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The use of ECTHR Case law by the CJEU after
Lisbon: The view of the Luxembourg insiders

2015-6

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THE USE OF ECtHR CASE LAW BY THE CJEU AFTER LISBON: THE VIEW OF THE LUXEMBOURG INSIDERS

A shortened version of this Working Paper will appear in the Maastricht Journal of European and Comparative Law 2015(4)¹

Abstract: *This article examines how and why the CJEU examines and cites the case law of the ECtHR after the entry into force of the Charter of Fundamental Rights in 2009. The CJEU's practice will be sketched on the basis of 20 interviews with judges, référendaires and Advocates General at the CJEU. It will be shown that the CJEU has examined and cited the Strasbourg case law less frequently and extensively. Several reasons will be given for this, primarily on the basis of the observations of the interviewees as to their readiness to cite the Strasbourg case-law. This includes an awareness that both courts are different as well as strategic reasons related to the wish to develop an autonomous interpretation of the Charter. These two considerations are also implicit in Opinion 2/13 where the CJEU found that the EU accession agreement to the ECHR was not compatible with the EU treaties.*

Key words: judicial dialogue – Court of Justice of the European Union - European Court of Human Rights – Charter of Fundamental Rights – Opinion 2/13

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Much has been written about the judicial dialogue and interaction between the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) in Strasbourg. The CJEU and the ECtHR have been referred to as ‘twins separated at birth’² who have been ‘living apart together’.³ No other body of ‘foreign’ case law has been cited on such a frequent basis by the CJEU and several observers noted that the CJEU has in practice operated as if it were already a party to the ECHR.⁴ Yet, relatively little is known about the actual practice at the CJEU and *the way in which* the case law of the ECtHR is used by judges, Advocates General (AGs) and référendaires. Most scholars have examined only one aspect of the CJEU’s reliance on ECtHR, which is arguably the most visible: the express references to judgments of the ECtHR in judgments. But even here, there is disagreement about the frequency of such explicit citation post-Lisbon after the entry into force of the Charter.⁵ Some commentators argue, on the one hand, that the Charter has actually solidified the practice of ‘cross-fertilisation’ and ‘parallel interpretation’ and that the CJEU has examined the case law of the ECtHR in more detail, in line with the ‘homogeneity clause’ of Article 52(3) of the Charter and Article 6(3) TEU.⁶ Other commentators argue, on the other hand, that the CJEU has increasingly relied on its ‘own’ instrument and developed an autonomous interpretation thereof and they expect that the Charter will eventually sideline the ECHR and the ECtHR.⁷ *Opinion 2/13*, where the CJEU held that the agreement on the

² G. Quinn, ‘The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?’, *McGill Law Journal*, vol. 46 (2001), 849-874.

³ B. de Witte, ‘The use of the ECHR and Convention case law by the European Court of Justice’, in P. Popelier *et al.* (eds), *Human rights protection in the European legal order: the interaction between the European and the national courts* (Antwerp: Intersentia, 2011), 17-34, 17.

⁴ A. Rosas, ‘The European Court of Justice in context: forms and patterns of judicial dialogue’, *European Journal of Legal Studies*, vol. 1, no. 2 (2007), 10. De Witte, n 3 *supra*, 18.

⁵ Note that the text of the Charter was already adopted and officially proclaimed on 7 December 2000 in Nice. Most of the text has remained unchanged, except for the horizontal provisions governing the Charter’s interpretation and application in Title VII. Article 6(1) TEU provides that the Charter ‘shall have the same legal value as the Treaties’.

⁶ For the terms ‘cross-fertilisation’ and ‘parallel interpretation’, see respectively F. G. Jacobs, ‘Judicial dialogue and the cross-fertilization of legal systems: the European Court of Justice’, *Texas International Law Journal*, vol. 38 (2003), 547-556. Joint communication from Presidents Costa and Skouris, 24 January 2011, at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf [last accessed 4 May 2015], para. 1. See also C. Eckes, ‘The Court of Justice’s participation in the judicial discourse: theory and practice’, in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations - Constitutional Challenges* (Oxford: Hart, 2014). T. Marguery, ‘European Union Fundamental Rights and Member States Action in EU Criminal Law’, *Maastricht Journal of European and Comparative Law*, vol. 20, no. 2 (2013), 282-301, 285.

⁷ L. Scheeck, ‘Diplomatic intrusions, dialogues and fragile equilibria: the European Court as a constitutional actor of the European Union’, in J. Christoffersen and M.R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press 2011), 164-180, 165. De Witte, n 3 *supra*, 33. G. de Búrca, ‘After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator’, *Maastricht Journal of European and Comparative Law*, vol. 20, no. 2 (2013), 168-184, 172. J. Polakiewicz, ‘EU and the ECHR: will EU accession to the European Convention on Human Rights square the circle’, at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2331497 [last accessed 4 May 2015], 6. C. Timmermans, ‘Will the

accession of the EU to the ECHR was not compatible with Article 6(2) TEU, seems to lend further credence to the latter proposition.

This article seeks to unravel the practice of the CJEU with respect to the discussion and citation of the ECtHR by actually asking those who should have the best direct knowledge of what is happening: those working in the Court of Justice themselves. More specifically it aims to answer the following research questions for the post-Lisbon period after 1 December 2009: To what extent does the CJEU examine or discuss the case law of the ECtHR in cases dealing with fundamental rights in the deliberative phase preceding the actual judgment? Why is Strasbourg explicitly cited in some cases, while not in others? What are the reasons for (not) doing so? In order to answer these questions interviews with former and sitting judges, AGs and référendaires were conducted at the CJEU in December 2014. The author interviewed 20 persons: two former and seven sitting judges, seven référendaires of judges, three référendaires of AGs and one AG.⁸ The reason for conducting the interviews is that the research questions cannot be answered solely on the basis of an analysis of written documents available, including the judgments of the CJEU and the Opinions of the AGs as well as scholarly literature addressing this matter. What is more, the rationale behind the interviews is that the way in which courts examine and cite judgments of other (international) courts depends very much on the attitudes, preferences and personal interests of individual judges and legal secretaries.⁹ This is the first scholarly work that examines the actual practice of the use of Strasbourg case law by Luxemburg on the basis of interviews with CJEU officials in the post-Lisbon period.¹⁰ This article does not pretend to give an all-exhaustive

accession of the EU to the ECHR fundamentally change the relationship between the Luxemburg and the Strasbourg Courts?', *CJC Distinguished Lecture 2014/01*, 12.

