

# ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A LOGICAL RESPONSE TO THE OPTIONALITY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN EU LAW<sup>1</sup>

by

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## Summary

*The benchmark function formally conferred on the European Convention on Human Rights by the Union legislature is rendered optional in the practice of Union law. As a result, the minimum level of protection which the Convention ensures in the Member States and which the EU legislature sought to extend to Union law is more often than not ignored, in favour of a more frequent use of the Convention as a mere "toolbox", i.e. as a source of inspiration or non-binding interpretation. This optionality of the Convention leads to significant reductions in protection, introduces double standards into procedures involving hybrid structures and causes conflicts of loyalty for national judges who are both Union and Convention judges. The resulting dysfunctions are a source of fragmentation and weaken European fundamental rights. They make it imperative for the EU to accede to the Convention.*

## **INTRODUCTION**

The starting point for this study will be the optionality of the Convention on Human Rights (hereinafter "the Convention") in Union law.

The reference to optionality is used here to define the situation of the Convention in Union law, which is currently characterised by the fact that it is taken into account more often than not as an option rather than as a guarantee. In this respect, optionality stands at odds with the case law of the European Court of Human Rights (hereinafter "the European Court") and with the provisions of the Charter of Fundamental Rights of the European Union.

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<sup>1</sup> This text is the English translation of an article with the title: "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme : une réponse logique à l'optionnalité de la Convention européenne des droits de l'homme en droit de l'Union européenne", published in the *Revue trimestrielle des droits de l'homme*, 2025, p. 9.

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The immediate result is a lack of protection in certain areas of Union law and, in the longer term, the ever-increasing risk of fragmentation and relativisation of European fundamental rights.

It is these risks that make it imperative for the European Union to accede to the Convention, as provided for in Article 6(2) of the Treaty on European Union (TEU), the effect of which will be to remove the optionality of the Convention in Union law and restore it to its function as a minimum guarantee, applicable to Union law as a whole, in the same way as it applies to the jurisdiction of the Contracting States as a whole.

This is what the following lines will seek to demonstrate, with the help of concrete examples. A distinction will be drawn between two forms of optionality under the Convention: optionality chosen by the Court of Justice of the European Union (I) and optionality imposed by the Union legislature (II).

## **I. THE OPTIONALITY CHOSEN BY THE COURT OF JUSTICE**

### **1) *The forms of the optionality of the Convention in the case law of the Court of Justice: the Convention as a mere toolbox***

The European Union's accession to the Convention is not primarily a question of legal technique, but of what is at stake. What is at stake is ensuring that the Convention guarantees a minimum level of protection of fundamental rights for the European Union and its Member States, thanks to the mechanism that enables the European Court to exercise external control over decisions and judgments given at last instance by the courts of the Contracting Parties.

But is this really an issue? On reading some recent contributions on the current state of the interaction between Union law and the Convention<sup>3</sup>, one might doubt it and wonder whether this accession is still necessary and justifies making so much effort to bring it about. This is because the few general comparisons between Union law and the Convention are usually happy to emphasise the proximity and/or complementarity between the two systems. The evidence in support of this observation generally consists of pointing to a few selected Luxembourg and Strasbourg judgments showing a degree of convergence and concluding, sometimes rather hastily, that this is the case everywhere.

However, a closer look reveals a much more nuanced reality. On the one hand, it is certainly possible to observe, as Judge Guyomar did, that "the decisions and judgments of the European Court abound [...] with numerous references to Union law, which are so many elements of context or sources of inspiration testifying to the concern to ensure the greatest possible overall consistency between the two legal orders and, in so doing, ensuring complementarity between the two systems for protecting fundamental rights".

The fact that the European Court does not hesitate to present elements of Union law in its judgments, though without always relying on them, is certainly commendable from the point of view of consistency and complementarity, but is not decisive for our purposes, given that the Convention only guarantees a minimum level of protection that may be exceeded (Art. 53). There

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<sup>3</sup> See in particular the speeches given at the seminar held at the European Court of Human Rights on 14 June 2024 on the subject of "The relationship between the Convention and Union law: past, present and future", available at: <https://www.echr.coe.int/fr/seminars-and-lectures-at-the-court> (last consulted on 17 September 2024).

is therefore no legal obligation for the Convention and its interpretation to "fit" at EU level. The Convention covers 46 Member States, the European Union only 27. The European Court must take this into account.

The position of Union law and its case law in relation to the Convention is quite different. Since the courts of the Member States are still obliged to comply with the Convention when applying Union law<sup>4</sup>, albeit without prejudice to the major changes introduced by the Bosphorus presumption<sup>5</sup>, any lowering of the level of the Convention by Union law exposes those courts to censure by the European Court. These courts may then find themselves caught between the Convention and Union law. It is to avoid this type of scenario and to protect national judges that Articles 6(2) TEU<sup>6</sup> and 52(3) of the Charter of Fundamental Rights<sup>7</sup>, each in its own way, approach the Convention as a guarantee by imposing the Convention minimum on Union law, which Union law may nevertheless raise.

