on data collection.<sup>22</sup> This demonstrates that preliminary rulings may be the start and not the end of national courts' obligations.

In recent years, particularly effective symmetry and synergy can be found in case law pertaining to the rule of law and, in particular, to the safeguarding of judicial independence.

The recent judgment in *Tuleya v. Poland* provides a good example. The case concerned preliminary investigations in view of disciplinary proceedings against a judge due to, amongst other things, a preliminary question referred by the applicant Judge to the CJEU regarding the compatibility of the Polish disciplinary system with EU law. The Court relied on several rulings of the CJEU to consider that the preliminary investigations relating to a request for a preliminary ruling were contrary to Article 8 of the European Convention.<sup>23</sup>

In this respect, what one could call virtuous and effective circles have formed on rule of law issues. Both Courts have been referring extensively to the case law of their European counterpart, and in doing so, have strengthened the effectiveness of the protection afforded by their respective jurisprudence. As an example, consider the CJEU's judgment in the case of *Simpson and HG* where it strongly relied on the Court's chamber judgment in *Guðmundur Andri Ástráðsson v. Iceland* to define the notion of 'tribunal established by law'.<sup>24</sup> The judicial dialogue did not end there but circled back to Strasbourg. In its Grand Chamber judgment concerning the same Icelandic case, following referral, the Court, in turn, extensively referred to the case law of the Luxembourg court – including the Grand Chamber judgment in *Simpson and HG* which had been handed down in the interim.<sup>25</sup>

As a result of this intensive indirect dialogue between the two European courts, a shared understanding of the requirement to have tribunals established by law has emerged.

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<sup>20</sup> ECHR, *Hurbain v. Belgium* [GC], n° 57292/16, 4 July 2023. The case, which concerned a requirement on a newspaper publisher to anonymise the online archived version of a lawfully published article, extensively refers to the EU Charter and to CJEU case law on the right to be forgotten (*Ibid* §§ 192, 195, 210, 215, 218). Conversely, the CJEU has referred to ECHR case law on the right to be forgotten, see e.g., CJEU [GC], *GC and others*, 24 September 2019, EU:C:2019:773, § 76.

<sup>21</sup> ECHR [GC], *Satakunnan Markkinapörsi OY and Satamedia OY v. Finland* [GC], n° 931/13, 27 June 2017 which concerns the freedom to impart information in the context of an order restraining mass publication of tax information. See references to CJEU case-law on data protection and freedom of expression in §§ 55-79, 133, 149-151, 158-159, 188, 193, 197 and 212.

<sup>22</sup> See ECHR, *Jehovah's Witnesses v. Finland*, n° 31172/19, 9 May 2023 which relates to a decision prohibiting the Jehovah's Witnesses religious community from collecting and processing personal data during door-to-door preaching without the data subjects' consent. See references to CJEU case-law on collection of personal data in door-to-door activities in §§ 39-41, §§ 85-87. It is of note that in both *Satakunnan v. Finland* and *Jehovah's Witness v. Finland*, the Court underlined the significance of judicial dialogue between the CJEU and the national courts of EU member states, in the form of preliminary references to the CJEU, for the protection of fundamental rights within the EU Union (*Satakunnan*, § 212; *Jehovah's Witnesses*, §§ 85-87).

<sup>23</sup> In particular, the Court referred to CJEU case-law to determine that the interference in the form of a preliminary investigation regarding a request for a preliminary ruling was contrary to Article 267 of the TFEU. For this reason, the Court concluded that the interference with the applicant's right to respect for his private life was not 'prescribed by law' within the meaning of Article 8 of the Convention (ECHR, *Tuleya v. Poland*, §§ 434-438, n° 21181/19 and 51751/20, 6 July 2023).

<sup>24</sup> CJEU [GC], *Erik Simpson and HG*, Joined Cases C-542/18 RX-II and C-543/18 RX-II, 26 March 2020, EU:C:2020:232. See the reference in § 74 to ECHR, *Guðmundur Andri Ástráðsson v. Iceland*, n° 26374/18, 12 March 2019 which led the CJEU to consider that the right to be judged by a tribunal 'established by law' encompasses the process of appointing judges.

<sup>25</sup> ECHR [GC], *Guðmundur Andri Ástráðsson v. Iceland*, n° 26374/18, 1 December 2020. See the extensive references to CJEU case-law (§§ 130-139 and 239).

In this way, the European Courts seek to construct a solid bulwark against threats to common values underpinning the Convention and the EU Treaties – common values which derive from Europe’s common constitutional heritage.<sup>26</sup>

### III – Shifting from divergence to convergence

It is of course true that there were some areas in which the case law of the two European courts seemed to diverge or showed potential for doing so.

