Two Courts, One Goal

Accession of the EU to the ECHR

*Joseph Saed**

Following the ratification of the Lisbon Treaty, the EU is heading to become a member of the ECHR. How will this change the system of Human Rights Protection in the EU and what are the future prospects of cooperation for the ECJ and the ECtHR? The author points out his view on the legal expectations and uncertainties regarding this historic act.

By establishing two courts of the highest instance in Europe, the ECJ and the ECtHR, domestic legal orders were suddenly influenced by supranational courts. While the ECtHR - at the beginning - acted as a human rights 'fine-tuner'[1] for well-established Western democracies, the ECJ enhanced the level of European integration by scrutinizing the legal framework and forcing domestic authorities to comply with Community/Union standards.

These different approaches on the legal map of Europe were developed concomitantly but with different mandates with a common goal to establish a European framework, a European ordre public.

The ECJ established, under certain circumstances by virtue of its own case-law,[2] a strong implementation mechanism by scrutinizing domestic authorities; its 'mandate to unify Europe'[3] was both its weakness and strength. While fostering the integration process within the European Union, its judgments concerning fundamental rights were criticized in legal academia and on a national level for supposed methodological uncertainty and trespassing of competences.[4] As a matter of lacking competences and monitoring mechanisms, the protection of human rights was only a punctual scheme of 'institutional constitutionalism' which was aimed to foster European integration, not individual justice.[5]

The situation inside the Convention system was decisively different. The ECtHR offers an individual approach to human rights with the possibility of individual application enshrined in Art 34 ECHR. It characterised itself as a 'constitutional instrument of European public order'.[6] Now with 47 high contracting parties, the ECtHR plays an important role for Eastern European states on their way to constitutionality and democracy and already supported legal reform processes in new members of the European Union.[7]

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* Der Autor ist Studierender der Rechtswissenschaften an der LMU. Er dankt Prof. Streinz (LMU München) für die Durchsicht des Beitrages und die wertvollen Hinweise und Anregungen.

1 Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9 Human Rts L Rev, 397 (401).

2 See e.g. the 'doctrine of supremacy and direct effect' in Case 26/62 Van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 1.

3 Giuseppe Martinico, 'Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 European Journal of International Law, 401 (402).

4 It was referred to the court as the 'European lawyer's hobby horse'. See Sonia Morano-Foadi & Stelios Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' (2011) 17 Eur L J, 595, 596. Moreover, the derivation of 'general principles of Union Law' was harshly criticized. See therefore the criticism of the Case C-144/04 Mangold v Rüdiger Helm [2005] ECR I-9981, by Roman Herzog and Lüder Gerken, 'Stoppt den Europäischen Gerichtshof' FAZ (8 September 2008), available at www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite.pdf (accessed 6/29/2013).

5 Steven Greer & Andrew Williams, 'Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?' (2009) 15 Eur L J, 462 (473-475).

6 Loizidou v Turkey 23 March 1995 (preliminary objections) [1995] 20 EHRR 99, para 75.

7 Matthias Kloth, Die Zusammenarbeit zwischen Europäischer Union und Europarat (2012) 47 Europarecht, 155.

Evaluating the past and present communication between the courts through references in their respective case-law and examining ongoing reform processes, the author proposes that the present and, to a greater extent, the future protection of human rights in Europe will be dominated by a communicative system - a communicative ordre public for Europe manifested by the Accession of the EU to the ECHR.

1. Judicial Communication between both Courts: Modest Beginnings

The interaction between both courts was mostly described as an 'outstanding example of cooperation between the European Union and the Council of Europe.'[8]

In 2005, the ECtHR stated that as long as national authorities fulfill their obligation within the framework of a supranational organization, and this organization guarantees human rights protection 'in a manner at least equivalent to that for which the Convention provides […] the presumption will be that a State has not departed from the requirements of the Convention.'[9] This led to a coexistence of both systems, merely influenced, but not bound nor controlled by each other.