Thus, since the entry into force of the Lisbon Treaty and the Charter on 1 December 2009, this is no longer about Union law simply borrowing from the Convention as "general principles of Union law"<sup>8</sup>, but rather about the Convention having a certain imperative in Union law as an overridable minimum.

In these circumstances, it is not enough, as is often the case, to identify a few isolated cases of convergence in order to conclude that all is well. On the contrary, such a general conclusion presupposes an assessment of the extent to which the Convention has been taken into account as a guarantee of a minimum level in Union law as a whole.

It was also with this in mind that in its *Avotiņš v. Latvia* judgment, delivered by a unanimous Grand Chamber, the European Court stated that it was "especially mindful of the importance of compliance with the rule laid down in Article 52(3) of the Charter of Fundamental Rights given that the entry into force of the Treaty of Lisbon ... conferred on the Charter the same legal value as the Treaties"<sup>9</sup>. The European Court is clearly referring here to the rule contained in this provision, which can only be that of the binding minimum represented by the Convention, as opposed to the mere source of inspiration.

Admittedly, account must be taken of the autonomy of Union law, the importance of which was strongly emphasised by the Court of Justice in its Opinion 2/13, albeit without any reference to Article 52(3) of the Charter, which however qualifies that autonomy<sup>10</sup>. But it is equally important

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<sup>4</sup> ECtHR, *Pirrozi v. Belgium*, 17 April 2018, § 64; ECtHR, *Bivolaru and Moldovan v. France*, 25 March 2021, § 103.

<sup>5</sup> ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland ("Bosphorus")*, 30 June 2005; *Michaud v. France*, 6 December 2012; *Avotiņš v. Latvia*, 23 May 2016.

<sup>6</sup> Article 52(3) of the Charter 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."

<sup>7</sup> Article 6(2) TEU states: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties".

<sup>8</sup> Art. 6(3) TEU.

<sup>9</sup> *Avotiņš v. Latvia*, cited above, § 103.

<sup>10</sup> CJEU, *Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties*, Opinion 2/13, 18 December 2014.

to bear in mind that, in its Explanations to Article 52(3) of the Charter<sup>11</sup>, the European legislature states, *after* recalling the respect due to the autonomy of Union law and the Court of Justice, that "In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR".

However, in practice, when the Convention and its case law are invoked by the Court of Justice, it is most often to find simple elements of inspiration or to fill gaps in Union law, such as on the concept of political opinion<sup>12</sup>, on the rules governing the waiver of appeals<sup>13</sup> or on the expulsion of very ill persons<sup>14</sup>. Much less frequent, and more concentrated in certain areas, are references to the Convention which explicitly recognise the benchmark function assigned to it by Article 52(3) of the Charter, as can be seen in the field of subsidiary protection<sup>15</sup> or criminal procedure<sup>16</sup>. In the latter case, for example, the Court of Justice stated:

*"In accordance with Article 52(3) of the Charter, which is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law, the Court must therefore take into account, when interpreting the rights guaranteed by Articles 7 and 47 of the Charter, the corresponding rights guaranteed by Article 8(1) and Article 6(1) ECHR, as interpreted by the European Court of Human Rights ... , as the minimum threshold of protection".*<sup>17</sup>

Although these two types of reference to the Convention are useful in that they both serve to ensure inter-systemic consistency of the case law, it is as if the guarantee represented by the Convention in Union law under Article 52(3) of the Charter were *de facto* made optional. It is as if the Convention could be used à la carte, depending on the field, the need and the usefulness, without having to consider it as mandatory. It would be a simple option: the Convention as a toolbox rather than as a guarantee.

At least, this is the trend which emerges from a search of references made by the Court of Justice under Article 52(3) of the Charter over the period 2016-2024. As of 1<sup>st</sup> November 2024, only 55 references found over this 8-year period refer to the benchmark function of the Convention. In detail, 34 references concern Articles 6 (fair trial) and 13 (effective remedy) of the Convention, while the other 21 are divided between Articles 5 (detention), 7 (legality of penalties), 3 (ill-treatment), 8 (private and family life) and 9 (freedom of religion) of the Convention, as well as Article 1 of Protocol No. 1 (right to property) and Article 4 of Protocol No.7 (*non bis in idem*). This is therefore a marginal phenomenon in the Luxembourg case law. By way of comparison, in 2023 alone the Court of Justice (excluding the General Court) handed down 723 judgments, 145 of which concerned the area of freedom, security and justice and/or fundamental rights.

This optionality in the understanding and use of Article 52(3) of the Charter seems to have been taken for granted, to the extent that it is also found in the comments of the most eminent members

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<sup>11</sup> According to Article 52(7) of the Charter, "*The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.*"

<sup>12</sup> CJEU, *Migracijos departamentas (Grounds for persecution based on political opinions)*, 12 January 2023, C-280/21.

<sup>13</sup> CJEU, *Spetsializirana prokuratura (Trial of a fugitive)*, 19 May 2022, C-569/20.

<sup>14</sup> CJEU, *Staatssecretaris van Justitie en Veiligheid (Expulsion - Therapeutic Cannabis)*, 21 November 2022, C-69/21.

