

Judicial dialogue between the European Court of Human Rights and national supreme courts¹

JOHANNA RINCEANU

Dr. jur., LL.M., Senior Researcher at the Max Planck Institute for Foreign and International Criminal Law, Freiburg; Lecturer, Albert-Ludwigs – University Freiburg; Attorney-at-law, Freiburg

Introduction

The European system for the protection of human rights and fundamental freedoms is today the most developed and the most effective system of human rights protection worldwide. From a normative viewpoint, human rights protection takes place on a national, international, and supranational level. This pluralism of human rights protection does not, however, only lead to the strengthening of human rights but also to collisions of fundamental laws.²

At the national level, state authorities must respect constitutional guarantees of fundamental human rights. The 47 Member States of the Council of Europe are furthermore bound at the international level by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention, ECHR). At the supranational level, the 28 Member States of the European Union (EU) are addition-

¹ The present article is based on a lecture given by the author during the international scientific conference 'The europeanisation of criminal law and protection of human rights in criminal proceedings and the process of execution of criminal sanctions' at the Faculty of Law of the University of Split, Croatia, on 16 October 2015.

² See Ferdinand Kirchhof, 'Kooperation zwischen nationalen und europäischen Gerichten', *EuR* 2014, 267–276.

ally bound by the EU Charter of Fundamental Rights.

According to the Lisbon Treaty,³ the EU shall accede in the future – in a first step – to the Convention as well as to the first Protocol and Protocol No. 6 to the Convention, the latter being signed by all EU Member States. In a second step, the EU shall accede to further Protocols.⁴ The EU could make reservations to the Convention and to the Protocols – provided that they allow reservations – according to Art. 57 of the Convention.⁵ The reasons for accession are threefold: In the first place, a coherent application of human rights by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).⁶ A positive side effect could be hereby a prompt and uncomplicated judicial dialogue between the ECtHR and the CJEU. Secondly, by acceding to the European Convention on Human Rights, the EU as 48th Contracting Party to the Convention would be contractually bound by it: This means that the EU would have the same rights and duties of the other 47 Contracting Parties⁷ to be part to the proceedings before the ECtHR.⁸ If an application is directed against one or more member States of the European Union, the European Union may – under certain conditions – become a co-respondent to the proceedings.⁹ Visa versa, if an application is directed against the European Union,

³ The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. According to Art. 6 para. 2 of the Lisbon Treaty, the European Union “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

⁴ This would require the deposit of further separate accession instruments.

⁵ See Art. 2 § 1 of the Draft Accession Agreement.

⁶ Dorothee von Arnim, ‘The accession of the European Union to the European Convention on Human Rights’, *CritQ*, 95(1), (2012), p. 37.

⁷ The EU could for example make a reservation in respect of any particular provision of the Convention in accordance with Art. 57 of the Convention. Art. 57 of the Convention has to be reformulated in this respect, as it still refers to States.

⁸ Dorothee von Arnim, ‘The accession of the European Union to the European Convention on Human Rights’, *CritQ*, 95(1), (2012), 38.

⁹ Appendix I, Art. 3 of the Draft Accession Agreement.

the European Union member States may become co-respondents to the proceedings under certain conditions.¹⁰ The introduction of such a co-respondent mechanism *de lege ferenda* constitutes a new element.¹¹ After the accession, individuals would be able to apply to the European Court of Human Rights for review of the acts of EU institutions. Consequently, all legislative acts of the EU would be verifiable under the last binding decision by the European Court of Human Rights. The EU would be obliged under international law to refrain from any possible violations of the European Convention on Human Rights. "The current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties."¹² Thirdly, the trustworthiness of the EU's commitment to fundamental human rights protection towards its citizens shall be optimized.¹³

Article 59, para. 2 of the Convention as amended by Protocol No. 14 to the Convention¹⁴ provides, in turn, the legal bases for the accession of the EU. Accordingly, "[t]he European Union may accede to [the] Convention." For the European Convention, the EU accession would bring about a number of adjustments to the Convention in order to take account of the specific non-state nature of the EU. An important adjustment would be the introduction of a prior involvement mechanism of the Court of Justice of the European Union (CJEU). Before applying to the ECtHR, individuals would not only have to exhaust domestic remedies, if they challenge directly a measure taken by the EU; they would also have to bring their case before the CJEU for reviewing

¹⁰ Appendix I, Art. 3 of the Draft Accession Agreement.

¹¹ For further details about the co-respondent mechanism, see Dorothee von Arnim, 'The accession of the European Union to the European Convention on Human Rights', *CritQ*, 95(1) (2012), 49-55.

