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ECHR and ECJ: The Peer to Peer Perspective of Review

by

Oana Ichim*

Abstract

(French version below)

The study inquires into a form of dialogue that is very specific to European human rights adjudication and which is identified as being judicial peer review. It supports the idea that, as European judges were entitled by their system to interpret and apply the European Convention, and given that their judicial policies were interdependent due to the effects of their judgments on domestic law, they became peers in matters of human rights adjudication on the basis of that Convention.

In light of the ECHR and ECJ case law and bearing in mind the horizontal dimension of judicial interactions, the inquiry attempts to draw a theoretical framework to regulate non- hierarchically related courts that is based on constant observance and on incremental normative processes.

Keywords: Hierachy, Normative and institutional conflict, Equivalence, Horizontal jurisdictional relations, Coordination and cohabitation

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Résumé

Cette étude est un approfondissement d'une forme de dialogue qui est le propre des juges européens des contentieux des droits de l'homme, une sorte de « peer-review » judiciaire. L'idée étant que, puisque les juges de Strasbourg et de Luxembourg sont tous deux compétents pour interpréter et appliquer la convention européenne, et étant donné que leurs politiques judiciaires sont interdépendantes en raison des effets de leurs arrêts dans les systèmes juridiques internes des Etats parties, chacun devient nécessairement le pair de l'autre.

A la lumière de la jurisprudence de la CEDH et de la CJUE et tout en ayant égard à la dimension horizontale de leurs relations, l'objectif est de proposer un cadre théorique permettant de réglementer les relations entre des cours qui ne sont pas dans un rapport de hiérarchie. Ce cadre théorique, basé sur un suivi constant, donne naissance à des ajustements progressifs réciproques.

Mots-clés : Hiérarchie, Conflit normatif et institutionnel, Équivalence, Relations juridictionnelles non-hiérarchiques, Coordination et cohabitation

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I. Introduction and methodology

The interactions between the two major courts of Europe: the European Court of Human Rights (ECHR) and the European Court of Justice of the European Union (ECJ) have been labeled in many different ways. Each time a label seemed to fit – more or less – with their interactions, a judicial practice invariably diverged from the theoretical model implied by that label. There were few patterns and too many variables, making the task of conceptualizing a model for regulating jurisdictional interactions particularly difficult, especially since the classic models for resolving jurisdictional conflict were not suitable for such a situation.

Beyond legal labels, the relationship between the two sets of judges could be said to resemble that of a parent and his child, i.e., both judges, but in different tribunals, having to adjudicate upon the same facts, but in different contexts, applying similar or even identical provisions. While the ECHR would be the parent in the example given, because it is the ultimate judge of the European Convention of Human Rights, the ECJ would be the child for two primary reasons. First and foremost, because it developed a human rights mandate only subsequently and incidentally, and thus – similar to a child – it has less experience in applying the European Convention, being placed somehow in the shadow of the former. Secondly, because, it is less 'skilled' in applying this Convention, which was initially an external point of reference – similar to parental advice – which was imposed for the purposes of coherence and legitimacy of the Communities/EU construction. As is the case with any inherited feature or piece of advice given, there will always be ambivalent possibilities. The child could decide to reproduce parental patterns, or might decide not to. Moreover, the child might exert specific inclinations which are not 'in line' with the parental model or might simply decide to create similar, but specific versions of the parental model, while still relying on the authority of that model.

The issues raised by the accession of the European Union to the European Convention in light of the Draft Agreement on Accession of the European Union to the European Convention on Human Rights (the Draft Agreement) can be envisaged along similar lines to

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that of the parent-child situation. Why would the ECJ decide to reproduce ECHR case law to the detriment of its specific human rights language? Why is it that the drafters considered that the ECHR has authority over the specific EU human rights catalogue and related case law? Would it be justified to rely on a parent's decision once a child becomes a grown up just because he or she is supposed to know better? To what extent can, similar but not quite compatible versions of the same 'genetic material' – in this case, the two courts applying the same human rights Convention cohabit so that consistent instead of conflicting standards are upheld?

Like in any relationship of authority, compared here to parental authority – although, admittedly legal authority is more complex[1] - the question at the heart of the debate on the interactions between the two courts is that of determining the role of each actor – who is in command and who follows. But as courts are not in a hierarchical relationship, the issue at stake here is to determine the role of the ECHR judge within the EU legal order as well as the status of the European Convention. The problem lies in the complicated nature of their interactions – they entertain horizontal relations – which makes it difficult to determine who is in a position of 'guiding' the direction of European human rights adjudication based on the European Convention. Moreover, the coexistence of two human rights catalogues created a situation of normative parallelism which dispersed even further the sources of authority. In such a complicated legal landscape authority shifts focus and the assessment of the functions of the two courts in relation with the same convention – the European Convention on Human Rights – needs to be re-conceptualized. The purpose of this study is precisely to re-conceptualize their relations and propose a framework for interactions based on practical necessities but also on theoretical considerations of authority and effectiveness.

The study establishes first the epistemological features that may enhance a common understanding of human rights adjudication based on the European Convention by building on the rules of interactions developed by the courts through their case law. Furthermore, the inquiry tests whether the idea of dialogue could replace hierarchical coordination and, whether this dialogue is based on reciprocity or, whether it could be based on other factors, factors that are triggered by the situation of interdependence that is created between the two courts. Based on the analysis of accession and the negative vote of the ECJ as expressed in its Opinion 2/13, the study proposes an alternative theoretical framework to the hierarchical model of judicial interactions: the peer to peer review. This form of review is built according to the specificities of European human rights adjudication and implies a form of dialogue that is based on interdependence rather than reciprocity. This assumption reshapes

[1] ALTER Karen J., HELFER Laurence R., MADSEN Mikael Rask, "How Context Shapes the Authority of International Courts", iCourts Working Paper Series, No. 18, 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574233, p. 6 (consulted on 15 March 2016).

the debate on institutional interactions by shifting the focus from the idea of *ordering* jurisdictional relations to that of *creating* strategies that courts should have recourse to in order to create the necessary links that would allow coexistence of normative provisions.

In order to draw the contours of peer judicial relations, the aspects of authority and effectiveness of courts will serve as the main tools for testing unusual judicial strategies against common understandings of adjudication. Finally, the present study attempts to serve an idealistic goal of sorts, that of proving that '*norms are hard to settle*' and despite our desire for stability and uniformity, the '*global culture is a work in process*' and thus needs to be supported by increasing dialogue and exchange instead of the dominance of particular interpretations.[2]

II. The evolution of adjudication: from colleagues to peers

A. The emergence of peer to peer features

As part and parcel of the European space, the two courts have gradually built two distinct legal orders lacking any effective claim for precedence over the other[3] but remaining nevertheless interconnected due to a variety of factors. Both orders are supported by constitutional claims. Very early on, the ECJ argued that EU law is a new legal order *tout court* and went further by characterizing the Treaty establishing the European Economic Community (EEC Treaty) as a basic constitutional charter,[4] thus stressing the municipal nature of the Community/EU law. The notion of constitutional charter was later upheld in several judgments and opinions with even more vigour.[5] The ECHR for its part embarked upon the mission of guardian of the European public order, which it proclaimed through the *Loizidou* judgment[6] and upheld several times when confronted with the question of determining the nature of the obligations of the Member States. Nonetheless, their constitutional mission was tailored according to their mandates and architectures, which were structurally different – one order was based on economic interactions between States and aimed at the development of a common market and related policies, and the other was designed to enhance human rights standards with regards to States and, more importantly, with regard to individuals.

[2] KOCH Charles H. Jr., "Judicial Dialogue for Legal Multiculturalism", MJIL 2004, pp. 879-902, p. 902.
[3] LEBECK Carl, "The European Court of Human Rights on the Relation between ECHR and EC-Law: The Limits of Constitutionalisation of Public International Law", ZÖR 2007, pp. 195-236.
[4] ECJ, case C-295/83, *Les Verts* [1984], ECLI:EU:C:1984:292, para. 23.
[5] See, for example, ECJ, Opinion 1/91, 14 December 1991, *Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, ECLI:EU:C:1991:490, para. 8; and ECJ, joined cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al-Barakaat Foundation* [2008], ECLI:EU:C:2008:461. In this later and famous judgment, the ECJ has stressed the fact that there is a constitutional core – *the very foundations of the Community legal order* – that cannot be transgressed (para. 282, emphasis added).
[6] ECHR, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310.