<sup>15</sup> CJEU, *Staatssecretaris van Justitie en Veiligheid (Notion of serious harm)*, 9 November 2023, C-125/22.

<sup>16</sup> CJEU, *Orde van Vlaamse Balies and Others*, 8 December 2022, C-694/20.

<sup>17</sup> § 26.

of the Court of Justice, such as Judge Bay Larsen, Vice-President of that high court, who recently stated, referring to Article 52(3): "While the Court of Justice draws inspiration from the case law of the ECtHR, it does not set aside Union law rules on the basis of the ECHR"<sup>18</sup>. According to this reading, Article 52(3) would therefore assign to the Convention the function of a mere source of inspiration.

## **2) The effects of the optionality of the Convention in the case law of the Court of Justice: significant protection deficits**

This optionality of the guarantee function of the Convention is at the root of certain protection deficits in the case law of the Court of Justice, when compared with that of the European Court. Some examples are given below. It does not appear to be a coincidence that in none of them the Court of Justice has taken account of the Convention minimum imposed by Article 52(3) of the Charter. It should also be noted that these shortcomings often have their source in the methodology applied to fundamental rights in Luxembourg rather than in the content of those rights. This shows that both content and methodology must be taken into account when assessing the level of protection afforded by a fundamental right.<sup>19</sup>

Under no circumstances should the examples below obscure the convergence that exists between the Strasbourg Court and the Luxembourg Court in a number of important areas (including judicial independence and the rule of law, the right to be forgotten and subsidiary protection<sup>20</sup>), or even the fact that Union law goes beyond the Convention level, as in the case of the use of classified documents in expulsion proceedings<sup>21</sup>. However, under no circumstances either should these convergences obscure the recent developments in the case law of the Court of Justice, which appear to represent a break with the current Strasbourg case law. Some of these developments are presented below, in no particular order, without prejudice to the judgement which the European Court may make on them in the future.

### *i. Non bis in idem*

The *non bis in idem* principle represents a first area of divergence. The inconsistencies, which first became apparent in relation to mixed proceedings<sup>22</sup>, recently culminated in the *Generalstaatsanwaltschaft Bamberg* judgment. In a break with the Strasbourg approach, the Court of Justice in this judgment came to regard an exception to the *non bis in idem* principle as a mere limitation of that principle. In considering whether this exception nevertheless preserved

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<sup>18</sup> Lars Bay Larsen, "Protection of Fundamental Rights in a Multi-Level European System – the CJEU's Perspective", Seminar on "The articulation between the European Convention of Human Rights and the European Law: past, present and future", cited above.

<sup>19</sup> On this distinction, see J. Callewaert, "Vingt ans de coexistence entre la Charte et la Convention européenne des droits de l'homme : un bilan mitigé", *Cahiers de droit européen*, 2021, pp. 169, here pp. 177 et seq.

<sup>20</sup> See <https://johan-callewaert.eu/wp-content/uploads/2024/11/Trends-2021-24.2.pdf> (last consulted on 20 January 2025).

<sup>21</sup> CJEU, *NW and PQ (Classified information)*, 25 April 2024, joined cases C-420/22 and C-528/22. For a more detailed commentary, see: <https://johan-callewaert.eu/similarities-and-differences-between-strasbourg-and-luxembourg-on-classified-documents-used-as-a-basis-for-expulsion-judgment-of-the-cjeu-in-the-cases-of-nw-and-pq-compared-with-muhammad-an/> (last consulted on 23 September 2024).

<sup>22</sup> For example in CJEU, *Direction départementale des finances publiques de la Haute-Savoie*, 5 May 2022, C-570/20. For a more detailed commentary, see: <https://johan-callewaert.eu/non-bis-in-idem-between-menci-and-bpost-judgment-of-the-cjeu-in-the-bv-case/> (last consulted on 23 September 2024).

the essence of the principle, the Court of Justice held that the essence should be preserved for the benefit of the prosecuting State and not for the benefit of the person prosecuted, which seems rather absurd. Indeed, how could the criterion of preserving the essence of an individual's fundamental right be interpreted as aiming to preserve the rights of the State that infringes that right?<sup>23</sup>

ii. *The European arrest warrant*

In another area, the case law of the Court of Justice has for some time been witnessing, as a result of a methodological break with that of the European Court, a gradual collectivisation of certain fundamental rights, with the result that respect for these rights, which are in essence individual, can now only be assessed collectively and no longer individually. This approach in turn leads to a hierarchisation and categorisation of fundamental rights, the effects of which in the executing State are limited according to the type of risks, collective or individual, invoked, the latter now being considered irrelevant.

This phenomenon can be seen in the area of the European arrest warrant, where the judicial authorities executing such a warrant are now obliged in certain cases to limit their examination of the risks of violation of fundamental rights in the issuing State to situations resulting from "systemic or generalised deficiencies in that Member State or deficiencies affecting an objectively identifiable group of persons"<sup>24</sup>. This excludes in particular from consideration risks incurred on an individual basis, arising for example from a person's particular biography, as in situations such as that experienced by Julian Assange.<sup>25</sup>

What we see here is a break with the Strasbourg approach, which, based on the right of individual petition enshrined in Article 34 of the Convention, focuses on the personal situation of the applicants and is not satisfied with a collective assessment, including in the examination of a risk of violation in the State of destination<sup>26</sup>. In other words, the right to an individual determination flows from the right of individual petition.