¹² Appendix V, Nr. 7 of the Draft Accession Agreement.

¹³ Dorothee von Arnim, 'The accession of the European Union to the European Convention on Human Rights', *CritQ*, 95(1) (2012), 38.

¹⁴ Protocol No. 14 entered into force on 1 June 2010.

the compliance of EU acts with fundamental human rights.¹⁵

In 2013, after a long negotiation process between the EU and the Council of Europe, a draft accession treaty was agreed upon in principle. By the end of 2014, however, the negotiations suffered an immense setback: The Court of Justice of the European Union declared the draft accession treaty incompatible with EU law.¹⁶ It expressly pointed out that the EU is not a state but a system *sui generis*. It based the declaration of incompatibility on several grounds related *inter alia* to the primacy of the EU courts over the ECtHR and the priority of EU law over the subject matter of the rights protected by the European Convention on Human Rights.¹⁷ Consequently, the Court of Justice of the European Union provided a list of amendments to be made in order to ensure that the accession would be compatible with EU law. The European Court of Human Rights is now next in line to rule on the compatibility of the proposed amendments with the European Convention.

In the following, I would like to focus on the position of the European Convention within national law and take a closer look at the judicial dialogue between the international and national systems of human rights promotion and protection, leaving aside the supranational level and the sensitive ongoing debate on the accession of the EU to the Convention.

Position of the European Convention within national law

1. Fundamentals concerning the position of the ECHR

With the entry into force of the European Convention, the high con-

¹⁵ For details on the prior involvement mechanism of the CJEU, see *Dorothee von Arnim*, The Accession of the European Union to the European Convention on Human Rights, *CritQ*, 95(1) (2012), 55-59.

¹⁶ The accession treaty is particularly incompatible with Art. 6 (2) TEU and with Protocol (No. 8) relating to Art. 6 (2) TEU. See opinion 2/13 of the Court of Justice of the European Union of 18 December 2014, <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>

¹⁷ For more details, see Steve Peers, <http://eulawanalysis.blogspot.de/2014/12/the-cjeu-and-eus-accession-to-echr.html>

tracting parties have committed themselves to securing for everyone within their jurisdiction both human rights and fundamental freedoms.¹⁸ The European Convention does not, however, mention how this objective should be achieved. It does not impose a specific constitutional structure on the high contracting parties.¹⁹ It is subject to the sovereignty of each Member State as to how to implement its international obligations. Consequently, the position of the European Convention in the national hierarchy of norms is different for the different Member States. Intrinsically linked with the position of the European Convention is its reception into the domestic legal order of the Member States²⁰ and the judicial dialogue between the ECtHR and national supreme courts.

In analyzing the method of implementation on the part of the high contracting parties, four different models have emerged: A first model, which was implemented for example by Bulgaria²¹ and the Netherlands, assigns the European Convention primacy over the constitution. The second model makes the European Convention either part of the constitution or allocates it the same rank as the constitution. Austria²² is a Member State that has implemented the second model. A third model, which was implemented by the majority of the high contracting

¹⁸ Art. 1 ECHR.

¹⁹ Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"', in: Janneke Gerards & Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law. A comparative analysis* (2014), p. 24.

²⁰ For an in-depth analyses of the reception of the European Convention in various European Union Countries, see Helen Keller & Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, Oxford, New York 2008. In Germany, the Federal Constitutional Court speaks of an "active reception process" ("aktiver Rezeptionsvorgang"), see for example BVerfGE 128, 326, 370.

²¹ Art. 5 of the Bulgarian Constitution; Art. 85 IV of the Bulgarian Constitution.

²² For a short summary concerning the Austrian implementation, see for example Maja Nastić, 'ECHR and national constitutional courts', 71 *Collection Papers Fac. L. Nis* 2015, 203–220 (2017).

parties, assigns the European Convention a rank between the constitution and an ordinary law. Countries like Croatia, France,²³ Italy,²⁴ Romania, Serbia²⁵ and Spain²⁶ have implemented this third model. The fourth model assigns the European Convention the rank of an ordinary law. Germany has chosen this fourth model for the implementation of international treaties such as the European Convention.