As a direct consequence of these different architectures, judges developed strategies meant to support their specific legal order and ensure the pervasiveness of the normative arguments at the domestic level. The Communitarian construction was built upon strategies of harmonization of States' interests aimed at integration, the ECJ developed the famous doctrines of direct effect and supremacy in order to both reduce discretion of governments and domestic courts in matters transferred towards the European level but also to be able to include additional goals to attain the European construction, goals intended to ensure the coherence and completeness of the EU architecture and facilitate its assimilation at domestic level. Human rights were such 'an additional goal' due in part to the pressure coming from domestic level. The human rights mandate developed decades after the Court was established, and was explicitly endorsed by the mandate providers only in 2007 when the Treaty of Lisbon was concluded. Since the main mission was to protect the European Communities and help build their objectives, human rights came into the purview of the ECJ only later on.[7] To date, human rights have constitutional value and even form a higher normative standard within the EU system.[8]

On the other hand, the European Convention was of a subsidiary nature and States remained free to choose the manner for ensuring the effective implementation of any of the provisions of the Convention within their internal law.[9] However, despite the optional choice regarding domestic incorporation of the European Convention and numerous statements by the Court on the State's margin of appreciation, what has actually occurred is a considerable expansion of positive obligations and numerous rulings against States.[10] The ECHR has proclaimed the existence of a *European public order* of which it was the sole guardian, but, the margin of appreciation doctrine which would have allowed States to tailor their specific needs to the provisions of the Convention turned out to be too abstract and affected the quality and nature of dialogue with domestic courts and governments.

Despite the different mechanisms developed in order to ensure embededness, their unavoidable cohabitation within the European space and the overlapping membership of their mandate providers, led, in time, to the penetration of the imperatives of human rights protection into the Communities' legal order. For a host of reasons, including pressure from constitutional courts which is the standard example, the ECJ engaged in a gradual process of human rights reception. Human rights came to be assimilated to primary sources via

[7] While the EU was not equipped with a specific human rights catalogue, the ECJ's willingness to apply the provisions of the European Convention is not clear even to date. The Luxembourg Court has no specific competence to apply the European Convention. Despite all the efforts to speed up accession, it has not developed a particular doctrine regarding the status of the European Convention and Strasbourg case law. Even if it was foreseeable under Art. 6(2) TEU to give priority to the European Convention, the ECJ did not follow this path, not even when accession was a 'burning issue'.

[8] TZANAKOPOULOS Antonios, "Collective Security and Human Rights", *in* De Wett Erika, Vidmar Jure (eds), *Hierarchy in International Law: The Place of Human Rights*, Oxford, Oxford University Press, 2012, pp. 42-70.

[9] ECHR, *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, Series A no. 20, para. 50.

[10] XENOS Dimitris, *The Positive Obligations of the State under the European Convention of Human Rights*, London, Routledge, 2012, 231 p., p. 5.

general principles, and, even before incorporation into the Charter of the Fundamental Rights of the European Union (EU Charter), they were granted constitutional value and were further used as one of the principal means for constitutionalizing the EU.[11]

The protection of fundamental rights, while inspired by the constitutional traditions common to Member States, had to be ensured within the framework of the structure and objectives of the Community[12] and the European Convention was attributed '*special significance*' among international treaties on the protection of human rights.[13] As aptly noted, '*it is difficult to say whether this human rights adjudication is judge-made case law as a defensive move to shield the judge-made doctrines of direct effect and supremacy or rather a pro-active step in the protection of fundamental rights in Europe*'.[14]

In parallel to the process of human rights assimilation, the ECHR, when faced with specific issues related to the European Communities, developed a deferent attitude, and adopted an approach similar to a polite gesture, a helping hand towards European construction. Through the intermediary of the so-called *Coëme* doctrine, the ECHR prevented Article 6 guarantees from entering the specific EU architecture. This period of '*jurisprudence attentiste*'[15] was followed by a saga concerning the participation of States within specific EU procedures. In cases such as *CFDT*[16] and *M. & Co* and *Matthews*, the Commission and then the Court had to determine whether States have exercised jurisdiction within the meaning of the Convention. The judges admitted that the Convention generally allowed the Member States to transfer sovereignty to the EU, but when they do so, they are responsible for ensuring that the Convention rights are 'secured'. Hence, where the EU provisions go against the Convention, an individual can hold a Member State to account. Otherwise stated, EU acts were indirectly subjected to control by the ECHR.

This indirect and diffuse-type of ECHR control over the acts of European Communities opened the way for a confrontation not only of views with regard to the scope of human rights review based on the European Convention, but also with regard to the reach of this protection at the domestic level depending on who the ultimate adjudicator is: Strasbourg or Luxembourg. Soon it became obvious that even with the European Convention as a common reference point for human rights protection in Europe, there could never be full convergence in Europe, but rather complementarity.[17] The judicial landscape became even

[11] LEBECK, *supra* note 3, p. 195.
[12] ECJ, case C-11/70, *Internationale Handelsgesellschaft* [1970], ECLI:EU:C:1970:114, para. 4.
[13] ECJ, case C-222/84, *Johnston* [1986], ECLI:EU:C:1986:206, para. 18, and ECJ, case C-299/95, *Kremzow* [1997], ECLI:EU:C:1997:254, para. 14.
[14] FABBRINI Federico, LARIK Joris, "The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights", iCourts Working Paper Series, No. 37, 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697513, p. 7 (consulted on 15 March 2016).
[15] BULTRINI Antonio, "La responsabilité des Etats membres de l'Union européenne pour les violations de la Convention européenne des droits de l'homme imputables au système communautaire", RTDH 2002, pp. 5-43, p. 15.
[16] *CFDT v. European Communities*, no. 8030/77, Commission decision of 10 July 1978.
[17] CLAPHAM Andrew, "On Complementarity: Human Rights in the European Legal Orders", HRLJ 2000, pp. 313-323.

more complicated once the EU Charter was adopted. Indeed, despite the correspondence clause laid down in Article 52(3), the ECJ felt even safer than before to develop its own human rights views.[18]

The indirect control performed by the ECHR also clashed with the capacity and, more importantly, readiness of domestic judges to balance issues of human rights protection related to the European Convention against imperatives imposed by the specific Communities/EU architecture. There was a strain on domestic adjudication because the national judge was caught up between allowing the direct application of EU law and submitting the State for review at Strasbourg in a case in which the degree of protection contravened the Convention's standards or, denying direct application and thus submitting the State to infringement proceedings under EU law.

Such a clash was unavoidable given the differentiated reception of the courts' case law at the domestic level. The differentiated reception mirrored the interactions the ECHR and ECJ entertained with their domestic counterparts. On the one hand, the Luxembourg Court – through the preliminary reference procedure set out in Article 267 TFEU – has carefully managed the relationship it had with domestic courts by introducing a form of dialogue that would allow domestic counter-parts to be involved to some extent in supranational adjudication. On the other hand, the ECHR had not established a structured and formal dialogue with domestic courts, and, due to the Strasbourg Court's mismanagement of the margin of appreciation and positive obligation doctrines, has led to the creation of alternative standards depending on the specific circumstances of the case. Moreover, at the domestic level, a human rights claim was simultaneously anchored in the Charter and the European Convention and those instruments guaranteed its substance. However, the scope of protection varied from one institutional context to another. For example, a Strasbourg statement on freedom of association would impact the capacity of States to apply the Communities' and, subsequently, the EU's policies in the matter of freedom of goods. Should the Strasbourg judge decide that the national measures of implementation constitute a violation of Article 11 of the European Convention, the legitimacy of EU policies would be thrown into question, and, most importantly, would call for the Luxembourg judge to reconsider those policies should a case on this matter arise before the ECJ.

[18] Art. 52(3) states: '*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*' Some authors have considered that the ECJ would not use this opportunity to go beyond Conventional provisions (DE WITTE Bruno, "The Use of the ECHR and Convention Case Law by the European Court of Justice", *in* Popelier Patricia, Van de Heyning Catherine, Van Nuffel Piet (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts*, Antwerp, Intersentia, 2011, pp. 17-34, p. 25, while others praised this opportunity as a way for re-inventing human rights standards within the EU (COUTRON Laurent, "L'hypothèse du dépassement du standard conventionnel", *in* Picheral Caroline, Coutron Laurent (eds), *Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme*, Bruxelles, Bruylant, 2012, pp. 45-65, p. 42).