It is worth mentioning in this regard that although the ECJ had no legal basis, nor an obligation to follow Strasbourg's case-law, the ECJ referred to it as a source of interpretation and special significance.[10] The ECtHR was often referred to as an 'iconic figure'[11] for the ECJ and both courts developed a great system of cooperation and reference, which is even plainer by an observance of their respective case-law.[12]

Nevertheless, not all fields of jurisdiction are harmonized and the ECJ, as well as the ECtHR keep the 'power to take their own path'.[13]

An example of divergence between the courts is the ECtHR's ruling in Saadi[14] and the EU legislation concerning detention of asylum seekers.[15] In Saadi the ECtHR examined whether the administrative detention of an asylum seeker is contrary to the right to liberty and security enshrined in Art 5 ECHR. Although it referred to Union standards, it continued to affirm that the Convention under Art 5 (1) (f) permits 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.' Therefore, the court determined that 'given the difficult administrative problems […], it was not incompatible with Art 5 (1) (f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily.'[16]

The European Union on the other hand, by virtue of Art 18 (1) Council Directive 2005/85, clearly prohibits 'detention for the sole reason that he/she is an applicant for asylum.' In this regard the European Union provides a broader protection mechanism.[17]

However, in their joint partly dissenting opinion a group of judges raised concern about the conclusion of the majority.[18] They observed that the Council Directive cited above is the codified 'minimum guarantee' which shall be provided for asylum seekers. Furthermore, the judges refuse to 'accept that Art 5 of the Convention […] should afford a lower level of protection as regards asylum and immigration' compared to the standards of the European Union. This opinion raises hope that not only the ECJ, but also the ECtHR will adapt its minimum standards to those of the ECJ if it offers a broader protection scheme. In certain areas of judicial review the ECJ may then be the 'iconic figure' for the ECtHR. It is indispensable for both courts to speak with one voice. A sufficient ordre public for Europe may only be established if legal certainty paves its way through a harmonized jurisprudence regarding fundamental rights.

A paradigm for successful harmonisation can be found in Zolotukhin[19]. The case concerned a Russian national, who was convicted under administrative and criminal procedures because of verbally abusive conduct. While the ECtHR in previous decisions concerning the prohibition of double jeopardy, codified in Art 4 (1) Prot No 7 to the ECHR, relied upon various 'contradictory solutions'[20]; the ECJ based its reasoning on 'the identity of material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together.'[21] In Zolotukhin, the ECtHR then reconsidered its various former approaches and clarified its position, stating that 'Article 4 of Prot No 7 must be understood as prohibiting a prosecution or trial of a second 'offence' if it arises from identical facts or facts which are substantially the same.'[22] Determining this, it harmonized the standards applied by both courts.

8 Ibid.

9 Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şiketi v Ireland (2005), 42 EHRR 1.

10 The first case where the Convention was taken into consideration is C-185/95 Baustahlgewebe GmbH v Commission [1998] ECR I-8417, para 29.

11 Greer & Williams (n 5) (473).

12 For the notion of 'special significance', See Case 36/75 Roland Rutili v Minister of Interior [1975] ECR 1219; Case C-274/99 Connolly v Commission [2001] ECR I-1611; Case C-94/00 Roquette Frères v Commission [2002] ECR I-9011; Case C-112/00 Schmidberger v Republik Österreich [2003] ECR I-5659.

13 Greer & Williams (n 5) (477).

14 Saadi v UK (2008) 47 EHRR 17.

15 For a specific comparison See Johan Callewaert, 'The European Convention on Human Rights and European Union Law: a long way to harmony' (2009) 6 Eur Human Rts L Rev, 768 (775-777).

16 Saadi (n 14), para 80.

17 One has to wait if Saadi will be overruled in the light of the Cases Yoh-Ekale Mwanje v Belgium (2013) 56 EHRR 35 & Popov v France App no 39472/07 (ECtHR, 10 January 2012) and a more proportional examining in these cases.

18 Saadi (n 14) Rozakis, Tulkens, Kovler, Hajiyev, Spielmann, Hirvelä.

19 Zolotukhin v Russia (2012) 54 EHRR 16.

20 Idem factum in Gradinger v Austria (1995) Series A no 328; concours ideal d'infractions in Oliviera v. Switzerland (1998) 28 EHRR 289; or a vague reference to the 'essential elements' of the offences in Gauthier v. France App no 61178/00 (ECtHR, 24 June 2003).

