Article

To accede or not to accede : European protection of fundamental rights at the crossroads

Adhérer ou ne pas adhérer : la protection européenne des droits fondamentaux à la croisée des chemins

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Abstract

This article highlights the stakes behind the debate on the accession of the European Union to the European Convention on Human Rights. It goes beyond the technical dimensions to address the substantive questions that emerge, such as the value of an external supervision of compliance with fundamental rights in the European Union, beyond the control already exercised by the Court of the Justice of the European Union ; or the risk that requirement mutual trust between the EU Member States, in the establishment of the internal market or in the Area of Freedom, Security and Justice, shall trump the restrictions to mutual recognition that fundamental rights require.

Résumé

Cet article éclaire les enjeux du débat portant sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme. Il va au-delà des aspects techniques pour évoquer les questions de fond qui émergent, concernant notamment la valeur ajoutée d'un contrôle du respect des droits fondamentaux externe à l'ordre juridique de l'Union européenne, au-delà du contrôle qu'assure déjà la Cour de justice de l'Union européenne ; ou le risque que le présupposé d'une confiance mutuelle entre les États membres de l'UE, dans l'établissement du marché intérieur ou dans l'espace de liberté, de sécurité et de justice, l'emporte sur les limites à la reconnaissance mutuelle qu'exige le plein respect des droits fondamentaux.

The accession of the European Union (EU) to the European Convention on Human Rights (the Convention) has been under discussion for more than thirty years. The Treaty of Lisbon has given the project a new impetus, however, by explicitly requiring the EU to take this step and by providing the legal basis to that effect.[2]

[1] This paper is the expanded and updated English version of a conference given by the author on 5 October 2013 in Bonn, at the 6th Conference on EU criminal justice ("6. EU-Strafrechtstag").
[2] Article 6 § 2 TEU.

A lot has already been written on EU-accession[3] and the topic has been the subject of even more attention since a Draft Accession Treaty was finalized and sent by the European Commission to the European Court of Justice (ECJ) for an opinion on its compatibility with the EU treaties.[4] This paper argues that in light of recent developments regarding the protection of fundamental rights in some areas of EU law, accession has become even more urgent, notably as a means to prevent the traditional pan-European approach to fundamental rights from being fatally undermined. In this sense, the European protection of fundamental rights can rightly be said to be at the crossroads.

I. Fundamental rights at the crossroads: will the EU follow the pan-European tradition or go its own way?

The importance of EU-accession for the European legal culture and indeed for Europe as a whole can hardly be overestimated. What is at stake here in the long-term is nothing less than the very notion of fundamental rights to which democracies in Europe have been adhering ever since the Second World War, i.e. a notion which is individual-oriented and draws on the concept of universality of human rights, as laid down in the 1948 Universal Declaration of Human Rights and endorsed meanwhile by the Treaty of Lisbon.[5]

This notion of fundamental rights finds itself embodied in the Convention, which has always been understood, as its Preamble reveals, as the European response to the call by the Universal Declaration for its implementation at regional level.[6] It is this notion of fundamental rights which has given rise to the body of case-law developed by the European Court of Human Rights (ECHR) over the last sixty

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[3] On EU-accession to the Convention, see, among many others: Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 2014; Paul Craig, "EU Accession to the ECHR: Competence, Procedure and Substance", *Fordham International Law Journal*, vol. 36, No. 1115, 2013; the series of articles presented in the *European Journal of Human Rights*, 2013/4, p. 561; Clemens Ladenburger, "Vers l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", *Revue trimestrielle de droit européen*, 2011, p. 21; Tobias Lock, "End of an Epic? The Draft Agreement on the EU's Accession to the ECHR", *Yearbook of European Law*, vol. 31 (2012), p. 162; Jörg Polakiewicz, "EU Law and the ECHR: Will the EU's Accession square the Circle?", *European Human Rights Law Review*, 2013, p. 592; Vassilios Skouris, "First Thoughts on the Forthcoming Accession of the European Union to the European Convention on Human Rights", in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds.), *The European Convention on Human Rights, a Living Instrument. Essays in Honour of Christos L. Rozakis*, Brussels, Bruylant, 2011, p. 556; Françoise Tulkens, "La protection des droits fondamentaux en Europe et l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", *Revue critique trimestrielle de jurisprudence et de législation*, 2012, p. 14.

[4] On 5 April 2013 a draft accession treaty was agreed upon by the negotiators of the 47 Council of Europe Member States and of the European Commission. On 4 July 2013, the European Commission sought the opinion of the ECJ (2/13), under Article 218, paragraph 11, of the TFEU, on whether this draft was compatible with the treaties. The ECJ held a public hearing on these issues on 5-6 May 2014.

[5] Article 21 TEU.

[6] "… The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction." (Preamble to the Universal Declaration of Human Rights, December 10th 1948).

years and which today gives guidance to 47 States and some 800 million Europeans in applying and respecting fundamental rights in virtually every situation of daily life.