Yet, the European Court does not reject the Court of Justice's two-stage methodology in this area. However, in its *Avotiņš v Latvia* judgment, handed down by a unanimous Grand Chamber, it insisted on the need to "verify that the principle of mutual recognition is not applied automatically

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<sup>23</sup> CJEU, *Generalstaatsanwaltschaft Bamberg (Exception to the ne bis in idem principle)*, 23 March 2023, C-365/21. For a more detailed commentary, see: <https://johan-callewaert.eu/a-different-ne-bis-in-idem-in-luxembourg-judgment-of-the-cjeu-in-generalstaatsanwaltschaft-bamberg/> (last consulted on 23 September 2024). See also A. Ballieux and C. Rizcallah, "Les droits fondamentaux dans l'ordre juridique de l'Union européenne", *Journal de droit européen*, 2023, pp. 456 et seq., (458).

<sup>24</sup> CJEU, *Puig Gordi and Others*, 31 January 2023, C-158/21; *GN (Ground for refusal based on the best interests of the child)*, 21 December 2023, C-261/22. See, for a more detailed commentary: <https://johan-callewaert.eu/is-the-cjeu-creating-two-different-categories-of-fundamental-rights-judgment-of-the-cjeu-in-the-case-of-gn/> (last consulted on 23 September 2024). See also CJEU, *Staatsanwaltschaft Aachen*, 9 November 2023, C-819/21 and, for a more detailed commentary: <https://johan-callewaert.eu/two-steps-of-unequal-weight-judgment-of-the-cjeu-in-the-case-of-staatsanwaltschaft-aachen/> (last consulted on 23 September 2024).

<sup>25</sup> Julian Assange, journalist and whistleblower whose extradition was requested by the United States, where he was charged with "espionage" following revelations by WikiLeaks about the actions of the United States and its allies in Iraq and Afghanistan.

<sup>26</sup> *Bivolaru and Moldovan v. France*, cited above. In this judgment, the European Court accepts the two-steps examination promoted by the Court of Justice, but itself carries out a single examination, focussed on the individual situation of the applicants.

and mechanically [...] to the detriment of fundamental rights." The European Court concludes that:

*"Where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law".<sup>27</sup>*

However, it would appear that this latter requirement is completely ignored in the current Luxembourg case law, which makes the possibility to invoke individual risks dependent on prior - and methodologically debatable - findings as to the existence of collective risks in the issuing State.

### iii. *The Dublin Regulation*

A similar phenomenon of hierarchisation and categorisation of fundamental rights, again at variance with the Strasbourg approach, can be observed in the field of the Dublin Regulation, where, according to the interpretation of the Court of Justice, the only fundamental rights whose risk of violation is likely to justify an exception to the return of an asylum seeker to the State of first entry are, to the exclusion of all others, the rights enshrined in Article 4 of the Charter, which prohibits ill-treatment.<sup>28</sup>

### iv. *Wearing religious symbols in the workplace*

A form of collectivisation of fundamental rights, reducing the weight of individual rights, is also apparent in relation to the wearing of religious symbols in the workplace. In its *Commune d'Ans* judgment, the Court of Justice held that the proportionality of a general prohibition imposed by a municipality on its staff from wearing religious symbols at work should be assessed by reference not to the right to freedom of religion of the person challenging the prohibition, but to that of all the staff of the municipality taken as a whole. Here too, we are witnessing a step backwards in relation to the level of protection afforded in Strasbourg.<sup>29</sup>

### v. *Pre-trial detention and criminal procedure*

In another area, that of proceedings to review the lawfulness of pre-trial detention, the Court of Justice recently sought to adopt the case law of the European Court on the consequences of the absence of a lawyer during questioning in criminal proceedings. In so doing, however, it wrongly applied the criterion of the proceedings as a whole, which the European Court reserves for complaints relating to the right to a fair trial (Article 6 of the Convention), to proceedings concerning pre-trial detention, which are, on the contrary, covered by Article 5 of the Convention,

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<sup>27</sup> *Avotiņš v. Latvia*, cited above, § 116.

<sup>28</sup> CJEU, *Staatssecretaris van Justitie en Veiligheid (Mutual trust in the event of transfer)*, 29 February 2024, C-392/22. See, for a more detailed commentary: <https://johan-callewaert.eu/two-different-categories-of-fundamental-rights-under-the-dublin-iii-regulation-judgment-of-the-cjeu-in-the-case-of-staatssecretaris-van-justitie-en-veiligheid/> (last consulted on 23 September 2024).

<sup>29</sup> CJEU, *Commune d'Ans*, 28 November 2023, C-148/22. For a more detailed commentary, see: <https://johan-callewaert.eu/luxembourg-not-the-end-of-the-story-on-freedom-of-religion-in-the-workplace-judgment-of-the-cjeu-in-the-case-of-commune-dans/> (last consulted on 23 September 2024).

which applies strictly and, for this reason, does not lend itself to an assessment of the proceedings as a whole but rather requires an independent examination of each guarantee to be respected.