21 Case C-436/04 Criminal Proceedings against Leopold Henri Van Esbroeck [2006] ECR I-2333, paras 35-36.

22 Zolotukhin (n 19) 82.

2. Entry into Force of the Charter

In December 2009 the Lisbon Treaty and thus the Charter of Fundamental Rights of the European Union (the Charter/FRC) came into operation. This was a giant stride towards a deepened integration of the European Union 'based on rights'[23], codifying the Convention standards inspired by the Strasbourg case-law and the 'general principles' of EU law created by the ECJ jurisprudence into the European legal framework. Moreover, Art 6 (2) TEU states that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.' The Convention system likewise offers the EU the possibility to 'accede to this convention' in Art 59 (2) ECHR, following the entry into force of Prot No 14 to the ECHR.[24]

With general principles developed by the ECJ's case-law, now embedded in a legal document, a discussion about expanding competences of the Union's courts was obsolete.[25]

The functional and interpretative interaction of Charter and Convention can be observed in Schecke[26], in which the plaintiffs claimed before the Administrative Court in Wiesbaden that the publication of their respective names on the website of the German Federal Office for Agriculture and Food violated their right of protection of personal data in a disproportional manner. The publication was made in order to make the beneficiaries of aid from the EAGF and the EAFRD public and transparent according to the principle of transparency. It was required by EU Regulations No 1290/2005 and No 259/2008. The ECJ thus referred to Art 8 (1) of the Charter on Fundamental Rights, stating that the protection of personal data 'does not constitute an absolute right' and has to be interpreted within its 'function in society'.[27] After determining the scope of the applicable Charter provision, it goes on to interpret the provision in the light of Strasbourg jurisprudence[28] of corresponding ECHR-regulation Art 8 ECHR by virtue of Art 52 (3) FRC, and thereby demands that the limitation on the restricted rights shall be proportionate. Therefore, the obligation to publish the names is not proportionate to the aim pursued by the restricting Reg No 1290/2005.

Since entry into force of the Charter, the principal of proportionality is increasingly established by the court as an integral part of judicial review and recent judgments show that the ECJ nowadays provides more than a mere market-friendly interpretation.[29] It is acting as a constitutional court for the EU, even examining cases through an extensive balancing.

With three sources of human rights rules - the Charter, the general principles of EU law and the Convention - the protection scheme has now increased on the basis, but as Morano-Foadi and Andreadakis pointed out, both courts need a 'common code of communication within human rights language'.[30] This 'common code' may only be established and clarified if the EU accedes to the ECHR and a 'legal basis for cooperation'[31] is given.

3. Accession of the EU to the ECHR

In 2010 official negotiations started concerning an accession of the EU to the ECHR and Protocols No 1 and 6 thereto. The ECHR as well as both protocols are already ratified by all member states of the European Union. To ensure that the Accession will not interfere with domestic ratifications of the ECHR, Art 2, sentence 2 Prot (No 8) relating to Art 6 (2) TEU provides that no new obligations will arise for the member states if their respective accession agreements included a caveat which constitutes a limitation clause for the general liability prescribed in Art 216 TFEU.

Regarding the Accession in general, the question has to be raised whether an Accession would have added value for a common European ordre public shared and protected by both institutions.

a) Does the ECJ suffice as a Guardian of Fundamental Rights?

While it stayed away from scrutinizing domestic authorities with regard to fundamental rights protection, the latest judgments show that it now safeguards fundamental rights protection even to the extent of examining acts arising from international obligations. This is strongly connected to the development of the EU, starting from a vague framework of cooperation in economic matters, to a unification of states with common constitutional principles – a unity of shared values. A strong impact of this development on the self-conception of the ECJ becomes manifested in Kadi.[32] In this case, the ECJ was not cautious of examining whether Council Regulation 881/2002 breached fundamental rights, by freezing funds and assets of individuals or legal entities, accused of connections to international terrorism. The applicants claimed a violation of their respective property rights, their right to be heard and to judicial review.