Against this background, accession by the EU to the Convention entails a crucial choice. It is about whether the EU will commit itself, along with virtually all European States, to this traditional notion of fundamental rights or whether it will go its own way? Will it join the pan-European community of Contracting Parties to the Convention or will it yield to the centrifugal forces currently operating within the EU legal system? Will it give priority to the individual or to the system? These are vital questions for the EU but also for the European protection of fundamental rights as a whole, for a solo run by the EU in this area would seriously affect the consensus on which the European protection of fundamental rights has been based so far, with the risk of seeing it break up and, ultimately, fundamental rights losing much of their fundamental nature. To correctly evaluate the impact of EU-accession in this respect, one should first briefly recall what accession is about and what its added value is.

II. Accession as the way to allow external supervision by the European Court of Human Rights

Accession is primarily designed to fill a legal gap. As matters currently stand, no individual and no undertaking can directly sue the EU before the ECHR on account of actions by the EU institutions or agents. EU Member States can be sued, including for their implementation of EU law,[7], but the EU as such cannot,[8] even when it performs acts very similar to those performed by the Member States, as it does for instance in the field of competition law. This is a significant anomaly to which EU-accession is precisely designed to put an end. The categories of cases concerned are those which are normally adjudicated on the merits by the EU courts, including cases concerning anti-trust law, trademark law, the law of torts and the European civil service.

Why is it so important to fill this gap? To answer this question, one has to bear in mind that all the competences which today are exercised by the EU initially lay with the Member States[9] and were subject to the scrutiny of the ECHR. By transferring them to the EU, a separate legal entity, the Member States also removed them from the scope of the Strasbourg Court's jurisdiction, with the consequence

[7] Eur. Ct. H.R. (GC), *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi ("Bosphorus") v. Ireland*, 30 June 2005 (Appl. No. 45036/98), § 137.
[8] Eur. Ct. H.R. (GC), *Matthews v. the United Kingdom*, 18 February 1999 (Appl. No. 24833/94), § 32.
[9] Article 5 § 2 TFUE.

that their exercise by the EU is no longer subject to the *external* scrutiny carried out by the ECHR.

Yet the external nature of this scrutiny is precisely the added value of the Strasbourg mechanism and what makes it unique. For the ECHR is the only court in Europe which is not part of any of the legal systems under its jurisdiction. It is therefore the only court able to carry out a truly *external* control over compliance with fundamental rights. Its unique legal position enables it to examine all these legal systems "from the outside" as it were, i.e. from a different perspective. By comparison, the ECJ, despite being a truly European institution, is not in a similar position, being the Supreme Court of the EU legal order and therefore part of it.

But what difference does it make for supervision to be exercised from outside the legal system concerned? As experience shows, the unique, genuinely international perspective of the ECHR enables it to adopt a somewhat different look at the facts of a case, i.e. a look from a greater distance, very often allowing an increased objectivity. It is not a *better* look but a *different* one, a look which is designed to be complementary to the one "from within" the system. The European States explicitly wanted this complementary, specifically *international* form of judicial control, given the paramount importance they attached to respect for fundamental rights. The numerous reforms which were carried out in many European States following Strasbourg judgments and which are now widely accepted as appropriate adaptations of the law testify of the usefulness of this type of supervision. By way of example, one should mention here the gradual elimination throughout the continent of many forms of discrimination – be it on grounds of birth, gender or sexual orientation – which has been initiated and supported all along by judgments of the ECHR.[10]

Admittedly, external supervision can sometimes be perceived as disturbing. This, however, is also its function, its *raison d'être*. The very purpose of the external Strasbourg supervision is to help question customary notions and habits, check their suitability in modern society and reflect on how to improve them. If judgments by the ECHR always stated the obvious, if they always met with general approval, there would obviously be no need for them. Their role is rather that of a little thorn in the flesh. In this context, Angelika Nußberger, the German judge at the ECHR, spoke of the "fruitful anger" (*fruchtbarer Ärger*) which was sometimes caused by Strasbourg judgments.[11]

At the same time, one should also bear in mind that the vast majority of applications to the ECHR are declared inadmissible or give rise to findings of no-violation, thereby confirming rather than "condemning" domestic authorities for their

[10] Among many other examples, see Eur. Ct. H.R. (Plenary), *Marckx v. Belgium,* 13 June 1979 (Appl. No. 6833/74); Eur. Ct. H.R. (3rd sect.), *Lustig-Prean and Beckett v. the United Kingdom,* 27 September 1999 (Appl. Nos. 31417/96 and 32377/96); Eur. Ct. H.R. (GC), *Christine Goodwin v. the United Kingdom*, 11 July 2002 (Appl. No. 28957/95); Eur. Ct. H.R. (GC), *Konstantin Markin v. Russia*, 22 March 2012 (Appl. No. 30078/06).

[11] Frankfurter Allgemeine Zeitung, 10 October 2013, p. 8.

actions. No better example of the impact of such an outcome could be given than the Strasbourg judgment which in 2001 confirmed the convictions by German courts of members of the former East-German leadership, following the German reunification, for the killing of fugitives along the Berlin Wall.[12] By virtue of this judgment the impugned convictions became internationally acceptable, thereby dispelling the complaint by the applicants that they had been the victims of victor's justice. A sigh of relief went through Germany.