This normative parallelism – which, as already emphasized, became more acute once the Charter was adopted – transformed human rights into multi-sourced equivalent norms: even though human rights provisions had an identical core, the underlying institutional context often made a difference first at the level of implementation, and then at the level of adjudication.[19] For instance, the right to a fair trial was assessed differently depending upon whether the applicant was opposing the European Commission before the ECJ or was contesting a domestic act with no relation to EU provisions before domestic courts. This normative complexity has triggered functional demands for coordination between the courts.[20] However, the nature of such coordination remained unclear given the impossibility of establishing a hierarchy between the two courts.

As the two courts were not in a hierarchical relationship, and, as over time, a given matter was under the purview of both courts, there was less of a temptation to acknowledge the superiority or inferiority of the European Convention or of EU provisions, but more of a temptation to examine how well the system actually works and to adapt its norms and standards according to internal legal and legitimacy requirements. That explains why the equivalence doctrine was developed with the *Bosphorus* case.[21] Essentially, in the *Bosphorus* case judges decided that, as long as the EU has not acceded to the Convention, the Strasbourg Court has agreed not to scrutinize national measures implementing EU law if, and so long as the EU legal order provides equivalent protection. Equivalence transformed the ECHR into the monitoring authority of the EU human rights framework, and the sole judge of what *manifest deficiency* of protection means. Nonetheless, the ECJ was also the monitoring and filtering authority of the Convention's reception within the EU legal order since it was the only one capable of giving meaning to what 'special significance means'.

This famous – and at the same time – reassuring doctrine of equivalence also raised awareness of the institutional and normative interdependence between the two courts, interdependence which was different from that existing between hierarchical inferior and superior courts.[22] Although not formally competent to annul or reform each other's case law, they still had the power to *control* the effects of such case law through the prism of specific judicial doctrines and in line with their specific mandate. Whilst their horizontal relationship

[19] SHANY Yuval, BROUDE Tomer, "The International Law and Policy of Multi-Sourced Equivalent Norms", *in* Shany Yuval, Broude Tomer (eds), *Multi-Sourced Equivalent Norms in International Law*, Oxford, Hart, 2011, pp. 1-15.

[20] JENSEN Mads Dagnis, KOOP Christel, TATHAM Michaël, "Coping with Power Dispersion? Autonomy, Co-Ordination and Control in Multilevel Systems", JEPP 2014, pp. 1237-1254, p. 1246.

[21] ECHR, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, ECHR 2005-VI.

[22] As emphasized above, the interdependence was created first and foremost due to the normative parallelism of provisions from the European Convention but also because, as obvious, there was an overlap with regard to their jurisdiction: all EU Member States were signatories of the European Convention. For instance, the Strasbourg judges could not be said to be free when deciding whether the measures of transposition of an EU directive are in line with Conventional requirements. Not only because they did not have the competence to assess whether EU law is compliant with the Convention, but also because they lacked any effective tool to annul or amend the decision and thus needed to avoid placing the State in a deadlock situation. By the same token, the Luxembourg judge had to be careful in determining the limits of the enjoyment of the right to property when enacting secondary legislation to be transposed by States given the ECHR's extensive interpretation of what possessions mean.

deprived the judges of possibilities of annulment and reform, they were left with the possibility of mutual monitoring – through fine-tuned judicial techniques of interpretation of State discretion and State responsibility – and thus a limited ability to push States to convergence of standards.

The *Bosphorus* doctrine translated the idea of mutual monitoring within the context of this constrained interdependence. The term 'constrained' constitutes a salient feature of the judicial interactions between the two courts because, first and foremost, human rights, by their very nature might be divisive[23] and second, especially in the particular situation of European adjudication, they had an equivalent nature.

The capacity of the courts to engage in dialogic encounters is directed by their epistemic premises. As described above, the ECHR and the ECJ are structurally different: they have different mandates and make use of different mechanisms for embedding their normative requirements at the domestic level. Nonetheless, they are also interconnected due to their overlapping membership and to the equivalent character of the human rights provisions which are based on the European Convention, but also reflected in the Charter and general principles of EU law. The dialogue they entertain is taking place in the absence of indicators for '*permissible multiplicity and unidirectional bindingness*', also known as hierarchy signifiers.[24] As a result, judges are in a peer to peer situation in which instead of hierarchical coordination they are facing strategic adjudication depending on the specific situation. This is also precisely the situation translated by the *Bosphorus* doctrine: between the EU human rights system and the guarantees provided by the Convention there is no hierarchy but a peer to peer relation implying a certain degree of compatibility. In the case at hand, the ECHR opted for the lowest degree of compatibility – manifest deficiency.

Even though their objective was the same – ensuring human rights protection – the Strasbourg and the Luxembourg judge had different roles with regard to establishing and checking human rights standards. The former is mandated to ensure at least a minimum level of protection and to correct the direction of domestic policies that contravene the standards set up in the European Convention. The latter is mandated to ensure the coherent application of EU treaties and secondary legislation, and human rights are integrated into these objectives and are not its main objective.

Courts have different epistemological premises and, at the same time, also an uncontested potential for specific adaptability. The peer to peer structure mirrors at best both the relation of interdependence, but also their antagonist tendency. Like in the parent-child relation envisaged at the beginning of this study, in which both are judges of similarly placed tribunals, but in different areas, in a peer to peer situation, both judges have the authority to say

[23] CLAPHAM Andrew, "A Human Rights Policy for the European Community", YEL 1991, pp. 309-366, p. 311.
[24] SHANY Yuval, *Regulating Jurisdictional Relations between National and International Courts*, Oxford, Oxford University Press, 2007, 256 p., p. 89.

'what the law is.' In such a situation of horizontal dialogue, the question at the heart of the debate is what to add to that authority so that one has the final word about 'how the law should be'. This 'additional something' might be the parent's moral influence, i.e., the ECHR expertise with respect to its own case law. This argument is nevertheless contested because as an adult child is free to decide not to follow his/her parent because his/her views do not fit with the present situations, so the ECJ can narrow the application of the views of the ECHR and thus deny the appropriateness of applying its case law. Peer judicial review is an ongoing process of monitoring, contestation and adaptation in which both parties compete, but at the same time participate in defining the law.

By constraining peers to a unique model of interaction instead of offering them a panoply of measures to be adopted within some acceptable limits, which was the case before, in particular with the equivalence doctrine, the political negotiators upset the peer to peer equilibrium. It is important to note that when the Draft Accession Agreement was adopted, the case law of the two courts was saturated with cross-references in courts' case law, cross-references which had not brought an important added-value to their case law. What was sought with the Draft Agreement was to provide incentives for cohabitation, not to regulate through procedural steps the adjudicative powers of the ECJ with regard to the European Convention given that, the former has always shown reluctance in allowing Strasbourg review of EU human rights standards. The ECJ rejected accession and, through its case law, took an independent interpretation of the human rights provisions from the Convention that had equivalent provisions in the Charter. It was thus wrong to assume that the two courts constitute a big happy family of human rights defenders under the same banner – that is the European Convention on Human Rights. It would have been more efficient to provide incentives for adaptation instead of opting in favour of two institutions aimed at ensuring procedural involvement. Those institutions were based on hierarchy and thus completely ignored the peer to peer review perspective in which the two courts were placed by virtue of their interdependence, normative parallelism and monitoring as a way of conflict avoidance.

B. The authority of a peer judge

Given the lack of rules for hierarchical subordination and normative coordination, European judges tried to deal properly with situations of normative parallelism very particular to this horizontal perspective. In the absence of commonly accepted hierarchy markers, the judges were left with unanswered legal questions with regard to non-hierarchical structures and very challenging situations of control of acts of international organizations – and by that also issues related to responsibility of States and organizations, but also treaty interpretation – and inter systemic rules of conflict.

The European human rights arena is represented by two judicial decision makers which share a normative structure[25] – that is the human rights provisions – which nonetheless is applied in different institutional contexts and have therefore an equivalent character. Moreover, the Communitarian construction and the respect of the provisions of the European Convention have always been complementary and somehow conditional on one another.[26] In designing the institutional interactions between the two courts which apply the same provisions – a situation of normative parallelism – this normative parallelism has been largely ignored. While the *Bosphorus* doctrine aimed at regulating the normative overlap, it left open institutional coordination. The Draft Accession Agreement was intended to complete this picture, but instead it denied courts the possibility to coordinate and thus establish the 'shared epistemological premises' that would have been necessary for their coexistence.