⁸ See n 11 *infra* for the selection of interviewees. All the interviews were held in Luxemburg on 8-10 December 2014, except for three which were conducted via telephone beforehand. The interviews thus took place before *Opinion 2/13*, which was therefore not touched upon during the interviews. Each interview took on average between 45 minutes and 1 hour. Most interviews were taped after the consent of the interviewee. A list of questions was sent beforehand. In order to protect the anonymity of the interviewees, their names and identities will not be disclosed. Instead, a randomly generated series of letters were assigned to the interviewees and used for reference.

⁹ N. Krisch, 'The open architecture of European human rights law', *The Modern Law Review*, vol. 71, no. 2 (2008), 183-216, 211-213. E. Mak, 'Why do Dutch and UK judges cite foreign law', *The Cambridge Law Journal*, vol. 70, no. 2 (2011), 420-450, 421. M. Gelter and M. M. Siems, 'Citations to foreign courts – illegitimate and superfluous, or unavoidable? Evidence from Europe', *American Journal of Comparative Law*, vol. 62 (2014), 35-85, 84. C. McCrudden, 'Using comparative reasoning in human rights adjudication: the Court of Justice of the European Union and the European Court of Human Rights compared', *Cambridge Yearbook of European Legal Studies*, vol. 15 (2012-2013), 384-415, 403.

¹⁰ There have been two research projects from before and shortly after the entering into force of the Lisbon Treaty. What distinguishes the present research is that it is focused on the actual use made of the ECtHR case law by the CJEU (one way) instead of the more general relationship between both courts (both ways). Scheeck conducted more than 80 interviews with a wide variety of different EU and Council of Europe actors in Brussels, Luxemburg and Strasbourg from April 2002 to June 2007. L. Scheeck, 'Competition, conflict and cooperation

account representative of the entire CJEU, especially because only a limited number of persons out of a much wider range of CJEU officials was actually interviewed.¹¹ In order to avoid that the information-base is too anecdotal, this article will primarily discuss the commonalities between the several interviewees and integrate -where possible- the interview data into the existing scholarly literature as well as the actual case law of the CJEU. This article does not intend to give a normative account by discussing whether the interaction between both courts and the express citation of Strasbourg is useful or desirable.¹²

This article has the following structure. Section 1 sketches a historical and legal background by shortly examining the CJEU's practice of referring to ECtHR case law pre-Lisbon. It then offers a legal analysis of the question whether the CJEU based on the Lisbon-Treaty and the EU Charter is (already) bound by the ECHR and the judgments of the ECtHR prior to accession of the EU to the ECHR. The second and third sections are focused on the actual 'methodology' of the CJEU and the way in which the case law of the ECtHR is used in practice post-Lisbon. These sections are primarily based upon the above mentioned interviews with judges, référendaires and AGs of the CJEU. Section 2 looks at the deliberative and heuristic phase. It will, firstly, examine the way in which the case law of the ECtHR is examined and discussed by CJEU judges and référendaires (how?) and, secondly, which factors make that the CJEU analyses Strasbourg case law or not (why?). Section 3 focuses on the eventual judgment of the CJEU. Section 3.1 focuses on the way in which the case law of the ECtHR has featured in the judgments of the CJEU post-Lisbon and reflects on the above mentioned conflicting propositions as to the frequency of ECtHR citations (how?). Section 3.2 discusses the reasons for citing Strasbourg in specific cases (why?).

between European courts and the diplomacy of *supranational* judicial networks', *GARNET Working Paper 23/07*, 3. Morano-Foadi and Andreadakis conducted interviews with 13 judges and 6 AGs at the CJEU in October and December 2010 which were primarily focused on the accession of the EU to the ECHR. S. Morano-Foadi and S. Andreadakis, 'A report on the protection of fundamental rights in Europe: a reflection on the relationship between the Court of Justice of the European Union and the European Court of Human Rights' (2014), at: <https://dm.coe.int/CED20140017597> [last accessed 4 May 2015].

¹¹ Seven out of the 28 sitting judges were interviewed, as well as seven out of 86 référendaires of judges. In addition, only one of the nine AGs and three out of the 36 référendaires of AGs were interviewed. Persons were chosen and contacted on the basis of their expertise on fundamental rights/ ECHR and their (academic) writing about the topic of the dialogue between the CJEU and the ECtHR. These persons were also asked whether they had any recommendations for other persons (snowballing effect). The inclusion of CJEU officials with relatively extensive knowledge about fundamental rights or the ECHR also means that primarily those officials that are most aware of the ECtHR case law and the dialogue with Strasbourg were included. The interview data could thus be biased towards a greater impact of Strasbourg. Note that this article only looks to the practice of the Court of Justice and not the General Court or the Civil Service Tribunal.

¹² For an example of a more normative approach, see G. Harpaz, 'The European Court of Justice and its relations with the European Court of Human Rights: the quest for enhanced reliance, coherence and legitimacy', *Common Market Law Review*, vol. 46 (2009), 105-141.

1. The historical and legal context

1.1. The historical context: the pre-Lisbon citation of the case law of the ECtHR by the CJEU

Several reviews have been given of the reliance of the CJEU on the case law of the ECtHR. It is not the point of this article to repeat them.¹³ A short background sketch is, however, indispensable to understand the current post-Lisbon situation. The first mention of the ECHR was in 1975 in *Rutili*.¹⁴ The first explicit reference to the ECtHR was more than twenty years later in 1996 in *P&S*, one month after *Opinion 2/94* in which the CJEU underlined that the EU was not competent to accede to the ECHR.¹⁵ The CJEU's reliance on the ECHR and the ECtHR pre-Lisbon was primarily driven by the 'demands' of national (constitutional) courts to have the CJEU take fundamental rights more seriously.¹⁶ In the absence of an EU fundamental rights charter, the CJEU could use the EC(t)HR to fill this void.¹⁷ The EC(t)HR was more useful than the constitutional traditions common to the Member States, because it offered a ready-made European consensus.¹⁸ The rather late explicit citation of Strasbourg does, however, not necessarily mean that the ECtHR had not been of any influence on the CJEU before 1996. There has certainly been an implicit influence. Jacobs, for example, argued that the CJEU borrowed the doctrine of impossibility of retroactive effect of court judgments in *Defrenne II* from the ECtHR.¹⁹ Moreover, Opinions of AGs started to discuss the case law already in the late 1980s and it is not unreasonable to assume that they have had an effect on judges and judgments, as will be discussed further below.²⁰

The initial references to the ECtHR as a 'source of inspiration' were rather short.²¹ Soon, the CJEU began citing ECtHR judgments more frequently and in a more detailed way,

¹³ De Witte, n 3 *supra*, 25.