Thus, EU-accession is also about the EU accepting to be "disturbed" and to have its actions called into question from time to time. The mere acceptance of this possibility will already benefit the EU, as it has benefited the States. The mere fact that external supervision *can be* exercised by the ECHR in respect of a State indeed already has the effect of boosting the latter's credibility and the legitimacy of its actions. This is also the approach of the European Commission who made it very clear that it wishes the EU to be subjected to the same external supervision as its Member States in order to benefit from the same enhanced credibility which it provides.[13]

III. Accession as the answer to the autonomisation of fundamental rights in the EU

The importance of accession, however, goes well beyond opening up the EU to external supervision by the ECHR. What we see today is a clear risk that the two main European systems of fundamental rights protection, operated respectively by the Convention and EU law, drift apart and indeed break up. Accession should help prevent this from happening. This brings us back to the opening statement about the key question being raised by accession: will the EU accept the integration of its own fundamental rights standards into the pre-existing pan-European standards of the Convention or will it go its own way? Signs of such a drifting apart between the EU and the Convention can be seen in legislation as well as in jurisprudence. While they are still not dramatic, they should be taken seriously because of their potential consequences.

A. The directives on procedural rights in criminal proceedings

In the field of legislation, the directives on defense rights in criminal proceedings are a good example of what might be an emerging trend towards a kind of autonomisation of fundamental rights in EU law. As has now become widely known, the

[12] Eur. Ct. H.R. (GC), *Streletz, Kessler und Krenz v. Germany*, 22 March 2001 (Appl. Nos. 34044/96, 35532/97 and 44801/98).

[13] See the Recommendation from the European Commission to the EU Council for a Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (SEC(2010) 305 final, 17 March 2010), p. 3.

EU-legislature is in the process of codifying in a number of directives the procedural rights of suspected and accused persons in criminal proceedings.[14] Three such directives already entered into force, covering respectively the right to translation and interpretation,[15] the right to information[16] and the right to access to a lawyer.[17] More such directives are in the pipeline, notably on the presumption of innocence and the right to be present at trial.[18]

Because of the high potential for conflict with the Strasbourg Court's case-law on Article 6 of the Convention, the Council of Europe has been regularly consulted on such draft directives by EU-institutions with a view to ensuring that these new instruments do not lag behind the level of protection guaranteed by Article 6. In practice, however, this consultation sometimes turns out to be a difficult exercise. Firstly, because any attempt at codifying the Strasbourg Court's case-law always runs the risk of freezing it, thereby ignoring its dynamic nature.[19] If tomorrow the Strasbourg Court raises the level of protection beyond the one laid down in any of those directives, there will be a problem.

The greatest difficulty, however, comes from the repeated attempts by some Member States at lowering the minimum standards of the Convention in such directives or at least at providing therein for the possibility of weakening existing procedural rights, notably through the widening of the scope for limitations on those rights as defined by the Strasbourg Court. This is also what happened with the new Directive on the right to access to a lawyer. While a few such attempts at lowering the standards could be neutralized in Strasbourg, others produced results which have now become legally binding. Admittedly, the final version of the Directive contains a number of positive, progressive elements which extend the protection currently provided by the Convention, such as the – albeit conditional – right for the lawyer to attend some investigative or evidence-gathering acts[20] or the application of defense rights in European Arrest Warrant proceedings.[21] The right of the accused person to communicate, while deprived of liberty, with third persons and with consular authorities should also be mentioned in this context.[22]

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[14] See the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (*O.J.* C 295, 4 December 2009, p. 1).
[15] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (*O.J.* L 280, 26 October 2010, p. 1).
[16] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (*O.J.* L 142, 1 June 2012, p. 1).
[17] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (*O.J.* L 294, 6 November 2013, p. 1)
[18] See the Proposal for a directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM(2013)821 final, 27.11.2013).
[19] "The Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today" (Eur. Ct. H.R. (GC), *Austin and Others v. the United Kingdom*, 15 March 2012 (Appl. Nos. 39692/09, 40713/09 and 41008/09), § 53).
[20] Article 3 § 3 c) of the Directive.
[21] Articles 2 § 2 and 10 of the Directive.
[22] Articles 6 and 7 respectively of the Directive.

It remains the case, however, that the Directive also contains a number of provisions obviously intended to weaken the requirements of Article 6 of the Convention, notably by systemizing and expanding a few marginal exceptions allowed in the Strasbourg case-law to the extent that some provisions now almost come across as an "invitation to an exception" to the principle of legal assistance as from the first interrogation. Article 3 § 6 b), for instance, provides that the right to legal assistance can be temporarily suspended at the pre-trial stage, "in exceptional circumstances ... where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings." A very general wording indeed. Even though Article 8 of the Directive lays down some further requirements with regard to the handling and the justification of such "temporary derogations", the fact remains that such general formulations open up a large scope for exceptions to the basic right to legal assistance. Many more such vague and elastic formulas can be found in the Directive, leaving a fair amount of leeway to the prosecuting authorities in applying them and to the courts in interpreting them.

Admittedly, Article 14 of the Directive contains a so-called non-regression clause, according to which "[n]othing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection." But who will have the stamina and the means to go to Strasbourg for clarification of whether this clause has been respected, as far as the Convention is concerned? The result is a clear risk that parallel European defense rights might be emerging here.