In a situation of horizontal interaction, in which it is not clear who gives the command and who follows it, the authority of a judge to have a final say is located and relocated according to the ability to identify similarities and justify differences based on those similarities. The idea of similarities presupposes that there are ways in which those similarities are fixed through a specific way of dialogue. As emphasized above, while the ECJ and ECHR were peers given that they shared an objective of human rights protection, they did not have at their disposal the same means to achieve such protection and their mentalities are irreducibly distinctive.[27] The role of the ECJ and ECHR as adjudicators and standard setters is functionally the same, but substantially, their strategies differ greatly. While the latter has the goal of ensuring a minimal policy change and is driven by the principle of subsidiarity, the former has to ensure the best uniform change which is mirrored in principles of direct effect and supremacy reinforced by that of mutual confidence and sincere cooperation between States. What was missing in their interaction was the identification of modalities of dialogue through which judges could draw on their similarities in order to deal with their differences.

The 'problem' was that the two judges did not share a common legal culture, fact which seems to have been ignored by the Draft Accession Agreement. In fact, with rare occasions before, but especially after the adoption of the Charter, the judge in Luxembourg relied less and less on the European Convention and favored its own human rights catalogue.[28] The

[25] STONE SWEET Alec, "Judicialization and the Construction of Governance", CPS 1999, pp. 147-184.
[26] HELFER Laurence R., SLAUGHTER Anne-Marie, "Toward a Theory of Effective Supranational Adjudication", YLJ 1997, pp. 273-391.
[27] LEGRAND Pierre, "European Systems Are Not Converging", ICLQ 1996, pp. 52–81, pp. 81 and 86. The author talks about the convergence of European domestic systems, but his arguments are pertinent also for the supranational perspective since they mirror and also guide domestic adjudication.
[28] In 2012, Professor Gráinne de Búrca conducted an analysis of all cases in which the ECJ and General Court have referred to the EU Charter since it has had binding effect. During the period in question (December 2009 until 31 December 2012), the ECJ referred to the EU Charter in at least 122 cases. Out of those 122 cases, the ECJ referred to the ECHR in only 18 cases (with 10 of these involving mention or discussion of ECHR case law, the other 8 merely mentioning an ECHR provision). The few examples of cases when it was used by the ECJ mostly refer to simple surveys of the ECHR's case law for the purpose of better delineating the scope of protection. There is a better record of judicial borrowing between the courts prior to the adoption of the Charter.

horizontal network of European human rights protection does not reflect an ideal reciprocity-based framework of interaction.[29] The concept of peer review is premised on the idea that reciprocity is not inherent, but needs to be 'deserved', built and acknowledged. This is what differentiates peer legal authority from the mother-daughter relation envisaged. While a daughter could rely in number of situations on the mother's decision even though this decision does not represent her point of view, because she is the mother, a judicial peer will only do that if it resonates with its own practices.

A peer judge needs to actually understand the '*foreign language*' of the other and pursue an effort to '*get imaginatively inside*'.[30] This is what actually grounds its authority: to answer with borrowed language in solving a legal dispute. This borrowing is not automatic unless the judge '*discerns, in a given situation, the right solution*' because it knows best the '*moeurs et les coutumes*' of the system, or such an ideal capacity – *phronesis*[31] – is not inherent in a judge who is a peer, but is still a stranger to the system. That is why it is important that the judge secures authority in every specific situation and not as a general matter. Authority is *de facto*. Additional reasons have to ground authority in horizontal relations and these reasons depend on the capacity of understanding and adapting normative standards. Peers who review each other can derive best practices not on the basis of reciprocity but from reviewing each other given that they share normative expectations and because those practices best correspond to those expectations. Stabilizing normative expectations is the role of courts.[32]

Understanding is one part of peer review and it is a process that cannot be checked legally, '*confidence is a condition of cooperation*'.[33] A judicial peer cannot definitively and authoritatively change the organization and structure of the other, but can only adjudicate on the difference that creates divergence. If the ECHR were to find a violation on the basis of Article 8 of the Convention based on the application of a directive, the judge in Strasbourg could not change the contested provision by providing general measures to be adopted by the Member State whose measure was in dispute.

In legal terms, what is needed in order to arrive at an outcome that would best suit legal policy, legislators and judges is not to merge judicial strategies – structurally different through legal culture – or, to set an order of hierarchy between judicial responses – impossible because of the absence of meta-rules of conflict – but to create or use the strategies that would identify the best policy change to ensure cohabitation. Such policy change could

[29] VOETEN Erik, "Borrowing and Non-Borrowing among International Courts", JLS 2010, pp. 547-576, p. 572.
[30] LEGRAND, *supra* note 27, pp. 76-77.
[31] WYLER Éric, "Le concept d'acceptabilité du Jus auctoritas au coeur de la juridiction internationale?", *in* Kohen Marcelo, Bentolila Dolores (eds), *Mélanges en l'honneur du professeur Jean-Michel Jacquet: le droit des rapports internationaux économiques et privés*, Paris, LexisNexis, 2013, pp. 145-167, p. 155.
[32] VON BOGDANDY Armin, VENZKE Ingo, "On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority", LJIL 2013, pp. 49–72, pp. 54-55.
[33] JACQUÉ Jean Paul, "*Pride and/or prejudice?* Les lectures possibles de l'avis 2/13 de la Cour de justice', CDE 2015, pp. 19-46, p. 30.

be determined either through confrontation, trade-off mechanisms between courts or mediation of the domestic judge.

In each of the above situations the outcome of the decision would be different. Litigation strategies do not necessarily need a pre-determined normative and institutionalized framework, but they could develop incrementally through dialogue and adaptation. Adaptation through adjudication does not have to be a managerial process and endanger the nature of the judicial decision[34] or be an artificial extension of the judicial mandate. Adaptation can also mean cohabitation within a context of open-ended conflict. It is not to be expected that the Luxembourg judge apply the same standards to a human rights claim since his mandate is not solely to protect human rights, but to defend the European construction and its principles, of which human rights are an integral part. The EU judge's mandate could include consistent application of the European Convention, not even in the perspective of accession, but rather consistent application of the European Convention *within* EU law. In theory, because accession is an obligation in light of Article 6, the European Convention will be incorporated one way or another in EU law. Nonetheless, convergence through law is a process which was envisaged as a one-step activity by the agreement, while what is required is adaptation.

In the case of peer review, the judge must secure authority at both levels: the European Convention and the EU treaties. Hence, the judge needs to identify a common understanding from *within* the system but also justify authority from *outside* the system. Judges should first establish the terms of dialogue. While with the equivalence doctrine it was clear that the monitoring process is going to take place within the limits of the manifest deficiency threshold, in the Draft Agreement, there is no alternative to the conditional recognition established by this threshold and no special reference for normative coordination within the spirit of Article 52(3) EU Charter. Peer review lies in between comity and the legal boundaries imposed by the epistemic community that shapes the design of the two regimes.

Brussels has decided to push for accession despite knowing that the ECJ is reluctant and was always clear about the status of the European Convention within the EU legal order, of which it is the sole guardian. The ECJ's Opinion 2/13 confronts States with their own contradictions. Either they allow autonomy of EU law, or they refuse such full autonomy, but then review the treaties, and endorse external control in a direct manner. At least the ECJ brought the issue to the table for discussion.

[34] FULLER Lon L., WINSTON Kenneth I., "The Forms and Limits of Adjudication", HLRev 1978, pp. 353-409.

III. The design of peer review

A. The confrontation perspective

Certainly, the two courts have multiple identities which are shaped – among other factors – by the relations they entertain with their main interlocutors: States and domestic courts. The ECHR's reception process is less linear and fairly different among the Member States[35] because the implementation of ECHR decisions is a political process supervised by the Committee of Ministers. Within the EU legal order, the reception and concrete implementation of Community/EU law was guaranteed through legal provisions that were further developed by the ECJ in order to secure its prevalence over the domestic level.[36]

According to Professor Jacqué, accession failed because hierarchy was introduced and thus the ECJ reasoned in terms of constitutionality.[37] The Draft Agreement does not provide for indications on how to accommodate the reinforced constitutional guarantees that the ECJ has created through the *Kadi* judgment – '*the very foundations of the Community legal order*' – nor on how to replace the '*manifestly deficient threshold*' set up through the *Bosphorus* judgment. There is an important and almost conceptual difference between the two: the former is a constitutional limitation whereas the latter is an interface norm.[38] This 'misunderstanding' between what is the level of conformity required from States under the European Convention when implementing EU law has contributed greatly to the negative vote.