Even though the Regulation originates from a Resolution[33] of the UN Security Council designating the former established Sanctions Committee to advise States to freeze assets of suspects, the ECJ thus stated clearly that

23 Morano-Foadi & Stelios Adreadakis, (n 4) (610).

24 See Art 17 Prot No 14 of the ECHR.

25 See also Wolfgang Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon' (2011) 7 Eur Const L Rev, 64 (73).

26 Joined Cases C-92/09 and C-93/09 Schecke and Eifert v Land Hessen [2010] ECR I-11063.

27 Ibid 48.

28 Ibid 72; Gillow v UK (1986) Series A no 109, para 55.

29 See the preliminary ruling concerning the freedom to receive information and the pluralism of media enshrined in Art 11 FRC opposed to the right to property and conduct a business in Arts 16, 17 FRC. Case C-283/11 Sky Österreich [2013] ECR I-0000.

30 Sonia Morano-Foadi & Stelios Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 22 Eur J of Intl L, 1071 (1084).

31 Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 The L and Practice of Intl Courts and Tribunals, 375 (381).

32 Joined Cases C-402/05 and C-415/05 Kadi and Al Barakaat International Foundation v Council [2008] ECR I-6351.

33 S.C. Res. 1333, U.N. SCOR, U.N. Doc. S/Res/1333 (2000).

'[…] the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.'[34]

The reasoning in Kadi shows that the ECJ now understands itself as a human rights protector on a Union level.[35] Therefore, if the ECJ is called to rule upon fundamental rights, it offers a protection scheme equivalent and sometimes even broader than the Convention system.

b) The Individual as an Applicant

One main argument for an accession to the ECHR by the EU could be that EU legislation is not under external scrutiny and an individual application system equivalent to the one provided for by the Convention does not exist.

Article 263 (4) TFEU provides for a direct claim to the ECJ, stating that

'[a]ny natural or legal person may […] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

The wording suggests that Art 263 TFEU does not constitute a high threshold to complain against Union acts for individuals. In Plaumann[36] the ECJ held that although an individual complaint is possible, it may only be admissible if the

'*decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.*'[37]

Thus, the ECJ established a high burden for an individual applicant seeking a decision.

On the contrary, the ECHR provides for direct individual application as codified in Arts 34, 35. Although the right to individual application is considered the 'corner-stone' of the Convention system, Art 12 Prot No 14 amending Art 35 ECHR introduced a new threshold of admissibility with section 3 (b) determining that an application is inadmissible if the 'applicant has not suffered a significant disadvantage'. In Ionescu[38] the court declared the complaint inadmissible because the applicant's loss stemming from the domestic verdict amounted to only 90 euros, which did not constitute a 'significant disadvantage' compared to his financial situation.[39] Therefore, the formal threshold for an individual application to the ECtHR is not extraordinarily high. The huge workload of the ECtHR, however, brings the Convention system to the brink of collapse. So even if, prima facie, the ECtHR provides for a direct individual application without excessively burdening the individual, the huge workload of the ECtHR makes the effectiveness questionable.

However, the EU is not totally bound by the ECtHR's jurisprudence, because the ECJ will remain the highest court of the Union with respect to Union law. It is empowered to reject illegal provisions and interpret EU law as last instance.

Judgments of the ECtHR themselves are only binding inter partes, so after an Accession there will be no *erga omnes* effect of judgments issued by the ECtHR. The means of execution can be chosen by the domestic authorities. But, although not formally bound, it might be necessary for reasons of coherence and cooperation to follow and monitor the ECtHR's judgments on an EU level.

Conclusively, the Accession in itself has no added value for the level or sufficiency of human rights protection within the European Union, nor is it necessary for the European Union to accede to the Convention, already implemented by the Charter and the jurisprudence of the ECJ.

c) Further Development de Lege Ferenda

Mechanisms to safeguard a coherent human rights approach in Europe are still in the drafting process or awaiting approval. Recent reform proposals are the 'Final Draft Agreement on Accession of the European Union to the European Convention on Human Rights'[40], introducing a co-respondent mechanism and a prior involvement of the ECJ in proceedings pending before the ECtHR, as well as the 'Draft of Protocol No 16'[41], codifying and implementing an advisory opinion procedure.