B. The ECJ case-law

European jurisprudence would appear to be another area where parallel European fundamental rights are cropping up, as illustrated by a number of recent ECJ-rulings implicitly suggesting that jurisdiction over fundamental rights is divided up between Luxembourg and Strasbourg, between the EU-Charter of Fundamental Rights (the Charter) and the Convention, in spite of the fact that the Charter, the Convention and even the Treaty of Lisbon all go for an interlocking of those systems rather than their separation. Several indicators seem to point towards such a line of thinking.

One should first mention here some rulings which would appear to (wrongly) suggest that the Convention does not apply to Union law.[23] Next and more importantly, the ECJ seems to be setting a new trend whereby the relevant Convention provisions and/or Strasbourg case-law are no longer – or only scarcely – explic-

[23] Case C-256/11, *Dereci,* Judgment of 15 November 2011, § 72 and the View of Advocate General Mengozzi, § 40. Case C-87/12, *Ymeraga,* Judgment of 8 May 2013, § 44 could be seen as a "follow-up" to this.

itly relied upon. This applies even in respect of provisions which the Charter borrowed from the Convention – provisions which therefore, in accordance with Article 52 § 3 of the Charter, should be given "the same meaning and scope" as the corresponding Convention rights are given by the Strasbourg Court. Instead of disclosing this process of identifying the relevant Strasbourg standards, in the interest of a better understanding by the reader of the legal situation and the common European heritage existing in this area, as indeed the ECJ still did in the recent past,[24] this process is now increasingly being kept secret.[25]

In this way, EU fundamental rights are being presented in the Luxembourg case-law as having a degree of autonomy which, however, does not correspond to legal reality. The result is a kind of formal autonomisation of fundamental rights protected under EU law. At first sight, this phenomenon might appear harmless. In reality, however, things might look quite differently. For this *formal* autonomisation of EU fundamental rights could well be anticipating their *substantial* autonomisation, thereby paving the way for an understanding of fundamental rights which is somewhat different from the one lying at the heart of the Convention system.

C. A somewhat different understanding of fundamental rights?

As an example of this somewhat different understanding of fundamental rights under EU law, one could mention the recent case-law relating to the Area of freedom, security and justice (AFSJ) where the ECJ appears to be increasingly torn between respect for fundamental rights and efficiency considerations.[26] This requires a few words of explanation.

It is common knowledge today that mutual recognition of judicial decisions of other EU Member States is one of the cornerstones of the AFSJ.[27] This mutual recognition requires as a precondition a sufficient degree of confidence among Member States, notably in relation to whether Member States issuing judicial decisions the recognition of which they seek can be taken to fully respect fundamental rights, especially in respect of the persons affected by those decisions. For this purpose a presumption is applied according to which all EU Member

[24] E.g. in Case C-400/10 PPU, *McB.*, Judgment of 5 October 2010; Cases C-92/09 and 93/09, *Schecke and Eifert*, Judgment of 9 November 2010; Case C-279/09, *Deutsche Energiehandels- und Beratungsgesellschaft mbH*, Judgment of 22 December 2010.

[25] E.g. in Cases C-71/11 and C-99/11, *Y. and Z.*, Judgment of 5 September 2012; Case C-619/10 *Trade Agency Ltd.*, Judgment of 6 September 2012; Case C-199/11, *Otis NV*, Judgment of 6 November 2012. See however, as a recent but rather isolated counter-example, Case C-501/11 P, *Schindler Holding Ltd. and Others*, Judgment of 18 July 2013, §§ 30 et seq. Fortunately the Advocates General (for the time being) do not appear willing to join this trend.

[26] On these problems, see Olivier De Schutter and Françoise Tulkens, "Confiance mutuelle et droits de l'homme. La Convention européenne des droits de l'homme et la transformation de l'intégration européenne", in *Mélanges en hommage à Michel Melchior*, Brussels, Anthemis, 2010, p. 939.

[27] Article 67 §§ 3 and 4 TFEU.

States are considered to duly respect fundamental rights.[28] The new Directives on defense rights in criminal proceedings, which were discussed above, precisely serve to reinforce this presumption.

The next step in this reasoning is to consider that if it can be presumed that all Member States provide a sufficient and equivalent protection of fundamental rights, it becomes irrelevant in which one of the Member States – the State requesting recognition of its decision ("the issuing State") or the State requested to recognize it ("the executing State") – this protection is actually ensured. Hence, under this approach there is also nothing wrong with conferring, for the sake of efficiency, exclusive competence to protect fundamental rights to the courts of the issuing State, for instance the court which issued the European arrest warrant or certified the judgment ordering the return of an abducted child.[29]

Thus, under this scheme the requesting judge becomes the one having quasi-exclusive competence to ensure respect for the fundamental rights of the persons concerned by his decision. This approach logically flows from the doctrine of mutual recognition which aims at building a unified AFSJ without competence disputes and work duplication. It therefore certainly is coherent and efficient, which presumably is also why the ECJ appears fairly reluctant to allow exceptions from it. Yet the question being raised by this exclusive-competence approach is whether under the Convention and the Charter another judge – and notably the requested judge – can as a consequence be lawfully deprived of his own competence to apply those instruments in the context of the recognition process.[30]

The impact of this approach can be observed in several sectors of the AFSJ. Thus, under the Dublin II-Regulation on the competence for the processing of asylum applications,[31] only *systemic* flaws in the asylum procedure and reception conditions for asylum applicants in a Member State, resulting in inhuman or degrading treatment within the meaning of Article 4 of the Charter, can render the transfer of asylum seekers incompatible with that provision.[32] In matters concerning

[28] On this presumption as central element of the mutual recognition mechanism, see e.g. Case C-491/10 PPU, *Zarraga,* Judgment of 22 December 2010, §§ 59 and 70; Cases C-411/10 and C-493/10, *N. S. and Others,* Judgment of 21 December 2011, §§ 78-83; Case C-168/13 PPU, *Jeremy F.,* Judgment of 30 May 2013, § 50.