¹⁴ Case 36/75, *Rutili* [1975] 1219.

¹⁵ Case 13/94, *P & S* [1996] I-2143.

¹⁶ K. Schiemann, 'A response to The judge as comparatist', *Tulane Law Review*, vol. 80 (2005-2006), 281-297, 286. S. Douglas-Scott, 'The Court of Justice of the European Union and the European Court of Human Rights after Lisbon', in S. De Vries *et al.* (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford: Hart 2013), 153-179, 163.

¹⁷ S. Douglas-Scott, 'A tale of two courts: Luxembourg, Strasbourg and the growing European human rights *acquis*', *Common Market Law Review*, vol. 43 (2006), 629-665, 653-654.

¹⁸ A. Rosas and L. Armati, *EU Constitutional Law. An introduction* (Oxford: Hart, 2012), 168.

¹⁹ Case 43/75, *Defrenne v Sabena* [1976] 455. Jacobs, n 6 *supra*, 552.

²⁰ N 196 *infra*.

²¹ Douglas-Scott, n 17 *supra*, 645.

by also engaging with the grounds of justifications.²² Several observers noted that the CJEU started to drop the ‘special significance’ terminology and began referring to the ECHR directly in the same way as if referring to its own judgments.²³ The use of the case law of the ECtHR by the CJEU increasingly went beyond a mere inspirational use and seemed to take the case law of the ECtHR not only as a persuasive source, but as *de facto* binding by literally copying Strasbourg’s interpretation without much criticism as if it were the CJEU’s own precedents.²⁴ One of the most prominent examples of the reliance on the ECtHR, where the CJEU ‘scrupulously’ followed the ECHR, is *Connolly* where it applied the *Handyside* principles of the ECtHR with respect to limitations under Article 10 ECHR (freedom of expression).²⁵

This short pre-Lisbon overview shows that the CJEU has examined and referred to the case law of the ECtHR rather extensively and in that way has treated the judgments of the ECtHR as if they are *practically* binding.²⁶ Furthermore, actual differences and conflicts between both courts have been extremely rare. Former AG Jacobs (1988-2006), for example, could not think of a single case in which the CJEU evidently went against the interpretation of the ECtHR.²⁷ This is somehow surprising given that the CJEU is not formally bound by the ECHR and the interpretation of the ECtHR, as will be sketched in the next subsection.

²² One example is Case 465/00, *Österreichischer Rundfunk* [2003] I-04989. S. Peers and S. Prechal, ‘Article 52’, in S. Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart 2014), para 52.20. See also Krisch, n 9 *supra*, 199. Douglas-Scott, n 17 *supra*, 645.

²³ Examples include Case 341/06 P, *Chronopost* [2008] I-04777, paras. 46 and 54. Joined Cases 482/01 and 493/01, *Orfanopoulos* [2004] ECR I-05257, para. 99. Case 465/07, *Elgafaji* [2009] I-00921. Case 450/06, *Varec* [2008] I-00581, paras. 44-48. De Witte, n 3 *supra*, 23. Eckes, n 6 *supra*.

²⁴ In some cases, the CJEU incorporated the Strasbourg approach without elaborating upon the suitability of directly translating it into the –different- EU context. H. Senden, *Interpretation of fundamental rights in a multilevel Legal system. An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Antwerp: Intersentia 2011), 356-358.

²⁵ Case 274/99 P, *Connolly v Commission* [2001] I-01611. *Handyside v the United Kingdom*, ECHR [1976] 5493. Peers and Prechal, n 22 *supra*, para 52.23. W. Weiß, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon’, *European Constitutional Law Review*, vol. 7, no. 1 (2011), 64-95, 80.

²⁶ Interview R. Former CJEU Judge Timmermans (2000-2010) held that the treatment of the Strasbourg case law by the CJEU comes close to that of being directly bound. Timmermans, n 7 *supra*, 9. De Witte, n 3 *supra*, 24 and 34. Krisch, n 9 *supra*, 201.

²⁷ The only case mentioned during the interviews where the CJEU gave an interpretation which did not follow the ECtHR was *Emesa Sugar*, where the CJEU denied parties a right to comment on the AG’s Opinion. Case 17/98, *Emesa Sugar* [2000] I-00675. Interview U. De Witte, n 3 *supra*, 25. Douglas-Scott, n 17 *supra*, 648. S. Iglesias Sánchez, ‘The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ’s approach to fundamental rights’, *Common Market Law Review*, vol. 49, no. 5, (2012), 1565-1611, 1602.

1.2. The legal context: is the EU bound by the ECHR and the interpretation of the ECtHR prior to accession?

The EU is not yet legally bound to the ECHR prior to accession. In the post-Lisbon case of *Åkerberg Fransson*, and subsequent cases such as *Kone* and *Schindler*, the CJEU determined that the ECHR ‘does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law’.²⁸ Only after accession would the ECtHR’s interpretation of the ECHR be binding upon the EU as the CJEU also suggested in *Opinion 2/13*.²⁹ Likewise, CJEU Judge Rosas held extrajudicially that because the EU is not yet a party to the ECHR, the ECHR is ‘not a binding Community law instrument but plays a role rather as an authoritative guideline for determining the general principles of Community Law which the court applies’.³⁰ The CJEU’s interpretation has been questioned by some from the point of view of Article 6(3) TEU.³¹ De Witte argued that *from the point of view of Union law*, the EU is bound by the ECHR, because Article 6(3) TEU underlines that the provisions of the ECHR *are* general principles and not just sources for identifying them. Some judgments could be interpreted as giving (implicit) backing to this reading as well.³² De Witte, however, also recognised that Article 6(3) TEU does not make the ECHR applicable *as such*, but only via the general principles of EU law as intermediates. He attributed the different opinion of the CJEU -and much of the literature- to the fact that the Court only looks to whether the EU is bound by the ECHR *under international law* (which it is not) and not whether it is already bound *under EU law* (which it is, according to De Witte).

Another question, in addition to the question whether the EU is bound by the ECHR, is whether the CJEU is bound by the interpretation of the ECtHR in the current situation without formal accession.³³ At a first glance, this question seems simple even though the

²⁸ Case 617/10, *Åkerberg Fransson* [2013] nyr, para. 44. Case 510/11 P, *Kone v Commission* [2013] nyr, para. 21. C-501/11 P, *Schindler v Commission* [2013] nyr. This has, however, not prevented the CJEU from explicitly referring to the case law of the ECtHR in the latter two cases. See also Case 571/10, *Kamberaj* [2012] nyr, para. 60.