2. Position of the ECHR within the hierarchy of norms in Germany

According to Art. 59 para.2 of the Basic Law (*Grundgesetz*) “treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.” In other words, an international treaty requires the approval of the German Federal Council (*Bundesrat*). The authorities responsible for legislative bodies have agreed with the ‘Law on the Convention for the Protection of Human Rights and Fundamental Freedoms’ of 7 August 1952, upon the European Convention on Human Rights. This so-called “consent law” (*Zustimmungsgesetz*) gives the executive, particularly the President, ratification authorization. The consent law furthermore entails the national implementation of the content of the respective international treaty. This means that, pursuant to Art. 59 para. 2 of the Basic Law, the European Convention on Human Rights, through the law that ratified it, obtained the rank of an

²³ For a short summary concerning the French implementation, see for example Maja Nastić, ‘ECHR and national constitutional courts’, 71 *Collection Papers Fac. L. Nis* 2015, 203–220 (209).

²⁴ For a short summary concerning the Italian implementation, see for example Maja Nastić, ‘ECHR and national constitutional courts’, 71 *Collection Papers Fac. L. Nis* 2015, 203–220 (208 *et seq.*).

²⁵ See Maja Nastić, ‘ECHR and national constitutional courts’, 71 *Collection Papers Fac. L. Nis* 2015, pp. 203–220 (212 *et seq.*).

²⁶ For a short summary concerning the Spanish implementation, see for example Maja Nastić, ‘ECHR and national constitutional courts’, 71 *Collection Papers Fac. L. Nis* 2015, 203–220 (208).

ordinary federal law.²⁷ In the hierarchy of norms in Germany, it is equal to any other ordinary federal law like the Criminal Code or the Code of Criminal Procedure.

The allocation of the position of the European Convention as an ordinary federal law leads to two problems: Firstly, pursuant to the *lex posterior* principle, in case of a conflict of federal laws, the most recently enacted federal law generally antecedes the previously enacted federal law. In order to maintain the ties with the European Convention, a so-called “international law-friendly” interpretation (*völkerrechtsfreundliche Auslegung*) of German laws takes place, even if they were enacted after the entry into force of the European Convention. In this regard, the *lex posterior* principle is overcome here.²⁸ Secondly, the European Convention cannot displace constitutional law. In the literature, this was taken as an opportunity to look for ways to raise the European Convention to constitutional status.

DOGMATIC APPROACHES TO NORMATIVE CONSTITUTIONALIZATION

Some of the literature proposed effectuating an improvement of the position by means of recognizing the universal significance of the European Convention and considering its content as general principles of international law. Pursuant to Art. 25 of the Basic Law, general rules of international law shall take precedence over ordinary laws.²⁹ Against this reasoning, however, one has to take into consideration that the European Convention not only ensures human rights and fundamental freedoms but also contains provisions on its institutions and procedures that cannot be regarded as general rules of international law.³⁰

²⁷ See Helge Sodan, *Grundgesetz*, Art. 59 GG, point 19 ff, 2nd edn, Munich 2011.

²⁸ Helge Sodan, *Grundgesetz*, Art. 59 GG, point 24, 2nd edn, Munich 2011.

²⁹ For more details, see Dirk Diehm, *Die Menschenrechte der EMRK und ihr Einfluss auf das deutsche Strafgesetzbuch*, Berlin 2006, p. 81 f.; Matthias Ruffert, ‘Die Europäischen Menschenrechtskonvention und innerstaatliches Recht’, *EuGRZ* 2007, 246.

³⁰ Dirk Diehm, *Die Menschenrechte der EMRK und ihr Einfluss auf das deutsche*

Another approach to effectuating an improvement of the position of the European Convention is the incorporation of the Convention based on Art. 1 para. 2 of the Basic Law. Accordingly, the German people acknowledge inviolable and inalienable human rights as the basis of every community and of peace and justice in the world. This commitment to human rights is understood as a reference to international treaties and should trigger automatic incorporation. The main argument against this interpretation, however, is that international treaties have to go through a special constitutional transformation process pursuant to Art. 59 para. 2 of the Basic Law. Taking Art. 1 para. 2 of the Basic Law into consideration, one can elicit at most an “international law-friendly” tendency from the Basic Law.³¹

In addition, some of the literature suggests obtaining an increase in the rank of the European Convention by taking recourse to Art. 24 para. 1 of the Basic Law. Hence, the Federation may by means of a law transfer sovereign powers to international organisations. This view considers the European Court of Human Rights an international organisation pursuant to Art. 24 para. 1 of the Basic Law and accords its decision-making practice international priority.³² Against this conception, however, one has to take into consideration that albeit the interdependency of national and international law in the human rights sector, a transfer of sovereign rights to the European Court of Human Rights did not take place.³³ Such a transfer requires that the intergovernmental body is able to adopt acts with direct national effect or is able to issue unilateral binding acts against citizens. However, the decisions of the European Court of Human Rights develop only a binding

Strafgesetzbuch, Berlin 2006, p. 82.