[29] Article 42 § 1 of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (*O.J.* L 338, 23 December 2003, p. 1).

[30] On this, see *inter alia* Valsamis Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", *Yearbook of European Law*, vol. 31, No. 1, 2012, p. 319.

[31] Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("Dublin II Regulation"; *O.J.* L 50, 25 February 2003, p. 1). It has been replaced, with effect from 19 July 2013, by Regulation (EU) No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ("Dublin III Regulation"; *O.J.* L 180, 29 June 2013, p. 31).

[32] Cases C-411/10 and C-493/10, *N. S. and Others,* Judgment of 21 December 2011, §§ 84-86. The United Kingdom's Supreme Court seems to have some difficulties with this approach, as recently illustrated by [2014] UKSC 12 (19.2.2014), notably in § 63: "Where, therefore, it can be shown that the conditions in which an asylum seeker will be required to live if returned under Dublin II are such that there is a real risk that he will be subjected to inhuman or degrading treatment, his removal to that state is forbidden. When one is in the realm of positive obligations [...]

international child abductions falling under the Brussels II*bis* Regulation,[33] the courts of the executing State are denied the competence to assess whether the child's return could give rise to a breach of his fundamental rights.[34] Equally, the chances of a suspect or a convicted person who is the subject of a European arrest warrant[35] to have the compatibility of his transfer with his defense rights judicially reviewed in the executing State are very slim.[36]

The following quotations would appear to confirm the impact of efficiency considerations in the ECJ's understanding of the role of fundamental rights in the AFSJ. In *Radu*, the ECJ stated:

> "In any event, the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system."[37]

In *Melloni*, Advocate General Bot considered:

> "Framework Decision 2009/299 fits into that scheme by seeking not only to ensure the execution of European arrest warrants in connection with convictions in absentia, but also to guarantee that the fundamental rights of the persons concerned, such as the right to a fair trial and the rights of the defense, are adequately protected. In order to reconcile those objectives, the European Union legislature set the level of protection for the fundamental rights in question so as not to compromise the effectiveness of the mechanism of the European arrest warrant."[38]

And in *N.S.*, the ECJ ruled:

> "It cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No. 343/2003. At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compli-

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the evidence is more likely to partake of systemic failings but the search for such failings is by way of a route to establish that there is a real risk of article 3 [of the Convention] breach, rather than a hurdle to be surmounted." Recent ECJ case-law, however, has shown greater sensitivity towards individual situations. See, in this connection, Case C-648/11, *MA, BT and DA,* Judgment of 6 June 2013, in which the situation of unaccompanied minor asylum seekers has been addressed, and Case C-4/11, *Kaveh Puid,* Judgment of 14 November 2013, in which the ECJ stated that: "The Member State in which the asylum seeker is located must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time" (§ 35).

[33] Regulation 2201/2003 (footnote 29 above).

[34] Case C-211/10 PPU, *Povse,* Judgment of 1 July 2010, §§ 40, 74; Case C-491/10 PPU, *Zarraga,* Judgment of 22 December 2010, §§ 46, 51.

[35] Council Framework Decision No. 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (*O.J.* L 190, 18 July 2002, p. 1).

[36] As in Case C-396/11, *Radu,* Judgment of 29 January 2013. See also Case C-399/11, *Melloni,* Judgment of 26 February 2013.

[37] Case C-396/11, cited above (footnote 36), § 41.

[38] Advocate General Bot, Opinion delivered in Case C-399/11 (*Melloni*), §§ 118-119.

> ance, by other Member States, with European Union law and, in particular, fundamental rights."[39]

Another recent judgment[40] illustrates the efficiency-oriented thinking of the ECJ in applying the so-called Return-Directive.[41] The claimants were two third-country nationals kept in detention in the Netherlands under a removal procedure. They complained that their detention had been extended by the competent administration, pursuant to Article 15 § 6 of the Directive, without them having been heard. Relying on Article 41 § 2 of the Charter, the Supreme Administrative Court of the Netherlands referred the case to the ECJ for a preliminary ruling on the consequences of the failure by the administration to hear the claimants. The ECJ ruled that:

> "European Union law, in particular Article 15(2) and (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, must be interpreted as meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defense better, to the extent that the outcome of that administrative procedure could have been different."

In other words, failure by the administration to comply with the fundamental right of a detained person to be heard only has consequences when it can be assumed that if this right had not been disregarded, the person in question would most probably have been released. In support of this utilitarian interpretation of the right to be heard, the ECJ points to the need to preserve the efficiency of the Return Directive which is intended to establish an "effective removal and repatriation policy", the removal of any illegally staying third-country national being a matter of priority for the Member States. The Member States must therefore take account of the case-law concerning observance of the rights of the defense in conjunction with the scheme of Directive 2008/115.