Think, for example, of the potentially difficult conciliation of the principle of mutual trust with the protection of fundamental rights of individuals or groups of individuals, the subject of the rapporteur’s note and questionnaire.<sup>27</sup> Here too, recent case-law demonstrates signs of increased alignment.

In *Avotiņš v. Latvia* the Grand Chamber reasserted the legitimacy of mutual trust mechanisms integral to the functioning of EU law.<sup>28</sup> However, it emphasised that their application in practice should not endanger respect for human rights and recalled the requirement imposed by the Convention according to which the court in an executing State must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the issuing State.<sup>29</sup> Mutual recognition mechanisms must not leave gaps or give rise to particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient.

The CJEU, in cases such as *Aranyosi and Căldăraru*,<sup>30</sup> *Dorobantu*<sup>31</sup>, *Openbaar Ministerie*<sup>32</sup> and *E.D.L.*,<sup>33</sup> has further elaborated on the functioning of mutual trust mechanisms with reference to the primacy, effectiveness and unity of EU law. But, with time, it seems to have nuanced some of the terms of Opinion 2/13,<sup>34</sup> emphasising the need to ensure *effective* protection of fundamental rights and explicitly referring to the long-standing role of the ECHR and its case-law. In turn, this has allowed national courts, exceptionally, but where required, to rebut the presumption of fundamental rights compliance in some cases, as evidenced in the answers to the questionnaire.

The Strasbourg Court of course assesses EU Member States’ compliance with their Convention obligations in the light of the *Bosphorus* presumption of equivalent protection, where the conditions for its application are met.<sup>35</sup>

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<sup>26</sup> See, for an excellent illustration of this, the CJEU judgment in Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v. Openbaar Ministerie*, EU:C:2022:100, §§ 79-80, regarding execution of an EAW issued by an EU Member State and the two-step assessment required under EU law: “In the context of that assessment, the executing judicial authority may also take account of the case-law of the European Court of Human Rights, in which a breach of the requirement for a tribunal established by law in respect of the procedure for the appointment of judges has been established [...]. For the sake of completeness, it should also be added that those relevant factors also include constitutional case-law of the issuing Member State, which challenges the primacy of EU law and the binding nature of the ECHR as well as the binding force of judgments of the Court of Justice and of the European Court of Human Rights relating to compliance with EU law and with that convention of rules of that Member State governing the organisation of its judicial system, in particular the appointment of judges.”

<sup>27</sup> Contrast especially the early case law of ECHR [GC], *M.S.S. v. Belgium and Greece*, n° 30696/09, 21 January 2011 with that of the CJEU, *N.S. v. United Kingdom*, Joined cases C-411/10 and C-493/10, 21 December 2011, EU:C:2011:865.

<sup>28</sup> *Avotiņš v. Latvia* [GC], no. 17502/07, 23 May 2016.

<sup>29</sup> *Ibid.*, § 114.

<sup>30</sup> CJEU [GC], *Aranyosi and Căldăraru*, C-404/15, 5 April 2016, EU:C:2016:198.

<sup>31</sup> CJEU [GC], *Dorobantu*, C-128/18, 15 October 2019, EU:C:2019:857.

<sup>32</sup> CJEU [GC], *Openbaar Ministerie*, Joined Cases C-562/21 PPU and C-563/21 PPU, 22 February 2022, EU:C:2022:100.

<sup>33</sup> CJEU [GC], *E. D. L.*, C-699/21, 18 April 2023, EU:C:2023:295.

<sup>34</sup> See CJEU Opinion 2/13, 18 December 2014, EU:C:2014:2454, §§ 191-192.

<sup>35</sup> ECHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI. The two conditions for its application are the absence of any margin of manoeuvre on the part of the national authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law. If the presumption applies, the Court confines itself to ascertaining whether the protection of the rights guaranteed by the Convention has been manifestly deficient.

In only one case, *Bivolaru and Moldovan v. France*,<sup>36</sup> the Court has found that the presumption ceased to apply because the protection afforded by the courts in the executing State was manifestly deficient. Cogent information on the risk of Article 3 violations in the issuing State, given the proposed centre where it had been proposed to detain the applicant on execution of the EAW, had been ignored.

The Court also carefully takes into account the important enforcement interests that are at stake in the framework of, for example, the EAW.