³¹ Helge Sodan, *Grundgesetz*, Art. 59 GG, point 19 ff, 2nd edn, Munich 2011.

³¹ See Helge Sodan, *Grundgesetz*, Art. 59 GG, point 30, 2nd edn, Munich 2011.

³² Matthias Ruffert, ‘Die Europäischen Menschenrechtskonvention und innerstaatliches Recht’, *EuGRZ* 2007, 247; Dirk Diehm, *Die Menschenrechte der EMRK und ihr Einfluss auf das deutsche Strafgesetzbuch*, Berlin 2006, p. 83 f.

³³ Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, point 7, 4th edn, Munich 2009.

effect at the international level.³⁴

Ultimately, a further approach toward increasing the rank of the European Convention is taking recourse to Art. 2 para. 1 of the Basic Law. Accordingly, every person shall have the right to free development of his personality insofar as he does not violate the rights of others or violate the *constitutional order* or the moral law. The European Convention should be understood as part of the constitutional order and thus indirectly obtain constitutional status. This approach ignores the fact that the Basic Law provides for a differentiation of the national application of international law in Art 59 para. 2, Art. 25 and in Art. 24 of the Basic Law. There is no room for an incorporation of international law pursuant to Art. 2 para. 1 of the Basic Law.³⁵

“INTERNATIONAL LAW-FRIENDLY” INTERPRETATION OF THE FEDERAL CONSTITUTIONAL COURT

The Federal Constitutional Court (*Bundesverfassungsgericht*) did not follow the call for an improvement of the position of the European Convention within the hierarchy of norms in Germany. Time and again, the Federal Constitutional Court has emphasized in its case law that, domestically, the European Convention has the rank of a simple federal law. Instead of increasing the rank of the European Convention, the Court has decided to interpret the provisions of the Basic Law in an “international law-friendly” manner. Hence, the content and development of the European Convention should be taken into consideration when interpreting the fundamental rights of the Basic Law.³⁶ In this way, the European Convention is implemented at the constitutional level, giving it *de facto* an interpretational precedence over the simple federal law.

³⁴ Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, point 7, 4th edn, Munich 2009.

³⁵ Dirk Diehm, *Die Menschenrechte der EMRK und ihr Einfluss auf das deutsche Strafgesetzbuch*, Berlin 2006, p. 80.

³⁶ Matthias Ruffert, ‘Die Europäischen Menschenrechtskonvention und innerstaatliches Recht’, *EuGRZ* 2007, 247.

Judicial Dialogue

The rank of the European Convention of Human Rights within the national laws of the Member States is important for the judicial dialogue that can either take place between judgments of the European Court of Human Rights and judgments of all national constitutional courts or national courts of cassation in a formal way or between judges of those courts in an informal way. This ongoing judicial dialogue is essential for the development of human rights. It reinforces the Convention as a living instrument, to be interpreted in the light of present-day conditions. National courts have to copy the European Court's own evolutionary approach in order to comply with the minimum standards of the Convention.

In this context, the latest protocol – Protocol No. 16 – was drafted to bring about a new dialogue between the highest domestic courts and the European Court for Human Rights. Its aim is to further enhance the interaction between the courts in accordance with the principle of subsidiarity. The highest courts of a high contracting party *may* request the court under this protocol to give an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto in the context of a case pending before the requesting court. The request for an advisory opinion is optional and not in any way obligatory. The requesting court furthermore has the possibility to withdraw its request. However, the procedure is not intended to allow for an abstract review of legislation, which is not to be applied in a concrete pending case. The European Court of Human Rights is not a “fourth instance”. According to the principle of subsidiarity, the European Court may only deal with the matter after all domestic remedies have been exhausted.³⁷ National authorities have the primary responsibility to safeguard Convention rights, not least because of the better position of national authorities to make policy choices and to regulate fundamental rights is-

³⁷ Art. 35 para. 1 ECHR.

sues in a way that fits national laws and traditions.³⁸ It is the *principle of subsidiarity* and the *better placed argument* underlying the margin-of-appreciation doctrine that are important instruments of the European Court of Human Rights in determining its relationship with states. As long as national authorities respect the limits set by the European Convention and the case law of the European Court, they are free to make their own choices and decide which restrictions or exceptions are indispensable and rational within their own states.³⁹