If EU law is under examination of the ECtHR, the ECJ may be involved in the proceedings. The co-respondent mechanism on the other hand will ensure that inner competences of the EU will not be affected. If the compatibility of EU legal acts with the Convention is questionable and under examination of the ECJ, it will receive guidance from the ECtHR through an advisory opinion.

34 Kadi (n 32) 326.

35 For the impact on the relationship of European law and International public law see Albert Posch, 'The Kadi Case: Rethinking the Relationship between EU Law and International Law' (2009) 15 The Columbian J of Intl L Online www.cjel.net/wp-content/uploads/2009/03/albertposch-the-kadi-case.pdf (accessed 8/29/2013).

36 Case 25/62 Plaumann v Commission [1963] ECR 95.

37 Ibid 107.

38 Adrian Mihai Ionescu v Romania App no 36659/04 (ECtHR, 1 June 2010).

39 Ibid 35.

40 Available at www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf (accessed 8/29/2013), herein Accession Draft.

41 Available at www.coe.int/t/dghl/standardsetting/cddh/GT_GDR_B/GT-GDR-B(2012)R2en_Addendum%20III.pdf (accessed 8/29/2013), herein DP16.

aa) Co-Respondent Mechanism

Art 3 Accession Draft introduces a new procedural feature into the Convention system, the so-called co-respondent mechanism. It integrates the possibility of the European Union, or a member state, becoming a co-respondent and thereby a party to the case. The wording of Art 3 provides for two possible scenarios. Firstly, if primary EU law violates the Convention - like the blanket exclusion of Gibraltar in elections to the European Parliament in Matthews[42] - the member states may become co-respondents by virtue of Art 3 (3). Additionally, through Art 3 (2) Accession Draft the European Union will join as a co-respondent if a national act based on invalid EU law violates the Convention. This constellation was present in Bosphorus. The whole procedure shall secure the autonomy of Union law, shifting the derogation of responsibility into inter-union competences.[43] If the member state acts at its own discretion, there is no need for the EU to be a co-respondent. In such proceedings, the Union may only be a third party intervener. Furthermore, under Art 3 (7) Accession Draft, the ECtHR may, after finding a violation, considering the reasons of the respondent and after co-respondent and a hearing of the applicant, decide that one of them shall be held responsible; this is in line with the respect to the internal derogation of competences and responsibilities prevalent in the Union.

The co-respondent mechanism will also not influence the admissibility-criteria enshrined in Art 36 of the ECHR. Proposed Art 36 (4) sentence 3 determines that 'admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.' The autonomy of EU law and individual complaint will not be disrespected in this regard, also due to the fact that to have recourse to the mechanism is not an obligation, but a possibility ('[…] may become a co-respondent […]'). However, the Union itself may derive an obligation to join the proceedings as a co-respondent from the principle of loyalty codified in Art 4 (3) TEU.

bb) 'Prior Involvement' of the ECJ

Another tool of compliance and harmonisation is the 'prior involvement' of the ECJ. Article 3 (6) Accession Draft stipulates that the ECJ, as the highest judicial authority of the Union, shall be involved properly in the proceedings pending before the ECtHR, by assessing compatibility with the Convention. The 'prior involvement procedure' is necessary to ensure that the EU can be involved, even if no preliminary ruling has yet been made by the ECJ, this is not an obligatory domestic remedy an applicant has to exhaust before invoking the Convention in front of the ECtHR (Art 35 (1) ECHR). Therefore, an application may be pending, even if the ECJ has never examined the cause of action. This is not a discrimination of other contracting parties, as it remedies the systemic deficiency that national authorities may not have asked for a preliminary ruling by the ECJ.[44]