The judgment in *Romeo Castano v. Belgium* bears witness to this. In that case, the refusal by Belgium to execute a EAW issued by Spain was found to have violated the procedural limb of Article 2 of the Convention, the refusal decision not having been underpinned by a sufficient factual basis.

In this context, let me reiterate that the Strasbourg court does not have the authority to assess the validity or the correct interpretation of EU law. The Court refrains from trespassing into the exclusive domain of the CJEU in this regard.<sup>37</sup>

Our role is confined to ascertaining whether the effects of adjudication by national courts and authorities in EU Member States in an individual case are compatible with the Convention. Nevertheless, it may sanction the lack or incorrect application of EU law in light of the Convention, thereby contributing to its effective implementation.

Sometimes case-law differences may appear to be significant and more long-lasting.<sup>38</sup> Most of the time, however, this results from the fact that the Strasbourg Court and the CJEU are faced with different legal constraints that are specific to their respective legal systems and carry out an examination whose nature is distinct. In such circumstances, it is the task of the European Courts to be clear and transparent that such divergence exists, and why, to facilitate the work of national courts.

An illustrative case to consider is *Krombach v. France*. In this case, the Court made it clear that the fact that the principle of *ne bis in idem* has a transnational dimension in EU law is without bearing on the applicability of *ne bis in idem* in European Convention law which only applies *within* the national legal systems of the member States. Let me emphasise here however, as our Court did in this ruling, that the Convention does not prevent the States parties from granting more extensive legal protection, be it through domestic law, other international treaties, or EU law.<sup>39</sup>

#### IV – A glimpse into the future

At a time when Europe's fundamental rights *acquis* is more challenged in some quarters than at any time since after the Second World War, one of the most important elements for both courts when it comes to legitimising their systems and the judicial decisions which issue from them is and

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<sup>36</sup> *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, 25 March 2021.

<sup>37</sup> See, for example, ECHR [GC], *Jeunesse v. the Netherlands*, n° 12738/10, § 110, 3 October 2014; ECHR, *Thimothawes v. Belgium*, n° 39061/11, § 71, 4 April 2017, or ECHR *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, § 135, 25 March 2021. See, however, ECHR, *Spasov v. Romania*, n° 27122/14, 6 December 2022, on the thin line which may exist in some exceptional cases.

<sup>38</sup> The case law on mass surveillance, for instance, continues to show some differences as regards derogations and legal safeguards. Compare, for example, the CJEU's Grand Chamber judgments in *Digital Rights Ireland*, C-293/12 and C-594/12, 8 April 2014, EU:C:2014:238 and *Tele2 Sverige*, C-203/15 and C-698/15, 21 December 2016, EU:C:2016:970 with ECHR, *Centrum För Rättvisa v. Sweden*, 19 June 2018, application no. 35252/08 and *Big Brother Watch and others v. the United Kingdom*, 13 September 2018 applications nos. 58170/13, 62322/14 and 24960/15.

<sup>39</sup> ECHR, *Krombach v. France*, n° 67521/14, 20 February 2018, §§ 38-39.

will remain the quality of their reasoning and the judicial dialogue in which they engage – with each other and with national courts.<sup>40</sup>

The importance of such dialogue will only grow in the light of EU's expanding competences (and the latter's effect when it comes to jurisdiction in relation to fundamental rights protection). The development of EU legislative standards in domains such as whistleblowing,<sup>41</sup> domestic violence,<sup>42</sup> the digital environment,<sup>43</sup> or artificial intelligence<sup>44</sup> will call for further alignment and adjustment with the existing and sometimes extensive case-law of the Strasbourg Court.

Article 52 § 3 of the EU Charter ensures that the EU must respect the European Convention minimum standard as its floor. However, it is worth adding that the living instrument doctrine means that the Convention standard may adapt and is adjusted over time,<sup>45</sup> such that the CJEU will have to keep track of such changes for Article 52 § 3 of the Charter to be respected.

In addition, it may transpire that methodological alignment is needed or welcome in future. In this respect, I note the growing use of emblematic tools of Convention law – such as the living instrument doctrine or the margin of appreciation – in recent CJEU case law.

The latter was used, for instance, to find a balance between animal welfare and freedom of religion in the context of ritual slaughtering,<sup>46</sup> or to adjust the CJEU's first preliminary rulings in relation to the wearing by employees of religious symbols.<sup>47</sup>

Looking at the possibility of such alignment in the opposite direction, one could consider the usefulness of the more thorough approach of the CJEU in discrimination cases, compared to the more under-developed Article 14 case-law which I mentioned earlier.