Under a confrontation perspective – which is how the ECJ conceived the Draft Agreement – what is implied is a simultaneous review based on constitutional features. In a peer to peer perspective, the judge lacks any power to annul or declare a contested measure as having no legal effect, but maintains the competence to deny its implementation and establish under which conditions implementation would be possible.

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[35] The ECHR reception process could be said to be divided between established democracies and newly established democracies that have different interests in implementing the decisions rendered by the Strasbourg Court (MORAVCSIK Andrew, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe", IO 2000, pp. 217–252). This also explains the ECHR's judicial tactics of rendering different types of judgments depending on the respondent State – high or low reputation States (DOTHAN Shai, "Judicial Tactics in the European Court of Human Rights", CJIL 2011, pp. 115-142, p. 142.). The low reputation States are similar to what Moravcsik calls '*newly established democracies*' and could be said to be driven by considerations related to acculturation. Acculturation means that States adopt beliefs and patterns in order to converge with the surrounding culture (GOODMAN Ryan, JINKS Derek, *Socializing States: Promoting Human Rights through International Law*, Oxford, Oxford University Press, 2013, 256 p.). Acculturation creates a process of decoupling between the standards that are imposed and their actual capacity of implementing those standards. This decoupling between what States could achieve in matters of human rights protection read in conjunction with idea of different judicial tactics depending of the respondent State may explain the incongruent case of the ECHR with regard on certain subject matters.

[36] The European construction is very often described as a complex and *sui generis* process of governance, perceived as power dispersion. The ECJ, through the prism of a variety of theoretical inquiries, has been portrayed as allowing '*the transformation of the European legal system by limiting the possible responses of national governments to its decisions within the domestic political realm*' (ALTER Karen J., "Who Are the 'Masters of the Treaty'?: European Governments and the European Court of Justice", IO 1998, pp. 121–147, p. 122), and as arbiter to protect common interest from clashing against private interest (BURLEY Anne-Marie, MATTLI Walter, "Europe Before the Court: A Political Theory of Legal Integration", IO 1993, pp. 41-76, p. 68 writing on neo-functionalism). The ECJ's role in enforcement of the EU law is exercised through direct procedures (annulment procedure under Art. 230 EC Treaty; failure to act procedure under Art. 232 EC Treaty; liability of the EC under Art. 288 EC Treaty and enforcement procedure under Art. 226 EC Treaty) and indirect procedures and arguments (plea of illegality under Art. 241 EC Treaty and the preliminary ruling procedure under Art. 234 EC Treaty).

[37] JACQUÉ, *supra* note 33, p. 30.

[38] KRISCH Nico, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press, 2010, 384 p., p. 295.

Certainly it cannot be denied that both courts have developed specific conditions for the responsibility of Member States. Under EU law, States are under the general obligation to prevent any obstacles from preventing them performing their obligation under the Treaties.[39] Under the European Convention, States have to create the premises for the effective application of the Convention.[40] However, where such conditions amount to structural reasons, as is the case here, what is at stake is to justify why provisions from the European Convention do not threaten the unity and coherence of EU law, which is not the language used by the Draft Agreement.

The ECJ argues that accession might upset the very nature of Article 344 since the ECHR might adjudicate on disputes between EU Member States, and, by that, the very structure of EU law (paragraphs 205 and 212). This statement is to be read jointly with that in paragraph 224 on the assessment of specific criteria of competences and attribution under EU law for the purpose of triggering the co-respondent mechanism. What the ECJ hints at is that the architecture of accession and especially the co-respondent mechanism which is its *enfant prodige* is based on conflict. Article 3(5) of the Agreement clearly states that this special mechanism intervenes only when the facts underlying the alleged violation '*call into question the compatibility with the Convention rights at issue of a provision of EU law […] and notably where that violation could have been avoided only by disregarding an obligation under EU law*'. Hence, the foundation of this special mechanism of responsibility is the normative conflict arising as a consequence of the normative control of the EU over its Member States which is the standard type of situation. The avoidance of conflicting obligations was also the intention of the equivalence doctrine which aimed precisely to avoid the un-pleasant situation of competing and conflicting normative requirements. Nonetheless, the Draft Agreement does not introduce any substantial change with regard to the manner in which the ECHR will exercise its review. As before, the Strasbourg judges will have to differentiate between State obligations under the European Convention and under EU law, and decide whether State discretion has been exercised in a manner which is compliant with the standards set by the European Convention. The major difference to the period prior to accession is that, when State discretion is limited by some EU provisions, the State is absolved from responsibility under the Convention. And the ECJ is not totally wrong in fearing that the ECHR might err in interpreting attribution of competences which could in the long run affect the very functioning of the EU system.

[39] This is based not only on principles such as direct effect and supremacy, but also on the principles of mutual trust and sincere cooperation and Art. 297 EC Treaty.
[40] ECHR, *Maestri v. Italy*, no. 39748/98, 17 February 2004, para. 47.

Member States are caught up in a multilevel system of obligations which qualify as interdependent.[41] As a normal consequence, the refusal to comply with human rights standards under one is necessarily envisaged as a '*wrongful act*' in the other. However, the response, or counter-measure, can only be in the form of a denial of implementation and not an annulment[42] and, as such, specific conditions of attribution and jurisdiction, and by that, of responsibility, should have been envisaged. The conditions and limitations of EU involvement hinge upon issues of responsibility and division of competences between the organization and its Member States. Hence, the jurisdictional threshold should have laid down some guidelines that could have helped the ECHR to keep a balance between, on the one hand the ECHR's attribution techniques and standards of responsibility, and, on the other hand, the ECJ's interpretation of the extent to which Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union, mainly the Charter.

As the ECHR has no theory of attribution, the panoply of complicated cases falling under the heading of shared competences between the EU and its Member States will need to be developed and adapted. In that sense, in the light of the ECHR's broad basis of attribution, a question may arise as to the division of competences and the burden of proof in that regard. This may prove to be very difficult because determination of the EU's responsibility will always involve the issue of attribution and thereby implies an in-depth analysis of the complex EU internal law linked to the division of competences. Moreover, the problem with attribution before the ECHR is that the use of positive obligations widens the very concept of attribution. The normative criterion of performance of functions under the rules of an organization can be diluted by the ECHR's approach on what constitutes a State organ. As the Explanatory Report declares, the fact that the alleged violation may arise from a positive obligation deriving from the Convention would not affect the application of these tests of attribution. If positive obligations in this context are taken to mean that '*States need to take all appropriate measures to ensure effective protection*', and since there is no neat distinction between negative and positive obligations when it comes to the identity of the perpetrator, there are very high stakes in devising attribution between EU Member States and EU Institutions. It is even more so when taking into account that the ECHR has reduced to a considerable extent the States' discretion in cases of conflicting obligations. This issue is further complicated by the ECHR's jurisprudence on private entities irrespective of the fact

[41] ECHR in *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, para. 239, stated that the European Convention created '*over and above a network of mutual, bilateral undertakings, objective obligations which … benefit from a collective enforcement*' and ECJ in Opinion 2/13 in paragraph 167 stated that '*essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other*', see ECJ, Opinion 2/13 (Full Court), 18 December 2014, *Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties*, ECLI:EU:C:2014:2454.

[42] See, on that matter, TZANAKOPOULOS Antonios, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*", Oxford, Oxford University Press, 2011, 288 p.

of acting *ultra vires* or not. Moreover, in most circumstances, the Court has imposed a regulatory framework as a core content of positive obligations under the first paragraph of several Convention rights.[43] This possibility is difficult to imagine in the EU context, because it would imply imposing on the EU a constitutional duty to legislate according to the European Convention. Yet, theoretically at least, this possibility still exists in the light of the aforementioned ECHR jurisprudence.