The judicial dialogue is further characterized by a *shared responsibility*⁴⁰ between national courts and the European Court. National courts have the most important role to play in guaranteeing the *primary* protection of the Convention. The European Court has a supervisory role. It decides in individual cases whether a Member State has complied with its obligation of human rights protection. Hence, according to Art. 46 para. 1 of the European Convention, the Court's judgments are only binding on the parties to the case (*inter partes* effect).⁴¹ It has become accepted, on the one hand, that the *inter partes* effect is only relevant concerning the concrete evaluation of an alleged violation and its justification. The Court's interpretations of the terms and concepts con-

³⁸ Janneke Gerards, 'The European Court of Human Rights and the National Courts: giving shape to the notion of "shared responsibility"', in: Janneke Gerards & Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law. A comparative analysis* (2014), p. 17.

³⁹ Janneke Gerards, 'The European Court of Human Rights and the National Courts: giving shape to the notion of "shared responsibility"', in: Janneke Gerards & Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law. A comparative analysis* (2014), p. 28.

⁴⁰ For more details on "shared responsibility" see Janneke Gerards, 'The European Court of Human Rights and the National Courts: giving shape to the notion of "shared responsibility"', in: Janneke Gerards & Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law. A comparative analysis* (2014), pp. 35–51.

⁴¹ Art. 46 para. 1 ECHR.

tained in the European Convention are, on the other hand, of a general nature having an *erga omnes* effect.⁴² This effect is also called the *res interpretata* effect and “implies that all national authorities [...] have to comply with the Convention as explained by the Court in its case law, even if their state was not a party to the case.”⁴³ Due to the *res interpretata* effect, i.e., the binding nature of the Court’s interpretations, a uniform level of protection of human rights within the 47 Member States can be ensured.⁴⁴

Noteworthy cases in criminal proceedings that illustrate the judicial dialogue between judgments of the European Court of Human Rights and judgments of the Federal Constitutional Court are those concerning preventive detention (*Sicherungsverwahrung*). The European Court held in several judgments against Germany in 2009 and 2011 that Germany had violated Art. 5 para. 1 of the ECHR – right to liberty and security – with its provisions on preventive detention. The cases concerned the detention of applicants for preventive purposes, which had been ordered subsequent to their convictions, for an indefinite duration after having served their full prison sentence. As a result, during a new pending case, the Federal Constitutional Court declared in 2011 most of the regulations on preventive detention unconstitutional, tak-

⁴² Janneke Gerards, ‘The European Court of Human Rights and the National Courts: giving shape to the notion of “shared responsibility”’, in: Janneke Gerards & Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law. A comparative analysis* (2014), p. 21.

⁴³ Janneke Gerards, ‘The European Court of Human Rights and the National Courts: giving shape to the notion of “shared responsibility”’, in: Janneke Gerards & Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law. A comparative analysis* (2014), p. 23.

⁴⁴ The principles and methods of interpretation used by the European Court are those according to the general rules of interpretation in the Vienna Convention on the Law of Treaties’ textual interpretation, systematic interpretation, evolutionary interpretation, autonomous interpretation, “common ground” or consensus interpretation, and meta-teleological interpretation.

ing into consideration the arguments of the European Court of Human Rights.⁴⁵ The consequence of this was that the detainees concerned were released immediately all over Germany. The government was requested to draft new regulations on preventive detention in conformity with the constitution and human rights.

Informal judicial dialogue takes place in the form of exchange visits between judges of the European Court of Human Rights and national constitutional courts.

Conclusion: A Europe with Common Human Rights Standards

Today, the European Court of Human Rights exercises substantial influence on the national legal systems of its Member States and has therefore evolved into an important promoter of common human rights standards. Once Protocol No. 16 enters into force, the Member States will have a further tool for a permanent judicial dialogue with the European Court. Possible tensions between the national and international levels of human rights protection could be overcome more easily. However, there will always be some Member States that do not like the idea of losing part of their sovereignty on national issues. It is more important than ever to convince these states of a Europe with common human rights standards.

⁴⁵ See Andreas Voßkuhle, 'Zur Koordination des deutschen und europäischen Menschenrechtsschutzes im Lichte des Urteils des BVerfG vom 4. Mai 2011 (BVerfGE 128, 326 ff.) zur Sicherungsverwahrung', in: Georg Freund, Uwe Murmann, René Bloy & Walter Perron (eds.), *Grundlagen und Dogmatik des gesamten Strafrechtssystems. Festschrift für Wolfgang Frisch zum 70. Geburtstag* (2013), pp. 1359-1373.