In accordance with Art 3 (6) sentence 3 Accession Draft, the assessment 'shall not affect the powers' of the ECtHR, and is only a non-binding submission, which the court may take into account. Neither the ECJ nor the ECtHR expand their competences in this regard, the 'prior involvement procedure', comparable to a preliminary ruling by the ECJ, is no more than a reaction to the prior forbearance by national courts to request a preliminary ruling under Art 19 (3) (b) TEU, 267 TFEU.[45]

cc) Advisory Opinion

Article 1 (1) states, that 'highest courts or [/and] tribunals of a High Contracting Party […] may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto.' The highest court to request an advisory opinion by the ECtHR within the EU system will be the ECJ. The term 'may request' in Art 1 brings out that requesting such an opinion may not be a duty for the court. Therefore, the required autonomy of EU law (Art 267 (3) TFEU) is not infringed. It is up to the ECJ to decide whether it will request an advisory opinion. Article 1 (2) determines that an advisory opinion may be requested '[only] in the context of a case pending.' As Gragl points out, a situation shall be avoided in which abstract assessments of legislation are requested, drawing from resources of the ECtHR.[46]

The possibility to request an advisory opinion will foster the constitutional dialogue between Strasbourg and domestic courts as well as the ECJ, because it introduces an opportunity to communicate before deciding the case. In this respect, the quality of judicial dialogue is enhanced significantly. Keeping in mind that non-compliance with the advisory opinion by the domestic courts may arise in applications pending before it, will convince domestic authorities to follow in most of the cases.

When it comes to the ECJ, the advisory opinion thus becomes an important future tool to enhance the functionality and dialogue between both systems. Of course, it requires compliance by the ECJ to engage into such a dialogue. But there are different constellations, in which an advisory opinion may be necessary or not.

An example were it would not be necessary is, when there is already settled case-law concerning the issue at stake like in N.S. v. Secretary of State.[47] In the given case an Afghan asylum seeker entered the EU through Greece, did not request asylum and travelled to the United Kingdom, where he was detained in September 2008. Article 3 (1) of the Dublin Regulation states that the member state, from which

42 Matthews v UK (1999) 28 EHRR 361.

43 Robert Uerpmann-Wittzack, 'Rechtsfragen und Rechtsfolgen des Beitritts der Europäischen Union zur EMRK' (2012) 47 Europarecht, 167 (169-175).

44 Ibid 170.

45 Ibid 179.

46 Paul Gragl, '(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for the ECtHR advisory opinions under draft Protocol no. 16' (2013) 38 Eur L Rev, 229 (235).

47 Joined Cases C-411/10 and C-493/10 N.S. v. Secretary of State for the Home Department [2011] ECR I-0000.

the asylum seeker enters the EU, shall examine the application. In April 2009 the Secretary of State for the Home Department asked the Greek authorities to accept the asylum application. The authorities did not respond, thereby excepting to deal with the claim in question. Under Art 3 (2) Dublin Regulation the UK now informed the appellant that he would be transferred to Greece. He initiated appeal proceedings, claiming that his deportation to Greece violated his fundamental rights set forth in the Charter, because of the deficient conditions for asylum applicants in Greece. The ECJ adjusted the interpretation of the Dublin Regulation in accordance with the ECtHR's finding in M.S.S.[48] Even if national authorities act within their discretion, they act in the framework of Union law and are bound by the Charter. The 'scrutiny of Article 3(2) of Regulation No 343/2003 shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System […]'.[49] As the ECtHR confirmed in M.S.S., the asylum situation in Greece is deficient and leads to inhuman and degrading treatment of asylum seekers. Therefore, deporting an asylum seeker to a country where he may be subject to inhuman or degrading treatment is contrary to Art 3 ECHR.

The ECJ relied upon the cited case to answer whether a deportation to a member state in which an asylum seeker may be subjected to degrading conditions is contrary to the Union's fundamental rights standards in Art 4 FRC. It states that

'the Member States, […] may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.'[50]

An example in which the advisory opinion by the ECtHR may be necessary is the approach to legal professional privileges for an in-house lawyer in Akzo Nobel.[51] In this case the ECJ had to examine whether the legal professional privilege also applies to in-house lawyers, employed by the client. The court stated 'that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.'[52]

So far, the ECtHR has not considered whether the legal professional privilege for in-house lawyers applies, even though the court dealt with the privilege in a more general way in Campbell,[53] determining that 'the lawyer-client relationship is, in principle, privileged.'