²⁹ *Opinion 2/13* [2014] nyr, para. 185.

³⁰ Rosas noted the ‘semi-vertical relationship’ between the CJEU and ECtHR which goes further than a situation where the CJEU ‘may’ take into account another court’s case law. The CJEU ‘should’ take the case law into account, but it is not a ‘must’ or ‘shall’. Rosas, n 4 *supra*, 8 and 15.

³¹ De Witte, n 3 *supra*, 21-22.

³² The CJEU noted in *Elgafaji* that ‘the ECHR forms part of the general principles of Community law’. Case 465/07, *Elgafaji* [2009] I-00921, para. 28. In addition, the CJEU held in *Kone* that ‘Article 6(3) TEU confirms [that] fundamental rights recognised by the ECHR constitute general principles’. Case 510/11 P, *Kone v Commission* [2013] nyr, para. 21.

³³ During the hearings in the context of *Opinion 2/13* there was ‘extensive discussion’ as to whether the CJEU – after accession of the EU to the ECHR- could refuse to recognise judgments of the ECtHR where these conflict with the constitutional identity of the EU or where they are *ultra vires*. See AG Kokott in *Opinion 2/13* [2014] nyr, para. 167-171. The CJEU seemed to imply that such situations might indeed occur, because it held that ‘it should not be possible for the ECtHR to call into question the Court’s finding in relation to the scope *ratione*

CJEU has not really answered that question in very explicit terms.³⁴ It seems logical to assume that the CJEU's *Åkerberg* logic that it is not bound by the ECHR prior to the EU's accession to the ECHR also extends to interpretations of the same ECHR by the ECtHR. Nonetheless, Article 52(3) of the Charter compels the CJEU to interpret the meaning and scope of Charter rights, which corresponds to rights in the ECHR, in the same way as the ECHR. This Article does not expressly mention that this obligation also extends to the judgments of the ECtHR.³⁵ The Explanations, however, mention that 'the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights'. The difficulty with the Explanations is, however, that these are not legally binding, but should only 'be given due regard' to on the basis of Articles 52(7) and 6(1) TEU.³⁶ In addition, the obligation in the Explanations with respect to the case law of the ECtHR was intentionally not included in the Charter itself in order to safeguard the autonomy of the CJEU.³⁷ Douglas-Scott also noted that if the ECtHR case law were to be binding, this would introduce the Common Law doctrine of

materiae of EU law'. Opinion 2/13 [2014] nyr, para. 186. Note that even following accession, the CJEU is still not formally bound to the entire case law of the ECtHR, since Article 46(1) ECHR stipulates that judgments are binding *inter partes* (*res judicata*). In addition, judgment are declaratory in nature. AG Kokott in Opinion 2/13 [2014] nyr, paras. 78 and 123. See also *Kadi I* in which the CJEU held that UN Security Council Resolutions cannot derogate from the 'very foundations of the Community legal order' and cannot have primacy over general principles of EU law. Joined Cases 402/05 P and C-415/05 P, *Kadi* [2008] I-06351, paras. 304-308. ECtHR judgments are at the same time considered to have *res interpretata*, which means that an interpretation of the ECHR by the ECtHR that can be generalised beyond the concrete case is part of the ECHR and because of that binding on State Parties. A. Bodnar, 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings', *Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 30 (2014), 223-262.

³⁴ Several commentators observed that the CJEU has not really discussed the status of the ECtHR. Douglas-Scott, n 17 *supra*, 651. Harpaz, n 12 *supra*, 109-110. C. Eckes, 'EU accession to the ECHR: between autonomy and adaptation', *Modern Law Review*, vol. 76, no. 2 (2013), 254-285, 284. Morano-Foadi and Andreadakis, n 10 *supra*, 37.

³⁵ Article 52(3) provides: '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.' AG Kokott labeled Article 52(3) as a 'homogeneity clause'. Case 109/10 P, *Solvay v Commission* [2011] I-10329, para. 252. Case 110/10 P, *Toshiba v Commission* [2011] I-10439, para. 95 and 100. Note that there are twelve Charter rights corresponding with the ECHR and another six which corresponds to the ECHR, but which have a wider scope. X. Groussot and E. Gill-Pedro, 'Old and new human rights in Europe. The scope of EU rights versus that of ECHR rights', in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press 2014), 232-258, 235.

³⁶ Weiß, however, argued that a teleological interpretation of Article 52(3) would attach binding force to the case law of the ECtHR, also because the preamble of the Charter and the Explanations refer to the case law of the ECtHR. Weiß, n 25 *supra*, 80-81.

³⁷ Douglas-Scott, n 16 *supra*, 163. Krisch, n 9 *supra*, 201. For a full discussion, see J.B. Liisberg, 'Does the EU Charter of Fundamental Rights threaten the supremacy of Community Law?', *Jean Monnet Working Paper 4/01*, 7-18.

stare decisis which is unknown to EU law.³⁸ There are, however, some early Charter cases, including *DEB* and *J McB*, in which the CJEU held that Article 52(3) extends the obligation of conform interpretation to the case law of the ECtHR.³⁹ In *J. McB. v L.E.*, the CJEU held that the Charter must ‘be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights’.⁴⁰ Also AG Cruz Villalón held in *European Air Transport* that the interpretation of the ECtHR ‘binds the European Union and must be taken into account by the Court of Justice’.⁴¹ The CJEU determined in the more recent case of *Arango Jaramillo* that ‘reference must be made’ to the case law of the ECtHR in accordance with Article 52(3), which, however, seems not to be the same as acknowledging the binding force of ECtHR judgments.⁴² Some (former) CJEU judges also proposed -extra judicially- a more extensive interpretation. CJEU Judge Lenaerts already held in 2001 that the CJEU ‘will be obliged to take over the interpretation given by the ECtHR’, at least for ECHR rights corresponding to the rights in the Charter.⁴³ Former CJEU Judge Timmermans also argued that the EU made itself subject (unilaterally) to jurisdiction of the ECtHR with the Lisbon Treaty.⁴⁴

A third legal question is whether the CJEU is obliged to explicitly cite or refer to the case law of the ECtHR. There is no such obligation, which is not surprising in the light of the dismissive answer to the previous two questions.⁴⁵ One interviewee also argued that national courts are not explicitly citing Strasbourg since they are equally not obliged to do so.⁴⁶

³⁸ Douglas-Scott, n 16 *supra*, 163. Judgments of the ECtHR might still have a *res interpretata* effect. N 33 *supra*. Tridimas also noted that even though precedent is no formal source, it has ‘progressively acquired prime place in the ‘juristic consciousness’ of EU lawyers’. T. Tridimas, ‘Precedent and the Court of Justice. A jurisprudence of doubt’, in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press 2012), 307-330, 329.