In any event, as already stressed in my introduction, national courts must remain both the central focus and the drivers of the dialogue between the Court and the CJEU and the case-law of both. You are both EU and Convention judges. It is important, in this regard, for the two European courts to clearly represent the extensive convergence and complementarity which does exist, and to explain – and where necessary justify – points of divergence, with equal clarity and sensitivity.<sup>48</sup>

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<sup>40</sup> See S. O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg', in M. Bobek and J. Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, Oxford: Hart Publishing, 2020, 37-68, at p. 66.

<sup>41</sup> See, as regards EU law, Directive 2019/1937/EU of 23 October 2019 on the protection of persons who report breaches of Union law which had to be transposed by the EU Member States by 17 December 2021. See also the recent ruling of the ECHR in *Halet v. Luxembourg* [GC], n° 21884/18, 14 February 2023 on the protection of whistle-blowers and the references to EU law in §§ 58, 99, 101, 106.

<sup>42</sup> See in particular the proposal for an EU Directive on combating violence against women and domestic violence COM/2022/105. The Commission has also repeatedly emphasised the need to align EU law with established international standards, notably those set out in the Istanbul Convention, which the EU has now ratified.

<sup>43</sup> As regards EU law, see the EU Digital Markets Act and Digital Services Act which have been adopted and which entered into force on 1 November 2022 and 16 November 2022 respectively. As regards the ECHR, see, e.g., *Delfi AS v. Estonia* [GC], n° 64569/09, 16 June 2015, regarding the award of damages against an internet news portal for offensive comments posted on its site by anonymous third parties (see references to EU law, §§ 50-57, 147) and *Sanchez v. France* [GC], n° 45581/15, 15 May 2023 on a criminal fine imposed on a politician for failing to delete Islamophobic comments made by third parties from his Facebook "wall" which he used for his election campaign, (see references to EU law, §§ 74-78). In relation to early examples of AI case-law see *Glukhin v. Russia*, no. 11519/20, 4 July 2023 on the use of facial recognition technology to sanction demonstrators.

<sup>44</sup> Note that the legislative process for the proposed EU AI Act is currently [ongoing](#).

<sup>45</sup> See, for example, the clarification and consolidation of the general principles on whistle-blowing in *Halet*, cited above, or the development of ECHR case-law on the recognition of same-sex couples as explained in *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, §§ 167, 209, 17 January 2023

<sup>46</sup> CJEU, *Centraal Israëlitisch Consistorie van België and others*, C-336/19, 17 December 2020, EU:C:2020:1031, § 67 on the margin of appreciation and § 77 on the living instrument doctrine. On the subject of ritual slaughter, see also the pending Case *Muslims van België and others v. Belgium*, nos. 16760/22 and 10 others before the Strasbourg court.

<sup>47</sup> See, for example, CJEU, *WABE eV and others*, C-804/18 and C-341/19, 15 July 2021, EU:C:2021:594, § 86 and § 88.

<sup>48</sup> S. O'Leary, 'Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU', *Irish Jurist*, 4-41, at p. 40.



Turning again to the rapporteur's note and your responses to the questionnaire. For a Strasbourg court judge it is both fascinating and reassuring to see the reasons for references to our case-law in your court judgments. The reasons are summarised in the report as compliance, substantiation, transparency and judicial dialogue, all of which are essential for the proper functioning of the Convention system and for the preservation of your role as the primary judicial actors therein. The examples of case-law provided in the rapporteur's introductory report are illustrative of the margin in practice and your role in its regard.

The level of embeddedness of the Convention in domestic law influences how the Strasbourg court responds in a given case in terms of the principle of subsidiarity and the margin of appreciation. The judgment of the Court in a UK immigration case on Article 8, *Ndidi*, explains this well:

"The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, *applying the relevant human rights standards consistently with the Convention and its case-law*, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities."<sup>49</sup>

This was, of course, a case relating to a qualified and not an absolute Convention right. Nevertheless, it illustrates that your references to our case-law, whether for reasons of compliance, substantiation, transparency or dialogue, allow us to verify the embeddedness of the Convention in your legal system and in your courts' reasoning in individual cases and increase the incidences, where possible, in which we only engage in process based review.

### **Concluding remarks**

I return in my conclusion to the complexity of the multi-level system for the protection of human rights in which we are all called to participate and to the violent and troubled times in which we are living.

Both the system and the times require us, now more than ever, to engage in constructive and open dialogue both at events such as this, and in our judgments, in defence of our common European values.

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<sup>49</sup> *Ndidi v. the United Kingdom*, no. 41215/14, § 76, 14 September 2017.