The upshot is that both the right to be heard and the holders of that right find themselves significantly devaluated here, in that what a foreigner may have to say on the extension of his detention is considered as capable of being predicted anyway and therefore not worth being actually heard, which leaves hardly any room for unforeseen arguments. This approach even seems to defeat the very

[39] Cases C-411/10 and C-493/10, cited above (footnote 32), §§ 82-83.
[40] Case C-383/13 PPU, *M. G. and N. R.*, Judgment of 10 September 2013.
[41] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (*O.J.* L 348, 16 December 2008, p. 98).

purpose of the right to be heard. For what can be the sense of hearing a person only when it can be anticipated that he or she might come up with unforeseen arguments? How can the actual enjoyment of a fundamental right be made conditional upon the prediction of the unpredictable? By contrast, the ECHR made it clear long ago already that it is only for the holder of the right to be heard to decide whether to make use of it or not, since its primary purpose is to maintain confidence in the judiciary.[42] In the same vein, Advocate General Wathelet in his view on the case of *M.G. & N.R.* considered that:

> "As a matter of principle, the argument that, if the persons concerned had been given a hearing, that would not have influenced the outcome of the proceedings at issue cannot be accepted as it would undermine the very substance of the rights of the defense."[43]

D. The Strasbourg approach: "neither automatically nor mechanically"

In view of the key role played in the AFSJ by the presumption that all EU Member States satisfactorily respect fundamental rights, the question arises whether this approach is sufficient to ensure an *effective* protection of fundamental rights. No State has a clean record in this field, as clearly demonstrated by the case-law of the ECHR. Against this background, an unrebuttable presumption of sufficient protection of fundamental rights in each case by each Member State would appear to be a fiction. Should the Member States nonetheless be allowed to fully rely on it for the sake of ensuring mutual recognition, thereby consciously accepting the risk of "accidents" or "collateral damages" in respect of single individuals?

To mention but a few concrete examples, can it *always and automatically* be assumed that a convicted person whose transfer is requested by an issuing Member State under a European arrest warrant could exercise his defense rights in the proceedings leading to his conviction in that Member State?[44] Can it *always and automatically* be assumed that an asylum-seeker will be decently treated and his application properly processed in the Member State competent under the Dublin Regulation, which designates the EU Member State responsible for the examination of asylum claims filed within the EU? Equally, can it *always and automatically* be assumed that an abducted child should be returned to his former country of residence, regardless of the circumstances? In other words,

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[42] See, *mutatis mutandis*, Eur. Ct. H.R. (Ch.), *Nideröst-Huber v. Switzerland*, 8 February 1997 (Appl. No. 18990/91), § 29; Eur. Ct. H.R. (2nd sect.), *Ferreira Alves v. Portugal (No. 3)*, 21 June 2007 (Appl. No. 25053/05), § 41: "As the Court has reiterated on numerous occasions, only the parties to a dispute may properly decide whether or not a document calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file. Similarly, the effect the note actually had on the judges of the Oporto Court of Appeal is of little consequence".

[43] Advocate General Wathelet, View delivered in case C-383/13 (*M.G. and N.R.*), § 57.

[44] In its Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), the European Parliament has expressed clear doubts on this score.

does a system whereby the assessment of whether the fundamental rights of a person are at risk is always and automatically left to the requesting judge not run a serious risk of producing situations of non-assistance?

While it is true that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights",[45] this does not mean that in the face of an imminent danger for the fundamental rights of an individual, the protection of those rights can be suspended or delayed for the sake of any greater good. In this respect, the Strasbourg Court's perspective is different from – and complementary to – that of the ECJ: it does not rule in the abstract, with a view to interpreting the law, but *in concreto*, with the focus on individual situations. Its approach in this field is probably best reflected by the formula taken from its own case-law on child abductions: "not automatically and not mechanically".[46] Which means: yes to a presumption of sufficient protection of fundamental rights in the EU Member States,[47] yes to the recognition and execution of foreign decisions and judgments on that basis, but not automatically and not mechanically, i.e. not at all costs. No blind execution. Keeping eyes open instead, so as to remain able to identify imminent and serious breaches of fundamental rights in individual cases and to act accordingly, thereby considering the presumption as rebutted.

It would appear that in some areas Union law is somewhat struggling to strike the right balance here, i.e. a balance with room for exceptions in situations of particular hardship or where the protection of the fundamental rights of an individual cannot suffer any delays generated by the operation of exclusive competence mechanisms. The application of the Convention and the Charter can hardly be restricted or indeed suspended in any of the Member States, be it a requested State, simply because this would better fit into the systemic logic of mutual recognition and its efficiency requirements. It is indeed difficult to imagine how it could be imposed on any judicial or administrative body in a Member State to turn a blind eye to situations entailing the risk of an imminent danger for fundamental rights. Ultimately, they all remain bound by those instruments, even when they apply Union law.