³⁹ Case 279/09, *DEB* [2010] I-13849, para. 35.

⁴⁰ Case 400/10 PPU, *J. McB. v L.E.* [2010] I-08965, para. 53. This was interpreted by Craig as given implicit support for the wider reading of Article 52(3) as covering the case law of the ECtHR. P. Craig, ‘EU accession to the ECHR: competence, procedure and substance’, *Fordham International Law Journal*, vol. 36 (2013), 1114-1150, 1149.

⁴¹ He based this conclusion on Article 53 of the Charter. Cruz Villalón in Case 120/10, *European Air Transport* [2011] I-07865, para. 80. Likewise AG Sharpston held that ‘EU law must be interpreted taking into account the case-law’ of the ECtHR. Sharpston in Cases 456/12 and 457/12, *O. and B.* [2014] nyr, para. 64.

⁴² Case 334/12 RX-II, *Arango Jaramillo* [2013] nyr, para. 43. See also Case F-26/12, *Maria Concetta Cerafogli v European Central Bank* [2014] nyr, para. 49. See also AG Mengozzi in Case 382/12 P, *Mastercard v Commission* [2014] nyr, para. 20.

⁴³ K. Lenaerts and E. De Smijter, ‘The Charter and the role of the European Courts’, *Maastricht Journal of European and Comparative Law*, vol. 8 (2001), 90-101, 99. M. Bronckers, ‘The relationship of the EC Courts with other international tribunals: non-committal, respectful or submissive?’, *Common Market Law Review*, vol. 44 (2007), 601-627, 604-605.

⁴⁴ Timmermans, n 7 *supra*, 11.

⁴⁵ De Witte, n 3 *supra*, 25. Interview M.

⁴⁶ Interview C.

Some insights from Luxembourg

Which view is currently predominant in Luxembourg itself with respect to the question as to whether the CJEU is bound by the judgments of the ECtHR? The great majority of interviewees seemed to follow the *Åkerberg* line by arguing that the CJEU is not legally bound by the case law of the ECtHR prior to the EU's accession to the ECHR.⁴⁷ Most interviewees, however, noted that the CJEU is at a minimum obliged to 'take into account' or consider the case law of the ECtHR, on the basis of Article 6(3) TEU and 52(3) Charter.⁴⁸ This is an obligation of EU law and not an obligation under the ECHR.⁴⁹ This obligation of merely considering the case law also enables a reflective application of the ECtHR which fits the case before the CJEU.⁵⁰ One interviewee also noted that Article 52(3) leaves a margin of appreciation in determining what a corresponding right is and what it means to give a Charter right the same meaning and scope as the corresponding ECHR provision.⁵¹ The pragmatic and case-dependent approach is also visible in the Opinion of AG Trstenjak in *O. & B.* which noted that 'it would be wrong to regard the case-law of the ECtHR as a source of interpretation with full validity' because of the case-specific nature of the case law.⁵² Likewise, AG Cruz Villalón held in *Åkerberg* that Article 52(3) only contains a qualified obligation and proposed a partial autonomous and divergent interpretation from the case law of the ECtHR.⁵³ Further support for this approach is the Joint Communication of CJEU President Skouris and ECtHR President Costa on accession which merely noted in rather non-committal terms that 'parallel interpretation' under Article 52(3) 'could prove useful' and that 'greatest coherence' should be ensured.⁵⁴ Moreover, the view that the judgments of the ECtHR are not legally binding also corresponds with the case law of the CJEU with respect to international agreements concluded by the EU. The CJEU has never accepted the binding force of decisions of external judicial authorities, especially with a view on autonomy EU

⁴⁷ Interview D, I, P, R, S, T. One CJEU judge interviewed by Morano-Foadi also held that the CJEU is 'not bound' by the case law of the ECtHR. Morano-Foadi and Andreadakis, n 10 *supra*, 44. Weiß also pointed out that the CJEU still does not feel legally obliged to follow the ECHR and the case law of the ECtHR. Weiß, n 25 *supra*, 77 and 79.

⁴⁸ Interview A, C, E, I, P, S, T, Q, W, X. One interviewee, however, noted that Article 52(3) has given the case law of the ECtHR the status of primary -treaty- law even without the EU's accession to the ECHR. Interview B.

⁴⁹ Interview C and W.

⁵⁰ Interview T.

⁵¹ Interview W.

⁵² This is somewhat remarkable in the light of her earlier statement that Article 52(3) must be 'construed as an essentially dynamic reference which, in principle, covers the case-law of the ECtHR'. Sharpston in Cases 456/12 and 457/12, *O. and B.* [2014] nyr, paras. 145 and 146.

⁵³ He noted that this is possible when the ECHR (and Protocol 7) is not fully incorporated into national law in all Member States: 'the protective threshold which the Court of Justice is required to respect must be the result of an independent interpretation which is based exclusively on the wording and scope of Article 50 of the Charter.' Case 617/10, *Åkerberg Fransson* [2013] nyr, paras. 81-88.

⁵⁴ Joint communication, n 6 *supra*, para. 1.

legal order, which is also stressed in the Explanations to Article 52(3).⁵⁵ *Kadi I* and *Opinion 2/13* imply that the CJEU is reluctant to tie its own hand so that it maintains the possibility to give its own divergent interpretation.⁵⁶ This is also in line with the way the CJEU treats Strasbourg, as we saw in section 1.2 (see also section 3.1). The CJEU has generally used the case law of the ECtHR indirectly as a source of inspiration ('by analogy') instead of a source which gives guidance in a coercive sense.⁵⁷ The CJEU does so with a view of keeping Strasbourg outside the EU legal order and in order to underline that cases in Luxembourg are different.⁵⁸

2. The CJEU's methodology

Several scholars have criticised the inconsistencies and the apparent absence of a method and explanation in the reliance on the case law of the ECtHR by the CJEU.⁵⁹ Douglas-Scott, for example, labeled the practice as 'messy, unpredictable and complex', while De Búrca pointed to the 'increasingly selective' use of Strasbourg and the 'detached, autonomous and potentially uninformed case law' of the CJEU with respect to fundamental right.⁶⁰ Similar observations have been put forward with respect to the CJEU's reliance on its own case law.⁶¹ Several interviews agreed with the absence of a uniform practice, which was considered inherent in any institution where human beings work.⁶² Interviewees confirmed that there is no general orientation, decision or plan within the CJEU on how to deal with the case law of the ECtHR. Rather, a step-by-step or spontaneous approach applies.⁶³ The attention that is being paid to a legal source, including the case law of the ECtHR, also

⁵⁵ The Explanations to Article 52(3) stipulate that: 'without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.' Opinion 1/91 [1991] ECR I-6079 and Opinion 1/09 [2014] nyr. Eckes, n 34 *supra*, 259-260.