In addition, by selectively reading the Strasbourg case law cited, the Court of Justice ignored an essential guarantee of that case law for the benefit of accused persons or suspects: that the absence of a lawyer during such questioning must be justified by "compelling reasons", failing which the burden of proving the fairness of the proceedings will rest with the authorities<sup>30</sup>. All in all, these are two reductions in the protection afforded by the Convention.

*vi. International child abduction*

In some cases, it is secondary Union law which lowers the level of protection guaranteed by the Convention. This is the case, for example, in the area of international child abduction, where Union law is characterised by rigid rules of jurisdiction that are not always compatible with Article 8 of the Convention and the best interests of the child it protects. Thus the European Court has been able to consider, in the light of the circumstances of the cases concerned, that certain decisions by judges of the child's new residence refusing to return the child did not violate Article 8 of the Convention and, conversely, that decisions by judges of the child's former residence ordering the child's return did violate this provision.<sup>31</sup>

*vii. Detention of applicants for international protection*

The same applies to the detention of asylum seekers, in respect of which, in *M.B. v. the Netherlands*, the European Court found a violation of Article 5 § 1 of the Convention on account of the application to an asylum seeker of a ground for detention which is admittedly recognised by Article 8(3)(e) of the Reception Conditions Directive<sup>32</sup> but not by Article 5 of the Convention.<sup>33</sup>

Optionality of the Convention, collectivisation and hierarchisation of fundamental rights, limitation of their invocability, distortion of their essence, ignorance or selective reading of Strasbourg case law, legislative backtracking - these are just a few examples of significant deviations which Union law can present when compared with Convention law.

Far from being insignificant, these differences represent substantial losses of protection for the individuals concerned. It is doubtful that they can all be justified by the autonomy of Union law, when, as pointed out above, the Union legislature specifically sought to exclude any lowering of the level of protection provided by the Convention.

These discrepancies also demonstrate the ineffectiveness of existing mechanisms, in particular Article 52(3) of the Charter, in ensuring that Union law takes account of the Convention as a

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<sup>30</sup> CJEU, *Stachev*, 14 May 2024, C-15/24 PPU. For a more detailed commentary, see: <https://johan-callewaert.eu/raising-and-lowering-of-the-strasbourg-standards-regarding-judicial-review-of-detention-judgment-of-the-cjeu-in-stachev/> (last consulted on 23 September 2024).

<sup>31</sup> CJEU, *TT (Wrongful removal of a child)*, 13 July 2023, C-87/22. For a more detailed commentary, see: <https://johan-callewaert.eu/which-judge-should-assess-the-best-interests-of-a-wrongfully-removed-child-judgment-of-the-cjeu-in-tt/> (last consulted on 23 September 2024).

<sup>32</sup> Directive 2013/33 of 26 June 2013 laying down standards for the reception of persons seeking international protection (recast).

<sup>33</sup> ECtHR, *M.B. v. the Netherlands*, 23 April 2024. For a more detailed commentary, see: <https://johan-callewaert.eu/the-convention-and-the-reception-conditions-directive-judgment-of-the-ecthr-in-the-case-of-m-b-v-the-netherlands/> (last consulted on 23 September 2024).

guarantee of a minimum level. Article 52(3) could in fact have acted as a kind of "accession light" in advance, since, as noted above, its *ratio legis* corresponds to that of Article 6(2) TEU. In practice, however, this possibility did not materialise, for the reasons and with the consequences described above.

### **3) The consequences of the optionality of the Convention in the case law of the Court of Justice: a situation generating conflicts of loyalty for national judges**

The differences in protection referred to above, whether in case law or legislation, have significant consequences for legal certainty, which in turn affects the position of national judges in the Member States of the European Union. As the European Court recently pointed out, these judges are obliged to apply Union law in accordance with the Convention<sup>34</sup>. They must, as it were, combine their application of Union law with that of the Convention.

This obligation arises from the fact that legal acts performed by the Member States of the European Union in application of Union law fall within the scope of the Convention and may therefore give rise to a ruling by the European Court. The Member States of the European Union indeed retain their responsibility under the Convention for any action they take under Union law. This follows directly from the principle that the liability of the Contracting States to the Convention extends to the whole of their jurisdiction within the meaning of Article 1 of the Convention - including, in the case of the Member States of the European Union, Union law which forms an integral part of it.

Thus, the creation of the European Union - or its predecessor organisations - did not remove the Member States' responsibility under the Convention for their application of Union law. On the contrary, since the Member States have not pulled out of the Convention when creating or joining the European Union and therefore remain bound by the Convention, they also remain obliged to apply Union law in conformity with it. As the European Court stated in the *Bosphorus* case<sup>35</sup>, EU Member States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention. However, the European Union itself, as a separate legal entity with its own legal personality, is not subject to the Convention until it formally accedes to it.