There also seems to be no shortage of examples demonstrating that a more nuanced approach in this area is not necessarily incompatible with the principles underlying the AFSJ. It would indeed appear that efforts are being made in Union law to allow exceptions to the *automatic* mutual recognition of judicial decisions. In this connection, one should mention the recent ruling of the ECJ in the *Trade*

[45] Eur. Ct. H.R. (Plenary), *Soering v. the United Kingdom*, 7 July 1989 (Appl. No. 14038/88), § 89.
[46] Eur. Ct. H.R. (GC), *Neulinger and Shuruk v. Switzerland*, 6 July 2010 (Appl. No. 41615/07), § 138; Eur. Ct. H.R. (GC), *X. v. Latvia*, 26 November 2013 (Appl. No. 27853/09), § 98.
[47] As in Eur. Ct. H.R. (3rd sect.), *Stapleton v. Ireland* (dec.), 4 May 2010 (Appl. No. 56588/07), § 26.

Agency case[48] and the opinion of Advocate General Sharpston in the *Radu* case, the latter pleading in favor of such an exception in the face of breaches which fundamentally affect the fairness of the trial of a person whose is the subject of a European arrest warrant, for instance when decisive evidence was destroyed in the issuing Member State.[49]

IV. Accession as the way to preserve the specific effects of fundamental rights

A. The European tradition: an individual-oriented approach to fundamental rights

Perhaps surprisingly, all of this has a lot to do with EU-accession to the Convention. Let us go back to our opening question: will the EU commit itself to the traditional European notion of fundamental rights or will it go its own way? Actually, one of the main characteristics of this traditional notion, as embodied in the Convention, is that it places the individual, rather than any kind of system or institution, at the center of its attention, as illustrated notably by the fact that the right of individual application to the ECHR has always been seen as a cornerstone of the Strasbourg protection system.[50] While it duly recognizes the importance of efficiency, notably in the field of judicial activity,[51] it is not ready to do so to the point of sacrificing the very substance of fundamental rights. By joining the Convention the EU will formally subscribe to this very notion and, as a consequence, be firmly anchored in the European tradition which has produced it, thereby allowing its actions to be tested on whether or not they comply with it. This will send out an important signal, both within and outside the EU, to the effect that the EU is not departing from the individual-centered notion of fundamental rights which has prevailed in European democracies for the last sixty years but rather intends to uphold it, along with all other European States. This signal should, however, be sent out soon, before the centrifugal forces and the efficiency-thinking in the EU gain the upper hand.

At the same time, it is clear that EU accession will not obviate the need for a constant dialogue between the Strasbourg Court, the EU and its Member States, as there can be no question of undermining, in the name of fundamental rights,

[48] "Article 34(1) of Regulation No. 44/2001, to which Article 45(1) thereof refers, must be interpreted as meaning that the courts of the Member State in which enforcement is sought may refuse to enforce a judgment given in default of appearance which disposes of the substance of the dispute but which does not contain an assessment of the subject-matter or the basis of the action and which lacks any argument of its merits, only if it appears to the court, after an overall assessment of the proceedings and in the light of all the relevant circumstances, that that judgment is a manifest and disproportionate breach of the defendant's right to a fair trial referred to in the second paragraph of Article 47 of the Charter, on account of the impossibility of bringing an appropriate and effective appeal against it." (Case C-619/10 (*Trade Agency*), cited above (footnote 25), § 62).

[49] Advocate General Sharpston, Opinion delivered in C-396/11 (*Radu*), §§ 80-97.

[50] See the Brighton Declaration by the High Level Conference on the Future of the European Court of Human Rights (19-20.4.2012), § 2.

[51] See for instance Eur. Ct. H.R. (GC), *Hermi v. Italy*, 18 October 2006 (Appl. No. 18114/02), § 80.

the setting-up of an AFSJ and mutual recognition as one of its foundations, or indeed the autonomy of Union law as such. Rather, the "specific characteristics of the Union and Union law"[52] should be duly taken into account. As Advocate General Bot pointed out:

> "... fundamental rights within the Union must be protected within the framework of its structure and objectives. It follows that the weighing of the different fundamental rights at stake does not necessarily call for the same response at national or EU level."[53]

Having said that, the question is where to draw the line? How far can this go without affecting the substance or the essence of the fundamental rights concerned? A formal anchoring of the EU into the Convention would at least provide the correct starting point in this reflection process, by raising the crucial question of the *effects* of fundamental rights in the EU legal system.

B. The legitimizing and correcting effects of fundamental rights: two sides of the same coin

Compliance with fundamental rights does indeed not end with giving them a proper *content*. It also requires to give them the *effects* which are inherent in their specific nature, by regulating their relationship to other, non-fundamental rights. Why are some rights called "fundamental", if not for the purpose of conferring on them specific *effects* by reason of their specific *content*? It is because of the essential importance of some specific legal interests that the rights protecting them are called "fundamental" and, as a consequence, are given effects which normally trump those of "ordinary" rights, without necessarily being absolute rights.[54] Thus, the very notion of "fundamental rights" appears to be based on a clear link between (a) the importance of some legal interests worth being protected in a more "fundamental" way, (b) the specific "fundamental" nature of the rights protecting those legal interests, (c) the content of the said rights and (d) their effects, including their scope and rank in the hierarchy of norms of the legal system concerned. Any attempt to break up this logical link would only weaken fundamental rights as it would render meaningless, by comparison with "ordinary" rights, the reference to their specific fundamental nature, in the absence of any added value linked to that denomination. In short, it doesn't make any sense to call a right "fundamental" without ensuring, by reason of its content and importance, its prevalence over other non-fundamental rights.