⁵⁶ In *Kadi I*, the CJEU described the EC Treaty as 'an autonomous legal system which is not to be prejudiced by an international agreement'. Joined Cases 402/05 P and C-415/05 P, *Kadi* [2008] I-06351, para. 316. Senden, n 24 *supra*, 362. Harpaz, n 12 *supra*, 110.

⁵⁷ Interview O. L. Scheeck, 'Solving Europe's binary human rights puzzle. The interaction between supranational courts as a parameter of European governance', *Questions de Recherche*, no. 15 (2005), 21.

⁵⁸ *Ibid.*

⁵⁹ De Witte for example referred to the 'eclectic and unsystematic' approach. De Witte, n 3 *supra*, 19. Tulkens referred to Luxembourg's 'a la carte' use of ECHR. Scheeck, n 57 *supra*, 24.

⁶⁰ Often the ECtHR is cited, without discussing the facts of the case. Douglas-Scott, n 17 *supra*, 657-658 and 665. De Búrca, n 7 *supra*, 173-174.

⁶¹ Interview R. Tridimas qualified this practice as 'selective and superficial'. Tridimas, n 38 *supra*, 314-315 and 326.

⁶² Interview D, N, O, S, U.

⁶³ Interview B, C, O, U, V.

depends upon the composition of a Chamber and the dynamics within a certain formation.⁶⁴ There is, thus, not one unanimous opinion of ‘the’ CJEU, because there are different persons and formations.⁶⁵

This section discusses how the case law of the ECtHR is used by the CJEU by distinguishing between, on the one hand, the deliberative and heuristic phase during which the law is ‘discovered’ and a decision comes into being, and, on the other hand, the process of justification of the court’s decision in the eventual judgment.⁶⁶ This distinction is based on the possibility that judgments of the ECtHR are examined by the CJEU during the deliberative phase, but not explicitly referred to in a judgment. Not everything that has been considered by the CJEU ends up in judgment.⁶⁷ CJEU Judge Lenaerts, for example held that the CJEU’s research of ECtHR case law has often backed up a judgment of the CJEU but ‘rarely transpires directly in the reasoning’.⁶⁸

2.1. How? The way in which the case law of the ECtHR is examined in the deliberative phase

From the interviews it has become apparent that there is no formal mechanisms in the form of a standard format, guidelines or a separate department following the case law of the ECtHR that ensures that the case law of the ECtHR is duly taken into account.⁶⁹ This means that there is not a systematic method that is used by all judges and référendaires. Most interviewees, however, stated on the basis of their experience that the case law of the ECtHR is (almost) always -at least- considered or examined when a case concerns fundamental rights.⁷⁰ They, however, noted the tendency to start with the Charter as the primary point of reference,

⁶⁴ Interview B, E, N, O, U, W. Note, however, that there are several mechanisms to try to avoid inconsistencies; Vice-President and President who read all judgments. Lectors d’arrets who proofread all judgments and their uniformity with respect to the formal aspects. The Grand Chamber is another ‘mechanism’ that makes for coherence, because it eventually involves all the Judges in the debate. Interview B, C and V.

⁶⁵ Even the Grand Chamber has slightly more than halve of all judges involved. Interview N. See also M. Malecki, ‘Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgments of chambers’, *Journal of European Public Policy*, vol. 19, no. 1 (2012), 59-75.

⁶⁶ J. Bell, ‘The argumentative status of foreign Legal arguments’, *Utrecht Law Review*, vol. 8, no. 2 (2012), 8-19, 12. Mak, n 9 *supra*, 420.

⁶⁷ Interview I, P, X.

⁶⁸ K. Lenaerts, ‘Interlocking Legal orders in the European Union and comparative law’, *International and Comparative Law Quarterly*, vol. 52 (2003), 873-906, 873-875. See also C. McCrudden, ‘A common law of human rights? Transnational judicial conversations on constitutional rights’, *Oxford Journal of Legal Studies*, vol. 20, no. 4 (2000), 499-532, 511-512. Schiemann, n 16 *supra*, 286. De Búrca, n 7 *supra*, 178.

⁶⁹ Interview B, M, N, Q, Z.

⁷⁰ Interview A, C, D, E, O, P, R, S, T, V. It could obviously happen that judgments of ECtHR are simply overlooked. Interview W.

because this is considered the most up-to-date fundamental rights catalogue.⁷¹ One interviewee, nonetheless, admitted that the case law of the ECtHR may be studied less given the tendency to rely primarily upon the Charter and CJEU's own case law.⁷² Some interviewees also noted that the examination of the case law of the ECtHR has recently been more in the form of a compatibility check at the end, as will be discussed later.⁷³ Most commentators and interviewees noted that the AG usually examines and discusses the case law of the ECtHR more extensively than the CJEU.⁷⁴ The interviewees considered this a logical phenomenon given the different function of the AG and the fact that the AG has more freedom and time.⁷⁵ That is to say, the AG adopts a more analytical or academic approach and looks to the broader context to give reflections and alternative solutions that could enrich the legal debate. What is more, the AG does not have to compromise as the CJEU does.⁷⁶ One thing that is obvious, but what is nonetheless worth mentioning explicitly is that the CJEU does not solely rely on the work of the AG, but that it also conducts its own analysis of ECtHR case law independently. The CJEU, for example, referred to judgments of the ECtHR that were not mentioned in the Opinion of the AG.⁷⁷

Several interviewees noted that it is not only specific judgments of the ECtHR that have an impact, but rather the fundamental rights values and principles that are expressed in the case law of the ECtHR more generally. These values are always in the mind of those working at the CJEU and have an implicit influence on the way in which the CJEU handles certain cases.⁷⁸ The mindset of CJEU officials is shaped by a lifetime of reflection or education on human rights law of which the case law ECtHR obviously forms part.⁷⁹ Some interviews reframed this argument and argued that they are not concerned with the case law of the ECtHR very much, because they were of the opinion that the CJEU would spontaneously or independently reach the same outcome as the ECtHR, because the principles of the ECHR are ingrained in their way of thinking and the EC(t)HR is based on the same legal sources and

⁷¹ Interview C, D, E, I, N, Q, V, W. Morano-Foadi and Andreadakis, n 10 *supra*, 26-27. G. Arestis, 'Fundamental rights in the EU: three years after Lisbon, the Luxembourg perspective', College of Europe research papers, no. 2 (2013). Joint communication, n 6 *supra*, para. 1.