The result is a dual European status for national judges, who are both judges of the European Union and judges of the Convention. Consequently, when they apply Union law, they are never just judges of the Union. They are always also judges of the Convention. In short, while Union law is autonomous, the national courts to which it is binding are not, because Union law does not take precedence over the Convention and cannot therefore exclude its simultaneous application.

This raises the question of the approach to be adopted by national courts faced with divergences between Union law and the Convention. The combined reading of Article 53 of the Convention and Article 52(3) of the Charter requires them, in such cases, to apply the higher of the two standards of protection, without prejudice to the application, where appropriate, of Article 267 TFEU, which governs references for preliminary rulings. This can sometimes require judges to make delicate and time-consuming comparisons between several provisions in order to establish their respective levels of protection. No doubt they could do without it.

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<sup>34</sup> *Pirrozi v. Belgium*, cited above, § 64; *Bivolaru and Moldovan v. France*, cited above, § 103.

<sup>35</sup> *Bosphorus*, cited above, § 154.

However, they cannot be exempted from this requirement, as the European Court recently pointed out in its *M.B. v. the Netherlands* judgment<sup>36</sup>, which illustrates the practical consequences which may result from the application by a national court of a provision of Union law offering less protection than the Convention.

In this case, which concerned the detention of an asylum seeker, the Dutch courts had accepted as the legal basis for the detention in question a provision of national law that had transposed Article 8(3)(e) of the Reception Conditions Directive<sup>37</sup>, which itself authorises detention "*when protection of national security or public order so requires*". However, since article 5 of the Convention does not recognise such a ground as justifying deprivation of liberty, the European Court found a breach of this provision, stating in particular that:

*"Although Article 8 (3) e of the Reception Conditions Directive permits, from an EU-law standpoint, detention when national security or protection of public order so requires, this has no bearing on the fact that Article 5 § 1 (f) of the CEDH only allows for immigration detention to prevent unauthorised entry or to effect deportation".*<sup>38</sup>

Thus, the European Court is careful to point out that a provision of Union law providing less protection than that of the Convention has no bearing on the application of the Convention and leads to a finding of a breach by the Member State concerned. Union law does not therefore provide immunity from the requirements of the Convention, and it is the national judges which bear the most direct consequences of this situation.

It seems clear that the uncomfortable situation of national judges described above is largely the result of the optionality of the Convention in Union law. As has been shown, the failure to recognise the Convention's function as a benchmark applying to the whole of Union law is at the root of many of the protection deficits recorded in Union law and of complications for national judges, who sometimes find themselves caught between the two, which is a source of conflicts of loyalty for them.

It also seems clear that in the short term, the two European courts have a joint responsibility to help and support national judges in this difficult task, about which the latter do not hesitate to complain<sup>39</sup>. This requires greater clarity and better explanations on the interaction between their respective legal orders in the specific cases submitted to them for review, such as when the Court of Justice finds that its case law corresponds to that of the European Court<sup>40</sup> or indicates that it goes beyond it<sup>41</sup>, or when the European Court states that it aligns itself with Union law.<sup>42</sup>

Above all, this calls for a more holistic and less autonomist approach, since only a holistic vision that does not stop at the borders of its own legal system can take full account of the legal reality

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<sup>36</sup> *M.B. v. the Netherlands*, cited above.

<sup>37</sup> See note 32 above.

<sup>38</sup> § 72.

<sup>39</sup> In this sense: Frank Clarke, Chief Justice, Supreme Court of Ireland, "Who harmonises the Harmonisers?", speech given on 31 January 2020 at the opening ceremony of the judicial year of the European Court of Human Rights, <https://www.echr.coe.int/fr/w/2020> (last consulted on 23 September 2024); Beatrijs Deconinck, "Le métier de juge", *Journal des tribunaux*, 2019, p. 847.

<sup>40</sup> For example in CJEU, *KS and KD v Council and Others*, 10 September 2024, joined cases C-29/22 P and C-44/22 P, § 70.

<sup>41</sup> As in *Staatssecretaris van Justitie en Veiligheid (Notion of serious harm)*, cited above, § 66.

<sup>42</sup> As in ECtHR, *Jehovah's Witnesses v. Finland*, 9 May 2023.

on the ground, which is characterised by the interaction and entanglement of the legal systems involved, rather than by their autonomy and compartmentalisation.

The fact remains, however, that the lasting solution must come from removing the optionality of the Convention in Union law, as will result from the accession of the European Union to the Convention.

## II. THE OPTIONALITY IMPOSED BY THE UNION LEGISLATURE

### 1) The forms of the optionality of the Convention in hybrid structures: the example of the European Public Prosecutor's Office

Another form of optionality of the Convention in Union law, this time imposed by the European legislature, results from the creation by the latter of hybrid structures based on cooperation between national and Union institutions, the latter not being subject to the Convention as long as the Union is not a Contracting Party to it.

In relation to the Union components of these hybrid structures, the Convention is therefore rendered merely optional, i.e. reduced, at best, to the status of a toolbox, which contrasts with the mandatory nature of the Convention in relation to the national components. And, as demonstrated above, Article 52(3) of the Charter is not sufficient *a priori* to ensure a level of protection in Union law, and therefore in relation to the Union components of these hybrid structures, which is comparable to that of the Convention.