It follows from this specific position of fundamental rights that compliance with these rights is now seen as a precondition for the legitimacy of any public

[52] Treaty of Lisbon, Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the protection of Human Rights and Fundamental Freedoms, Article 1.
[53] Advocate General Bot, Opinion delivered in C-283/11 (*Sky Österreich*), § 80.
[54] On this, see Johan Callewaert, "The European Convention on Human Rights and European Union Law: a Long Way to Harmony", *European Human Rights Law Review*, 2009, at p. 768 et seq.

action, to the effect that today no decision or action by any public authority can be acceptable if it is not capable of passing the test of fundamental rights. To this extent, fundamental rights can indeed be said to fulfil a foundational and legitimizing role.

Union law appears to be adhering to this approach. Article 2 TEU, which establishes a clear link between Union law and the domestic law of the Member States in this field, states :

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

Earlier on, the Cologne European Council had stated in its decision mandating a "body", later called "Convention", to draw up a Charter of Fundamental Rights of the EU :

> "Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy."[55]

The consequences of this approach in Union law have been highlighted as follows by the ECJ :

> "Respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and [...] measures incompatible with respect for human rights are not acceptable in the Community."[56]

As regards the AFSJ, Advocate General Cruz Villalon, for his part, stated :

> "Although mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area."[57]

However, for the *legitimizing* effect of fundamental rights to be credible, they should also be allowed to have, to the same extent, a *correcting* effect in respect of State action impinging on the legal interests protected by them. It is only inasmuch as fundamental rights *can* limit or correct State or Union action disregarding them that they legitimize State or Union action left uncorrected. Only what could have been corrected and was not ends up being legitimized. The same applies to praise : it is only to the extent that a person expressing praise had the liberty to

[55] Cologne European Council (3-4 June 1999), Presidency Conclusions, Annex IV.
[56] Cases C-402/05 P and C-415/05 P, *Kadi*, Judgment of 3 September 2008, § 284.
[57] Opinion in C-306/09 (I.B.), § 43.

also express criticism that his or her praise is genuine.[58] So the *legitimizing* and the *correcting* function of fundamental rights necessarily make up both sides of the same coin, they are inseparable. Only together can they fulfil the role today assigned by modern democracies to fundamental rights : legitimizing State action which respects them and correcting State action which does not.[59]

Both functions also presuppose a *higher rank* for fundamental rights in the hierarchy of norms, as action by national or Union authorities can only be legitimized or corrected by reference to a higher norm.[60] The European Court of Human Rights expressed basically the same idea when stating that no part of a State's jurisdiction, including its Constitution, is outside the scope of the Convention, with the consequence that any kind of State action, be it of constitutional nature, has to comply with the fundamental rights laid down therein.[61] For the same reason, many European countries inserted their catalogue of fundamental rights in one of the first chapters of their Constitution, thus confirming the preeminent role of fundamental rights within the constitutional order of the State concerned.

As we have seen before, Union law seems to agree in principle that fundamental rights should be part of its own foundations, just as they are in the Member States. Yet, as illustrated by the examples discussed above, the reality in the AFSJ sometimes is a different one, with the ECJ fully relying on the *legitimizing* effect of fundamental rights while at the same time restricting their *correcting* effect, by allowing the latter only to the extent that it does not disturb the efficiency of the mechanisms operating in the AFSJ. This kind of cherry-picking runs the risk of distorting the very nature of fundamental rights as we know it. This is indeed adapting the effects of fundamental rights to the needs of the system, thereby departing from the European consensus on the nature and the role of fundamental rights. This comes down to instrumentalizing fundamental rights.

For if it is true that fundamental rights are foundational to Union law, in the same way as they are foundational to national legal systems, then it becomes very difficult to accept the idea that the effects of fundamental rights in any given Member State could be restricted or indeed suspended in the name of mutual recognition or any other system, only because that would better serve the purposes of that system, however useful it may be.

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[58] See already Beaumarchais' Figaro saying : "Sans la liberté de blâmer, il n'est point d'éloge flatteur" ("There can't be flattering praise without the liberty to blame").

[59] Lothar Michael and Martin Morlok, *Grundrechte*, Baden-Baden, Nomos, 3rd edition, 2012, p. 34.

[60] Attributing a higher rank to fundamental rights in the hierarchy of norms, however, does not have the effect of making them absolute. Consequently, when assessing their effect in relation to other norms of Union primary law, due regard should of course be had to the limitations which can lawfully be placed on both fundamental rights and other primary law provisions. In this sense, see Hans D. Jarras, *Charta der Grundrechte der Europäischen Union*, 2nd edition, 2013, Munich, Beck, p. 7-8.

[61] Eur. Ct. H.R. (GC), *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998 (Appl. No. 19392/92), § 29.

It is precisely on this score that EU accession to the Convention could make a difference, as it would help ensure that fundamental rights in the EU remain truly "fundamental" and are given not only the content but also the effects inherent in their nature. This would be an important contribution towards making sure that the EU effectively adheres to the notion of fundamental rights which European democracies, including all EU Member States, have been sharing ever since the Second World War and which, in view of its achievements, should not be allowed to be undermined.

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