The jurisdictional threshold that now depends on normative conflict would need to account for the specific EU architecture. Instead of prior-involvement – which is the other *enfant prodige* – inherent to the co-respondent mechanism – accession should have been concerned with *conditions* under which to allow the review of EU acts. The Draft Agreement seems to have forgotten the legal categories at stake when reviewing acts of the EU: review of acts of international organizations, State responsibility and issues related to treaty interpretation and treaty obligations. None of these categories are mentioned or alluded to; accession is concerned with the procedural involvement of the two courts. The ECHR has not developed criteria for performing a legality review of acts of the EU and its institutions since the EU had no legal standing, but now it has to develop these criteria. The Draft Agreement should have provided guidance in that regard.

Jurisdiction should have been envisaged as prospective – rather than based on conflict. The emphasis should have been on checking whether the degree of protection, as envisaged by the European legal order, is compatible with that envisaged under the European Convention. Determining jurisdiction would amount to elucidating what the duty of a State is when facing divergent obligations or interpretations. From a peer to peer perspective, jurisdiction would focus on the standards of responsibility in order to determine permissible instances of discretion and commonly accepted limitations. In a peer-to-peer relationship, authority could not be based on procedural criteria, but on substantive criteria related to the nature and scope of the obligations. A parent's decision is not obeyed in the absence of punishment because of procedural reasons, but because of substantive ones.

The two courts should confront the nature of obligations under both the European Convention and the EU Treaties and determine 'from the margins' – since they cannot modify the relevant treaties – an intersectional model based on substantive criteria. It is necessary to isolate and delimit legal criteria used by the two Courts for analyzing State discretion as well the criteria for upholding or denying limitations to rights. For instance, it is important to delimit conditions under which the ECJ legally reviews acts of States and EU institutions from ECHR's very broad statement that States remain responsible from the point of view

[43] XENOS, *supra* note 10, p. 107, and, among many others, ECHR, *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI, para. 46.

of the Convention even when transferring powers to international organizations[44] and they need to ensure normative convergence and procedural guarantees so that they ensure the application of the Convention at the domestic level.[45]

Besides the difficulty of identifying conditions under which the ECHR may perform a conformity review on EU acts without entering into aspects of internal legality – which, as the ECJ has argued, is an aspect related to autonomy[46] – *Melloni* raises an additional problem because it reinforces a horizontal approach to EU architecture[47] which is largely incompatible with the conformity control developed by Strasbourg with regard to the nature of the obligations that States have when implementing acts of international organizations or other international agreements. Moreover, after having stated that obligations under the Convention benefit from collective enforcement,[48] the ECHR has not further developed this issue, which now might stand in contrast with the mutual confidence presumption as the ECJ had noted.

It could indeed be said that the ECJ agreed in paragraph 182 to retain solely a relative autonomy and consented to an external review under two conditions: one is procedural – the external control has to be subsidiary, and the other is substantial – the review needs to be focused on human rights and not on constitutional issues.[49] The two courts are peers in ensuring human rights protection and it is normal that one should not give away its role for the benefit of the other, not unless clear criteria are set. The Accession Agreement should have introduced along with the co-respondent procedure and its jurisdictional threshold based on normative conflict, categories of review and perhaps even elements with regard to the nature of review. Delineating the powers of review of the ECHR according to specific categories of EU acts and their nature while at the same time involving the ECJ's opinion related to specific features could have enhanced their dialogue and shed some light on controversial issues from both the ECHR and ECJ case law on matters of State and institutional responsibility that, in the long run, would have been beneficial. The nature and degree of consultation could have had different intensities depending on the area of EU competences – shared, exclusive or mixed. By different intensities it is meant that the mechanisms of involvement of the ECJ and the scope of review of the ECHR will be different. This feature is an essential one given that a peer to peer confrontation has to lead to commonly accepted standards and not to deadlock situations. For instance when analyzing the

[44] ECHR, *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I, para. 33. The Court has clearly stated with regard to EU Member States that they can transfer powers to an international organization but, they retain responsibility for all acts, no matter if the act in question was a mere necessity to comply with international legal obligations.

[45] The ECHR favors the accommodation of conflicting obligations – see ECHR, *Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012, para. 170 – and looks at whether the procedural guarantees offered in cases where international agreements were applicable are sufficient and adequate, see for instance, among many others, ECHR, *Romańczyk v. France*, no. 7618/05, 18 November 2010, para. 60.

[46] See paragraphs 184 and 185 of Opinion 2/13.

[47] PERNICE Ingolf, "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme est suspendue", CDE 2015, pp. 47-72, p. 51.

[48] *Ireland v. the United Kingdom*, *supra* note 41.

[49] DUBOUT Edouard, "Une question de confiance: nature juridique de l'Union européenne et adhésion à la Convention européenne des droits de l'homme", CDE 2015, pp. 73-112, p. 82.

discretion exercised by an EU institution in implementing an international agreement, implementation which is later at the basis of a violation of the Convention, the Strasbourg Court would perform a review of the measure after the ECJ's opinion with regard to the legality of the measure depending on the area of competences and the discretion afforded to States in that area. Once the limits of discretion are determined from both sides, the ECHR will perform a compatibility review on the new delimited area and isolate factual and normative circumstances that lead to conflict. In light of those circumstances, the ECHR could now develop criteria for a review of the legality of EU acts as it was informed by the ECJ's opinion.

B. The trade-off perspective

While the confrontation perspective was based on a prospective view of jurisdiction and particularly focused on issues of responsibility, the trade-off perspective could be seen as a subsequent and complementary strategy since its focuses are the standards of protection and the judicial choices leading thereto. Once the jurisdictional issue is settled, peer judges are equipped with *imperium mixtum* and thus unable to reform contested acts that have led to a human rights violation. By the nature of his function, a peer judge is mandated to negotiate trade-offs with the peer and determine leverages in cases in which trade-offs are not possible.

It is under this particular and rather peculiar strategy that the ECJ's arguments related to mutual confidence, the principle of sincere cooperation and its involvement in the prior-involvement procedure could be analyzed. The situation is simple: whenever, the ECJ raises the argument related to its fundamental architecture and the principles supporting it, the ECHR cannot impose its own interpretation about EU politics without considering the possibility of submitting the State to infringement procedures for not respecting obligations under EU law. The assessment of acts of implementation of EU provisions is mainly the result of careful examination of conditions of compatibility *ratione materiae* and issues of responsibility – more precisely of circumvention.[50] However, issues of responsibility are not simply vertical norms designed to be applied to States, but are also supported by interstitial norms that are meant to enhance their application. It is at the level of those norms that institutional trade-offs regarding the level of protection could be created.

The peer perspective of judicial review envisages trade-offs between, on the one hand the obligations of States under the European Convention to construe their obligations so as to avoid conflict[51] and ensure that rights are effective and not illusory[52] against the obligation of States to maintain the coherence of EU law as translated in important principles such as

[50] Since the ECHR was clear that States cannot escape responsibility by transferring powers to international organizations.
[51] See the *Nada* case, *supra* note 45, para. 170.
[52] ECHR, *Tyrer v. the United Kingdom*, no 5856/72, 25 April 1978, Series A no. 26, para. 31.

effet utile, sincere cooperation, and particularly in Articles 344 TFEU and 4(3) TEU. Accession should have provided the occasion to determine conditions under which notions such as '*all necessary measures*' or '*reasonable limitations*' that ECHR uses when making use of positive obligations and margin of appreciation be confronted against the obligations of EU Member States to take '*any appropriate measure*' to ensure the fulfilment of EU obligations.[53] This is why, as emphasized above and rightly pointed out by the ECJ, it should be involved at every step of determining the scope of protection and not only when the ECHR sees fit. Such an involvement is not purely procedural as the initial reading of the mechanism might suggest, since it implicitly requires the determination of the law at stake.[54] Hence, the procedural involvement is just one necessary step leading to the creation of trade-offs between levels of protection. The real stake of prior-involvement is to achieve development of obligations and principles of the responsibility of States in coordination with commonly accepted limitations for those rights.[55]

At the normative level accession might imply a shift from specific obligations to obligations of means. This would imply that besides the general obligations, complementary criteria of protection will be developed. For instance, the principle of mutual confidence which the ECJ vehemently defended could be diluted by the complicated and unpredictable ECHR case law on positive obligations and margin of appreciation including that of horizontal effect.[56] The ECJ has established that the degree of protection can be higher only in areas in which the subject matter has not been completely regulated by the Union whereas the ECHR obliges States to set a proper legal and administrative framework to give effect to Convention rights.[57] Hence, what is at stake is the consistent interpretation of both sets of obligations. However, as consistent interpretation means different things to the two courts,[58] the imperative is now to settle the balance between the so-called obligation of convergence developed by the ECHR and the EU system of liability of States for EU legislation. While the core conditions of the principle of State liability for the breach of EU law are determined by EU law, the action for compensation is provided within the frame-

[53] ECJ, Opinion 1/09 (Full Court), 8 March 2011, *Opinion delivered pursuant to Art. 218(11) TFEU - Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties*, ECLI:EU:C:2011:123, para. 74 et seq.