The European Public Prosecutor's Office, which came into operation on 28 September 2020, is a good illustration of these new realities. Created by Regulation 2017/1739<sup>43</sup> (hereinafter: "the Regulation"), its specificity lies in the fact that while it is an institution of the Union operating in the exclusive interest of the Union, it nevertheless relies on the operational and judicial support of the Member States.<sup>44</sup>

Under Article 42(1) of the Regulation, the courts of the Member States are called upon to act in three different ways: first, by authorising, if required under national law, certain measures requested by a Deputy European Public Prosecutor; second, by carrying out a judicial review of the European Public Prosecutor's procedural acts intended to produce legal effects vis-à-vis third parties; and third, by ruling on cases brought before them by Deputy European Public Prosecutors.<sup>45</sup>

The structure of the European Public Prosecutor's Office thus represents a new challenge, insofar as it combines partners who are not equal before the Convention: on the one hand, the national authorities who are bound by both the Convention and Union law and, on the other, the European Public Prosecutor's Office which, as a body of the Union, is bound by Union law only.

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<sup>43</sup> Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

<sup>44</sup> On these aspects and their implications for the Convention, see J. Callewaert, "No Case to Answer for the European Public Prosecutor under the European Convention on Human Rights? Considerations on Convention Liability for Actions of the European Public Prosecutor's Office", *Europe of Rights & Liberties/Europe des Droits & Libertés*, 2021/1, No. 3, pp. 20-35.

<sup>45</sup> On the jurisdiction of national courts in this matter, see EU General Court, *Stan v. European Public Prosecutor*, 15 December 2023, T-103/23.

Where the applicable procedural guarantees differ between the Convention and Union law, as seems to be the case at present with regard, for example, to the *non bis in idem* principle or the assistance of a lawyer<sup>46</sup>, the result may be that criminal proceedings are subject to two different fundamental rights regimes, with guarantees varying according to the perpetrator and the stage of the proceedings.

More specifically, assuming that the national courts will, when assessing the actions of the European Public Prosecutor's Office, apply not only Union law but also the Convention in addition to their own national law, an entirely new procedural constellation will emerge. In this constellation, the investigation and prosecution, on the one hand, and the judgment, on the other, will no longer be governed by the same corpus of fundamental rights, although these stages are part of one and the same procedure. A procedural jigsaw, as it were.

## **2) The consequences of the optionality of the Convention in hybrid structures: a duality of actors and standards in the same procedure**

According to the scheme set up by the Regulation, national courts will have to apply the standards of the Convention to proceedings conducted by an authority which is not itself bound by that Convention and which, consequently, may not comply with it, while acting lawfully under Union law. This optionality of the Convention in relation to the European Public Prosecutor's Office, combined with its imperative nature in relation to national courts, is problematic in the light of the principles of the rule of law. Is it acceptable that criminal proceedings and judicial review of them should not be subject to the same standards? And even if the standards were to coincide in a given case, is the mere possibility of such a duality acceptable?

There may also be repercussions in Strasbourg, in the event of applications to the European Court challenging judgments handed down by national courts on the basis of the Regulation. To date, no such actions have been brought before the European Court, but it is already clear that the Member States concerned will incur liability under the Convention in respect of proceedings which have been initiated, directed and controlled by a Union institution, for the exclusive benefit of the Union, which is not itself subject to the Convention.

Within this framework, these States may be held liable, as sole defendants, for any breach of the Convention which has not been remedied by their courts and which may have resulted from these proceedings, in particular those which may have resulted from the fact that the European Public Prosecutor's Office, although having respected the fundamental rights of the Union, did not, in so doing, satisfy the minimum requirements of the Convention.

The European Public Prosecutor's Office scheme thus distorts the hitherto prevailing principle according to which the sole and general responsibility of States under the Convention derives directly from their total control of the actions which are the subject of the application.

In short, with their involvement in the hybrid structure of the European Public Prosecutor's Office, the Member States run the risk of being held liable under the Convention for acts of the European Public Prosecutor's Office which they do not fully control, which are subject to a partially different corpus of fundamental rights and which serve not their interests but those of the European Union alone. The European Union, on the other hand, runs the risk of seeing prosecutions by the

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<sup>46</sup> See point I.2 *above*.

European Public Prosecutor's Office invalidated by national courts applying a level of protection under the Convention which may be higher than that of the Union.

The only way to minimise the impact of these distortions is to make the European Union a Contracting Party to the Convention, alongside its own Member States, and thereby remove the optionality of the Convention in this particular context. Although this would not eliminate the exclusive Convention liability of the Member States - all judicial remedies to be exhausted at national level being those of the Member States (art. 42(1) of the Regulation) - it would nevertheless represent a significant improvement.

This would replace the optionality of the Convention by its mandatory nature in relation to the European Public Prosecutor's Office, thereby eliminating the hybrid legal framework characterising the protection of fundamental rights under the Regulation and replacing it with a uniform framework applicable to all the actors concerned - the European Public Prosecutor's Office, the national courts and the European Court - without prejudice to the applicability of standards that are more protective than those of the Convention. This would make a valuable contribution to a better implementation of the principles of the rule of law and procedural fairness advocated by the Regulation itself.