⁷² Interview W.

⁷³ Interview C, V.

⁷⁴ Douglas-Scott, n 17 *supra*, 647. G. de Baere, 'The Court of Justice of the EU as a European and international asylum court', *Working paper no. 118* (2013), 12-14. Iglesias Sánchez, n 27 *supra*, 1603.

⁷⁵ Interview B, C, E, I, N, O, P, V, Z.

⁷⁶ Interview T.

⁷⁷ Case 229/05, *Ocalan v Council* [2007] I-00439. Case 450/06, *Varec* [2008] I-00581. C-300/11, *ZZ* [2013] nyr. C-220/13, *Nikolau* [2014] nyr. Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland* [2014] nyr. Likewise, there are cases without an AG Opinion that refer to the case law of the ECtHR. Case 168/13 PPU, *Jeremy F* [2013] nyr. Case 510/11 P, *Kone v Commission* [2013] nyr.

⁷⁸ Interview N, S, U, V, Z. Douglas-Scott, n 17 *supra*, 660.

⁷⁹ Interview N.

legal traditions.⁸⁰ One interviewee likewise noted that there is no need to study specific judgments of the ECtHR, because of the assumption that the CJEU's own interpretation would automatically go beyond the interpretation of Strasbourg.⁸¹

It is primarily up to the *référéndaires* to make sure that everything, including any relevant case law, is thoroughly considered.⁸² Judges sometimes ask their *référéndaires* to do (additional) research on ECtHR case law, but this does not seem to happen very often.⁸³ *Référéndaires* –but also some judges– have used the case law database of the ECtHR (HUDOC)⁸⁴ and look in ECHR commentaries or scholarly literature.⁸⁵ Some interviewees noted that they sometimes might phone a friend or (former) colleague in Strasbourg.⁸⁶ One reason for this was that the ECtHR website and HUDOC database are considered difficult to navigate and less user friendly than Curia, the CJEU's database.⁸⁷ Another practical difficulty is that several important commentaries on ECHR are already outdated.⁸⁸ Hence, it is difficult for judges and *référéndaires* to be sure that they have found all the relevant and recent cases of the ECtHR for a given case.

The CJEU, more specifically the General Meeting of the Court, during which all Judges, AGs and the Registrar are present, has the option to request a 'note de recherche' from the Research and Documentation Department. This is usually a comparative law note on the legislation or legal practice in different Member States.⁸⁹ Some interviewees noted that the Court is generally reluctant to ask a note given the limited resources, so it would only do so when it is strictly necessary for solving the case.⁹⁰ Almost all interviewees held that they

⁸⁰ Interview T and U.

⁸¹ Interview C.

⁸² Interview D, N, P, T, X, W. See also Douglas-Scott, n 17 *supra*, 658.

⁸³ Interview B, D, O, T, V, W. It depends very much on individual Judges whether they give their *référéndaires* detailed instructions. Interview U. What could also happen is that a Judge and his/her *référéndaire* discuss a case jointly and one of them could come up with a Strasbourg-related question and jointly decide that this should be further examined by the *référéndaire*. Interview Q, Z.

⁸⁴ Interview D, T, V, Z.

⁸⁵ Interview A, W, Z. One interviewed judge held that he/she himself/ herself has not looked at the case law ECtHR a lot and guessed that this was less than once a year. Interview N.

⁸⁶ Interview W. Some, however, told that they have never done this when asked about it. Interview A, O and T. One interviewee has not done this either, but was aware that this sometimes happens. Interview U.

⁸⁷ Interview E, R, W. See also AG Kokott in Opinion 2/13 [2014], para. 224.

⁸⁸ Interview R.

⁸⁹ These notes usually do not deal with fundamental right issues. Interview Z. De Búrca, n 7 *supra*, 179. Two examples were given during which such a note was requested. Firstly, state liability in case of infringements of EU law attributable to national courts. Case 224/01, Köbler [2003] I-10239. Secondly, the definition of the concept of human embryo in Case 34/10, Brüstle [2011] I-09821. Interview B and N

⁹⁰ Interview O, Z. Judge Prechal also referred to the limited resources in 'Interview with Judge Sacha Prechal', 19 December 2013, at: <http://europeanlawblog.eu/?p=2118> [last accessed 4 May 2015]. The Research and Documentation Department writes a preliminary note about new incoming cases in which they shortly explain what the case is about in 1-1.5 pages. The Department makes references to the relevant case law of the CJEU and increasingly –after having been encouraged to do so– case law of other (inter)national courts, such as the

have never seen a request which specifically deals with the case law of the ECtHR.⁹¹ This is also not necessary because the case law of ECtHR is –despite the critical observations above– still relatively manageable and easily accessible via HUDOC, at least in comparison with the case law of national courts in some Member States.⁹² Some interviewees noted that the practice of the ECtHR, or the practice of third countries, usually Commonwealth countries or the International Court of Justice, is, however, looked at in the context of a comparative law note from time to time.⁹³

During the interview, some observations were also made about the deliberations themselves, even though the interviewees noted the private and secret nature of those meetings.⁹⁴ Several interviewees noted that there is not much discussion about the case law of the ECtHR. The case law of the ECtHR is not considered to be a reason for principled discussions.⁹⁵ It does not happen frequently that there is (oral) debate about the case law of the ECtHR in the *deliberé*.⁹⁶ Occasionally a judge might warn that a certain point could be problematic in the light of the case law of the ECtHR or he/she might refer to ECtHR case law in amendments to the draft judgment.⁹⁷ Interviewees referred to the following instances where there was actually some debate. In *Akzo Nobel*, which dealt with the question whether the legal professional privilege also extended to in-house lawyers, there was discussion in the *deliberé* about Article 6 ECHR and the case law of ECtHR on two occasions. This extensive discussion was considered to be relatively rare.⁹⁸ Likewise, Strasbourg was also debated lengthily in Court in the citizenship case of *ZZ* after discussions about it during the oral hearing.⁹⁹ Strasbourg was also discussed in *Sky Österreich*.¹⁰⁰ The ECtHR also had an added

ECtHR. Interview W. One interviewee noted that the contribution of these notes is limited, because they are not always complete and reliable. Interview O.