One has to wait whether this more general standard applies also in a relationship between client and employed lawyer. After accession, the ECJ may seek an advisory opinion from the ECtHR, if there is a pending case, which then has to clarify the standards laid down in the Convention.

The ECJ will have to ensure strong communication with the ECtHR and domestic courts after Accession with regard to for instance transnational cooperation in matters of extradition and criminal proceedings such as the European Arrest Warrant. An exemplary case is Symeou,[54] in which the applicant claimed that his extradition to Greece and the conditions in Greek prisons breached the prohibition of inhuman and degrading treatment enshrined in Art 3 ECHR. However, the administrative court concerned dismissed the appeal, stating that

'[t]here is no sound evidence that the Appellant is at a real risk of being subjected to treatment which would breach Article 3 ECHR, even if there is evidence that some police do sometimes inflict such treatment on those in detention. Regrettably, that is a sometime feature of police behaviour in all EU countries.'[55]

So far the European Arrest Warrant and its interpretation has not been under supervision of the ECtHR but an accession could change this situation significantly. If the compatibility with standards codified in the ECHR is at stake, domestic courts as well as the ECJ have the possibility to request an advisory opinion, in order to adjust their standards.

Finally, the advisory opinion will be used in three different constellations. First, if a domestic authority acts beyond the scope of EU law, it may seek for an advisory opinion directly from the ECtHR. Second, if the authority acts within the scope of EU law, even within its discretionary power, a preliminary reference shall be made to the ECJ. The ECJ should then adjust its case-law according to the standards of the ECtHR when the Convention system provides for more extensive protection. If there is no settled case-law of the ECtHR, the ECJ should seek for an advisory opinion.

Third, if a procedure concerning the action for annulment under Art 263 TFEU is brought before the ECJ, it is empowered to seek for an advisory opinion when compliance with fundamental rights standards is questionable.

48 M.S.S. v Belgium and Greece (2011) 53 EHRR 2.
49 N.S. (n 47) 65.
50 Ibid 94.
51 Case C-550/07 Akzo Nobel Chemicals and Akros Chemicals Limited and Akcros Chemicals Limited v Commission of the European Communities [2010] ECR 0000; Thanks to Dr Adam Bodnar for this advice.
52 Ibid 44.
53 Campbell v UK (1992) Series A no 233.
54 Symeou v Public Prosecutor's Office at Court of Appeals, Patras, Greece [2009] EWHC 897 (Admin), [2009] WLR (D) 146.
55 Ibid 65.

4. Conclusion

If the transformation and accession process will go underway, an internationalisation of human rights standards will lead to an adjusted protection scheme in Europe.[56]

Instruments and mechanisms will ensure a communication with domestic as well as European authorities, although without affecting the Union's inner competences. Indeed, it would be unrealistic to say that the length of proceedings will not increase in certain areas, but the proposed instruments may contribute to the prevention of a violation.[57]

A more coherent dialogue will be possible, to establish a common European ordre public concerning basic principles of law on which the EU and all member states are based. Universality does not mean uniformity,[58] but by enhancing the dialogue between all authorities involved, a European rule of law will pave its way through all instances and establish a communicative framework, a 'communicative ordre public' in Europe.

However, it is still uncertain whether this view will be shared by all high authorities and courts. There is never a security for total compliance. 'Back of ninety-nine assertions that a thing cannot be done is nothing, but the unwillingness to do it.'[59]

56 Walter Obwexer, 'Der Beitritt der EU zur EMRK: Rechtsgrundlagen, Rechtsfragen und Rechtsfolgen' (2012) 47 Europarecht, 115 (148).

57 For an outstanding example on a possible total process length until a final judgment of the ECtHR is adjudicating a right to the applicant See Koua Poirrez v France (2003) 40 EHRR 2.

58 Callewaert (n 15) 782.

59 Quote by William Feather.