[54] In paragraph 247 the ECJ aptly noted: '*Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR.*'

[55] This might benefit the asylum conundrum which has resulted in a direct clash between courts. Several contribution from this Workshop have addressed this issue and provided and in-depth account of the state of the law, therefore it is not covered here.

[56] Important normative inconsistencies may result from the application of the horizontal effect *à la Strasbourg*, as developed through the theory of positive obligations, given that the Luxembourg judges normally provide a narrow interpretation on the matter. Even if the Advocates before the ECJ sometimes give support to the horizontal application of the EU Charter, the ECJ does not seem to endorse this interpretation. The question of horizontal application is even more complicated because the Strasbourg judges have always been reluctant, and avoided elaborating a general theory on the extent to which the Convention should be extended to relations between private individuals *inter se*. This statement was used as a vehicle to privatize the Convention and was subject to criticism even by the Strasbourg judges. If Strasbourg takes this interpretation further, this might upset the rationale EU law.

[57] XENOS, *supra* note 10, p. 107.

[58] The ECHR envisages consistent interpretation as inter-systemic integration and emphasizes that the Convention is to be read in line with similar standards, while for the ECJ consistent interpretation means maximizing the effects of the EU provisions through the doctrine of the *effet utile*.

work of domestic legal systems, with varying procedural and substantive rules on the matter, such as time limits, causation, mitigation of loss and assessment of damages. Conditions for compensation and conditions for engaging States' responsibility should be coordinated so as to avoid imposing different normative requirements with regard to responsibility and the specific obligation to make reparation.[59] This coordination should be envisaged in light of the general principles of the EU such as effectivity and effective judicial protection as also envisaged by the Charter in Article 47 but also in light of the ECHR's case law on the duty of Member States to take general measures under Articles 41 and 47 of the Convention.

Such normative integration is a slow process with drawbacks and inherent confrontations. But normative integration also means that the source of authority is controlled.[60] Hence what is needed is to create the judicial techniques for confronting normative and institutional specificities in a less aggressive manner. Another trade-off might be achieved at the remedial stage by initiating negotiations on the effective administrative and legislative responses in cases that represent recurrent violations. In such a situation, the Commission, in its role as the guardian of the treaties, can liaise with the Committee of Ministers and thus a joint approach of Convention violations and their source would be addressed.

The Agreement has opened the way for a confrontation that was once settled by the equivalence doctrine. However, instead of developing standards of protection that would better correspond to the complicated European situation of equivalent standards, the Draft adopted a confrontational perspective and denied possibilities of adaptation which were previously possible.

C. The domestic mediation perspective

The first two litigation strategies of peer judicial review address classic issues of adjudication: jurisdiction and the scope of review. The third strategy is concerned with an equally important dimension related to institutional design rather than to specific techniques of adjudication: embededness.

This perspective focuses on the effects of judgments and the remedies that are created for domestic implementation. It is premised on the inherent conflict triggered by normative parallelism: that of the double identity of the domestic judge – as the *juge de droit commun* of EU law and as the implementing authority of the European Convention. At the heart of this litigation strategy lies a fundamental question which characterizes supranational human

[59] This hypothetical situation is already a reality when the two courts consider cases regarding the right to a fair trial, see note 76, *infra*.
[60] BROUDE Tomer, "Fragmentation(s) of International Law: On Normative Integration as Authority Allocation", *in* Broude Tomer, Shany Yuval (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity. Essays in Honour of Professor Ruth Lapidoth*, Oxford, Hart Publishing, 2008, 437 p., p. 111.

rights adjudication: the creation of effective mechanisms of implementation from a supranational perspective but also the creation of mechanisms of dissent or leverage from a domestic perspective. Peer judicial review could be enhanced through domestic support – given that judges can mediate the effects of frictions – or on the contrary, domestic judges could deter the capacity of courts to maintain dialogue.

Implementation is driven by specific institutional and normative features. The different nature of the courts' jurisdictional powers influences the process of implementation. From an EU perspective, national courts are entrusted with the interpretation and application of EU law and they are not entitled to delegate that function to an international tribunal[61] given that, on the basis of Article 10, the ECJ is the only competent authority to decide the validity and reach of EU law. By the same token, the ECHR asserts final authority on the basis of Article 19 of the Convention to decide on the ultimate interpretation given by national authorities to Conventional provisions.[62]

The mechanisms for ensuring implementation are also different. With regard to the ECJ, coherent application of EU law is realized through Article 267 TFEU. As the ECHR lacks effective means to ensure effective implementation, embebedness is partly a politically driven process by the Committee of Ministers. Only in the last decade has the ECHR realized the importance of judicializing implementation and sharing tasks with the Committee of Ministers through the pilot judgment procedure.[63] The ECJ has however an uncontested '*imperium jurisidictionel*'[64] on the basis of Article 260 TFEU.[65]

The ECHR judgments have '*persuasive authority*,' their persuasion is not debatable in most cases, but judgments retain their status as interpretations of international law until they have been domesticated by national courts.[66] This is not the case with the ECJ's case law which is directly applicable and binding on domestic courts. What has always differentiated the process of implementation was the intensity with which the standards they imposed were applied at the domestic level. While the ECHR has a contentious jurisdiction based on

[61] PARISH Matthew, "International Courts and the European Legal Order", EJIL 2012, pp. 141–153.
[62] ECHR, *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, paras. 48-50.
[63] HUNEEUS Alexandra, "Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts", YILJ 2015, pp. 1-40, p. 35.
[64] LAMBERT Elisabeth, "*Les effets des arrêts de la Cour européenne des droits de l'homme: contribution à une approche pluraliste du droit européen des droits de l'homme*", Bruxelles, Bruylant, 1999, 624 p., p. 159.
[65] *1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.*
2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 259.
3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.
[66] HELFER Laurence R., "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", EJIL 2008, pp. 125-159, p. 137.

conformity and allows differentiated protection,[67] the ECJ has full jurisdiction and is entitled to deny the effects of domestic legislation. Therefore the duty of a domestic judge depends on whether he or she acts in a capacity as judge of the Convention or of EU law. A considerable strain was created on domestic legislation to balance the two perspectives. Under such strain, domestic judges hardly have the ability or the willingness to act as mediators and participate in creating dialogic encounters between the courts. There is a stronger tendency to create leverage so as to maintain relevance and ensure effective application of human rights provisions as entrenched in national constitutions.

It was expected that the Draft Agreement would provide a solution, but this was not the case. Accession was supposed to settle the issue on what the duty of a domestic court is when it realizes that EU law is not in line with the provisions of the European Convention and Strasbourg case law. The ECJ was clear in stating that the application of national standards of the protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law.[68]

The ECJ expressed serious concerns with regard to the possibility that the preliminary reference procedure would be diluted or even circumvented and rightly so, given that nothing in the Draft Agreement protects the specific relation it has with domestic counterparts. As EU acts are subject to ECHR review, the Strasbourg Court can question the general capacity of the State to ensure the effectiveness of EU provisions as reflected in the EU law principles of effectiveness and sincere cooperation,[69] but it will question those basic features from the point of view of Article 1 of the Convention under which States had to secure the rights guaranteed by the Convention. In such a situation, the duties of authorities to ensure effective protection as well as those of the domestic judges multiply without a meta-principle of coordination.