This seems all the more important given that, on the one hand, the European Public Prosecutor's powers can be expected to be extended in the long term and, on the other hand, the European Union's status of Contracting Party to the Convention will also remove the optionality of the latter with regard to other hybrid structures, such as the Frontex Agency.<sup>47</sup>

## **CONCLUSION: THE IMPERATIVE FOR THE EUROPEAN UNION TO ACCEDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

A Convention that is optional and therefore marginalised in Union law, despite all the prescriptions and speeches to the contrary, is the reality of the situation that currently confronts those who closely observe the case law and legislation in this area. The Convention is thus being distorted, because it is being diverted from the principal function assigned to it by its own case law and by Article 52(3) of the Charter, which is to be a benchmark before being a toolbox.

The result is a significant reduction in protection under Union law and national judges caught between the two functions they perform simultaneously, those of judges of Union law and judges of the Convention, both of which demand the same loyalty.

Observing recent developments in case law and legislation, one does not get the impression that this gradual autonomisation of Union law from the Convention is losing momentum. On the contrary, there is every reason to believe, given the weaknesses of Article 52(3) of the Charter and the corresponding provisions of secondary legislation, that only the accession of the European Union to the Convention can restore the mandatory nature and the function of minimum guarantee which form the essence of the Convention and which the Union legislature intended to take over.<sup>48</sup>

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<sup>47</sup> Regulation 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations No 1052/2013 and 2016/1624.

<sup>48</sup> However, these are not the only expected effects of the European Union's accession to the Convention. On the latter, see J. Callewaert, "The accession of the European Union to the European Convention on Human Rights", Council of Europe Publishing, Strasbourg, 2014, pp. 13 et seq. On the legal issues still

Thus, in the light of the deficits described, the usefulness and added value of this accession have perhaps never been so apparent, and the need for it has perhaps never been so flagrant. Provided, however, that the aim is indeed to preserve the authority and force of fundamental rights, by protecting them from all the movements towards fragmentation, weakening, relativisation or collectivisation which the optionality of the Convention in Union law entails.

In other words, the good thing about the above breaks is that they are, in fact, advertising the accession of the European Union. For how can we convince people of the need for the European Union to accede to the Convention if the benefits of doing so are only marginal? And why should we believe that the European Union would be more virtuous in complying with the Convention than are its Member States subject to that same Convention when they apply Union law?

Fortunately, this accession currently appears to be on the right track. On 10 September 2024, in the cases of *KS and KD*<sup>49</sup> and *Neves 77 Solutions*<sup>50</sup>, the Court of Justice handed down two judgments which observers agree remove, 10 years on, the only objection raised by the Court of Justice in its Opinion 2/13 which had not yet been answered in the revised draft Accession Agreement adopted by the negotiators on 4 April 2023<sup>51</sup>, namely the objection concerning the European Union's Common Foreign and Security Policy<sup>52</sup>. At the very least, it seems clear that if the Court of Justice had wanted to block or slow down the accession process, it would have adopted a significantly different line of reasoning in these judgments. The openness thus created by the Court of Justice is therefore to be unreservedly welcomed.

However, even with this opening, the accession procedure will still be lengthy. Several opinions on the draft Accession Agreement - from the Court of Justice, the European Parliament, the European Court and the Parliamentary Assembly of the Council of Europe - will still have to be obtained, followed by 47 ratifications. It is to be hoped, however, that once the process is underway, it will act as a signal inciting to anticipate certain effects of accession in practice. In any case, one will need to remain vigilant.

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outstanding, see H el ene Gaudin, "L'adh esion de l'Union europ eenne   la Convention europ eenne des droits de l'homme - Le Big Bang des droits de l'homme en Europe est-il pour bient ot ?", *Revue trimestrielle des droits de l'homme*, 2024, pp. 845-866.

<sup>49</sup> *KS and KD / Council and Others*, cited above.

<sup>50</sup> CJEU, *Neves 77 Solutions*, 10 September 2024, C-351/22.

<sup>51</sup> The reports of the meetings of the group of negotiators ("the 46 + 1") are available at <https://www.coe.int/fr/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights> and at <https://johan-callewaert.eu/category/eu-accession/> (last consulted on 23 September 2024).

<sup>52</sup> In this regard : J. Krommendijk, "One step closer after KS and KD: EU accession to the ECHR", *Review of European Administrative Law*, 1<sup>st</sup> October 2024, <https://realaw.blog/2024/10/01/one-step-closer-after-ks-and-kd-eu-accession-to-the-echr-by-jasper-krommendijk/> (last accessed 1<sup>st</sup> October 2024); D. Sarmiento and S. Iglesias S anchez, "KS and Neves 77: Paving the Way to the EU's Accession to the ECHR", *EU Law Live*, 12 September 2024, <https://eulawlive.com/insight-ks-and-neves-77-paving-the-way-to-the-eus-accession-to-the-echr/> (last accessed 1<sup>st</sup> October 2024).