It is in situations like the one mentioned above that the role of the domestic judge as a mediator between the two normative levels could be developed. The domestic judge may act as a mediator by drawing on cross-cutting issues and developing them into procedural and substantial norms of conflict between the two systems.[70] One important aspect with great potential for conflict resolution is the specification of conditions for granting access to individuals for the contestation of violations of human rights which result from EU

[67] LAMBERT, *supra* note 64, pp. 210 and 290.
[68] ECJ, case C-399/11, *Melloni* [2013], ECLI:EU:C:2013:107, para. 60.
[69] NEFRAMI Elefteria, "Quelques réflexions sur l'article 19, paragraphe 1, alinéa 2, TUE et l'obligation de l'État membre d'assurer la protection juridictionnelle effective", *in* Boutayeb Chahira (ed), *La Constitution, l'Europe et le droit: mélanges en l'honneur de Jean-Claude Masclet*, Paris, Publications de l'Université Paris-Sorbonne, pp. 805-816, p. 816.
[70] One suggests that judges will find their way themselves. This has also been suggested by Professor Jacqué, who argues that the ECJ could be involved in the opinion requested under Protocol 16 to the European Convention.

provisions. At present, the EU framework seems more restrictive with regard to the possibility of individuals to contest EU acts and measures.[71] As emphasized above, under the EU framework the domestic judge has an obligation of cooperation based on sincere cooperation[72] whereas under the European Convention the domestic judge does not hold a similar obligation. However, under both systems the judge is responsible for ensuring that individuals have access to a court, it is only the criteria set out in the ECHR's and ECJ's case law that are different. The domestic judge could develop incrementally – within prescribed limits[73] or in an ad-hoc manner – criteria in order to measure the impairment to effective jurisdictional protection, but also for delimiting his or her own discretion.

The most probable situation is that of a national judge refusing to seize the ECJ with a preliminary ruling. The domestic judge could attempt to re-design questions related to the exhaustion of domestic remedies and with regard to rights limitations as developed in the ECHR's case law on access to a court and the right to an effective remedy. In that regard, the *CILFIT* jurisprudence[74] might receive a different interpretation through the prism of the European Convention since the ECHR uses an objective test consisting of the requirement that the substance of the right is not impaired. Moreover, its conditions as to the foreseeability of judicial decisions might not coincide with those envisaged by the ECJ.

The role the domestic judge could play depends on their capacity and willingness. It remains uncontested, however, that in the post-national architecture[75] the national judge no longer holds a comfortable position. Within the European framework he is given the tools to act and change. A re-assessment of the duty of national judges in light of both Article 19 TEU and the ECHR-made obligation that States are under a duty to organise their judicial systems in such a way that their courts can meet their requirements would allow a better understanding of what it is that domestic judges ought to do when operating under a double hat. The duties of the domestic judge might be conflicting, but they could also be complementary. The cases of *Schipani v. Italy* and *Dhahbi v. Italy* confront the objective criteria set by the ECHR of impairment to the right to access a court against the rather large margin offered by the ECJ to domestic courts of last instance in light of the *CILFIT* criteria, and, as a result, there is a divergent approach by the two supranational courts. A judge facing a future *Schipani* situation could find his way out by explaining why the *CILFIT* criteria does

[71] For a perspective on this *problematique* and its interferences with ECHR's case law, see FROMONT Louise, VAN WAEYENBERGE Arnaud, "La protection juridictionnelle effective en Europe ou l'histoire d'une procession d'Echternach", CDE 2015, pp. 113-150.
[72] NEFRAMI, *supra* note 69, p. 813.
[73] If the ECJ is willing, it could also adapt the *CILFIT* and *Foto-Frost* criteria (ECJ, case C-283/81, *CILFIT* [1982], ECLI:EU:C:1982:335 and ECJ, case C-314/85, *Foto-Frost* [1987], ECLI:EU:C:1987:452) so that the domestic judge will automatically seize it when a conflict of validity between the two norms is at stake, see JACQUÉ, *supra* note 33, p. 24. This could be read in conjunction with the obligation of national judges under the European Convention to avoid arbitrary determinations and ensure full use of procedural and substantial domestic provisions (ECHR, *Anheuser Busch Inc. v. Portugal* [GC], no. 73049/01, ECHR 2007, para. 71).
[74] The *CILFIT* case, *supra* note 73. According to that decision, a national court of last instance needs not make a reference where the question raised is irrelevant to the outcome of the case, where the EU law provision has already been interpreted by the ECJ (*acte éclairé*), or where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*).
[75] KRISCH, *supra* note 38, p. 12.

or does not correspond to the larger case law of the ECHR on access to a court, on with the case law on appeals and motivation of judgments.[76] By so doing, judges admit that under both systems authorities have the obligation to organize their judicial systems so as to ensure effective judicial protection and also allow the ECHR and ECJ,[77] if the case arrives before one of them, to uphold, complete or discard that criteria. In time, if their dialogue persists on a peer to peer basis, an enhanced and coherent list will be set up.

Domestic judges are at a cross road and their position to mediate between the application of the Convention and application of the Charter within EU law is a key position since they can use domestic interpretations[78] in order to determine the scope of Article 52(3). Moreover, a national judge is in a front row position for developing the principles set by the ECJ in *Åkerberg Fransson*[79] with regard to the scope of the Charter in the context of normative parallelism. The choice of standards of protection will be based on substantive criteria of compatibility.

IV. Conclusion

Some were already expecting such a negative response from the ECJ in light of its case law and previous opinions. What Opinion 2/13 has emphasized was that reciprocity and consistency in European human rights adjudications is a desire and not a reality. It has become clear now that there are two courts which are interdependent, but which are still a long way from fully connecting with each other.

The theoretical model proposed by the peer perspective of review conceives reciprocity as a process, and normative consistency as an outcome. Peer judicial review presupposes institutional dialogue and monitoring as well as normative adaptation. It is based on the idea that interdependence of courts which are in a horizontal rather than hierarchical relation creates institutional and normative links which are not reflected in the texts they apply or

[76] In light of ECHR's recent case law *Arlewin* (ECHR, *Arlewin v. Sweden*, no. 22302/10, 1 March 2016), corroborated with ECJ's judgment in *João Filipe Ferreira* (ECJ, case C-160/14, *Ferreira da Silva e Brito* [2015], ECLI:EU:C:2015:565), the discretion of the highest national courts mentioned by Article 267 TFEU may entail the responsibility of the Member State to compensate individuals – at the same time – for both their material damages (a EU law consequence in line with *Francovich* (ECJ, case C-6/90, *Francovich* [1991], ECLI:EU:C:1991:428) and *Köbler* (*infra* note 77) rulings) and their non-pecuniary damages (a consequence of the ECHR ruling which cannot decide on the legal consequences of breaching EU law).

[77] In light of the criteria set by *Gerhard Köbler v Republik Österreich* (ECJ, case C-224/01, *Köbler* [2013], ECLI:EU:C:2003:513), responsibility of a State can derive from decisions of domestic courts.

[78] Art. 52(4) EU Charter stipulates that the provisions of the Charter derived from national constitutional traditions should be interpreted in harmony with those traditions. Paragraph 6 complements this by stipulating that '*full account should be taken of national law and practices as specified in the Charter*'. This clause could be read as a subsidiarity clause in favour of the European Convention, or as a source of conflict generated by the ECJ's reluctance in interpreting rights in light of comparative practices.

[79] ECJ, case C-617/10, *Åkerberg Fransson* [2013], ECLI:EU:C:2013:105. The ECJ held that EU law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine certain conclusions to be drawn by a national court in the event of a conflict between the rights guaranteed by the European Convention and a rule of national law. However, the national judges could seize such an opportunity to determine the status of the European Convention in cases in which it conflicts with domestic provisions taken in application of EU law. A ruling in that respect can certainly influence the way in which the two European courts conceive the obligations of domestic judges when applying conflicting standards.

in their constitutive treaties. In their position as equals, peers have a duty to organize adjudication so as to account for those links and identify effective and authoritative standards of human rights protection.

As these standards are equivalent and not identical, specific adjudication techniques need to be developed. The three perspectives of adjudication analyzed in this study are complementary and overlapping, and might sometimes be conflicting, but are focused on the links that courts have developed and not on the desired outcome from the political perspective. However, the Draft Agreement seemed to have favored that political perspective. Judicial peers draw on their similarities but the 'right' to have the final word has to be 'deserved' and anchored in a common language that would discard alternative interpretations. Mutual monitoring between peers – based on their interdependence – lends itself towards different strategies which depend on the capacity of the courts to 'understand each other'. This understanding is incremental and is not linear, it might imply conflict, imitation, partial integration and other instances of adaptation or resistance, but, as stated in the beginning, 'norms are hard to settle' and dialogue and exchange produce better legal and legitimacy outcomes than unreasonable dominance of particular interpretations.

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