⁹¹ Interview B, M, N, Q.

⁹² Interview B, O, Z.

⁹³ Interview B, Q. See, however, interview N.

⁹⁴ The judge rapporteur could also organise a tour de table on an earlier occasion when (s)he disagrees with the Opinion of the AG or has hesitations. This tour de table is focused very much on outcome of the case and not so much the reasoning. Other judges sometimes refer to more recent or relevant cases of the CJEU, and occasionally the ECtHR. Interview B, N, V, W. Interviewee W noted that the case law of the ECtHR could play a role as well, but (s)he could not remember an instance.

⁹⁵ Interview C, N, V, W, Z.

⁹⁶ Interview A, B, Q. One interviewee, however, argued that it could be presumed that once the AG discusses the case law of the ECtHR, this is also touched upon in the *deliberé*. Interview I. The practice of cross-fertilisation is seldomly problematised by the participants in the two systems. McCrudden, n 9 *supra*, 390.

⁹⁷ Interview B, V.

⁹⁸ Interview A. Case 550/07 P, *Akzo Nobel v Commission* [2010] I-08301. The judgment did not cite the ECtHR, but AG Kokott did.

⁹⁹ Only a passing reference to ECtHR was made in the judgment. The CJEU determined that Article 47 Charter requires that when national authorities restrict the freedom of movement and residence of Union citizens, they must disclose to the person concerned, precisely and in full, the grounds on which that decision was taken and the related evidence limited to that which is strictly necessary. De Boer held that the CJEU's approach is clearly

value in debates among judges in the *Kadi* cases, about the freezing of assets of an alleged supporter of Al-Qaida, and *Digital Rights Ireland*, about the conformity of the Data Retention Directive with the right to privacy and data protection.¹⁰¹

In sum, the case law of the ECtHR is almost always examined when a case touches upon fundamental rights, primarily by the référendaire(s) of the Reporting Judge. What happens less often is that Strasbourg is discussed among judges in the *deliberé*.

2.2 Why? Reasons why the case law of the ECtHR is examined (or not) in the deliberative phase

The absence of a formal mechanism begs the question as to what makes that the CJEU examines the case law of the ECtHR in a particular case? The examination of Strasbourg is primarily driven by the preoccupation of the CJEU to prevent an open conflict with the ECtHR.¹⁰² CJEU Judge Prechal referred to the ‘search for convergence’¹⁰³, while former CJEU Judge Puissechet held that the CJEU is ‘extremely careful’ not to distance itself from ECtHR case law.¹⁰⁴ The inclination to avoid conflicting judgments was also confirmed by almost all interviewees.¹⁰⁵ What is more, there is also a certain willingness among CJEU judges in assisting Member States in fulfilling their obligations under both EU law and the ECHR. CJEU Judge Lenaerts, for example, noted with reference to *N.S.* that it is important to

inspired by the ECtHR who applies a similar distinction between the grounds for the decision and the evidence for it. N. de Boer, ‘Secret evidence and due process rights under EU law: ZZ’, *Common Market Law Review*, vol. 51, no. 4 (2014), 1235–1262, 1256. According to the interviewee, the (intervening) parties simply argued that the practice of the UK was consistent with the case law of the ECtHR, but they did not explain the case law of the ECtHR sufficiently. Interview O.

¹⁰⁰ Case 283/11, *Sky Österreich* [2013] nyr. Again, the judgment did not refer to the ECtHR. Interview O. This case was a request for a preliminary ruling by an Austrian court as to whether the requirement of Directive 2010/13/EU for holders of exclusive broadcasting rights to authorise any other broadcaster to make short news reports, without compensation exceeding the additional costs incurred in providing access to the signal was valid in the light of the right to property as laid down in Article 17 Charter and Article 1 of Additional Protocol No 1 to the ECHR and the freedom to conduct a business, Article 16 Charter. Hins noted that the approach of the CJEU corresponds to the ECtHR’s interpretation. W. Hins, ‘The freedom to conduct a business and the right to receive information for free: *Sky Österreich*’, *Common Market Law Review*, vol. 51, no. 2 (2014), 665–677, 673.

¹⁰¹ Interview B and O respectively. Joined Cases 402/05 P and C-415/05 P, *Kadi* [2008] I-06351. Joined Cases 293/12 and 594/12, *Digital Rights Ireland* [2014] nyr

¹⁰² Former CJEU Judge Arestis held that the CJEU is ‘very concerned with the consistency of its judgments’ with the case-law ECtHR. Arestis, n 71 *supra*, 13. Schiemann, n 16 *supra*, 285. The Joint Communication from Presidents Costa and Skouris pointed to the need to ensure ‘the greatest coherence’ between the ECHR and the Charter. Joint communication, n 6 *supra*, para. 1. Scheeck, n 10 *supra*, 14. Bronckers, n 43 *supra*, 604.

¹⁰³ S. Prechal and K. Cath, ‘The European acquis of civil procedure: constitutional aspects’, *Uniform Law Review*, vol. 19, no. 1 (2014), 1-20, 13.

¹⁰⁴ Scheeck, n 57 *supra*, 45.

¹⁰⁵ Interview B, N, Q, S and T. See also the CJEU judges quoted in Morano-Foadi: ‘Judges are responsible people and, for obvious reasons, they want to avoid conflicts or create chaos.’ and: ‘the last thing we have ever wanted is a situation where we were going to have a condemnation from Strasbourg’ . Morano-Foadi and Andreadakis, n 10 *supra*, 43 and 47-48.

avoid ‘double loyalties’ for Member States so that they do not have to choose between complying with their EU obligations or complying with the ECHR.¹⁰⁶ Rosas likewise noted the intention to avoid the situation that the ECHR and EU take on ‘two different strikes’, because this would create problems for Member States.¹⁰⁷

Examining the case law of ECtHR is seen as especially relevant when Charter provisions correspond to the rights in the ECHR.¹⁰⁸ One judge, for example, held: ‘If we have in the Charter a particular right, which comes out in the Convention so evidently, we will look what the Strasbourg Court has said in relation to this right when interpreting the Charter.’¹⁰⁹ Some interviewees noted that the case law of the ECtHR is closely studied in cases that deal with the Area of Freedom, Security and Justice (AFSJ), especially asylum and Brussels II cases.¹¹⁰ One interviewee gave *A, B & C*, about the procedures to determine the sexual orientation of asylum seekers, as an example of a case in which the practice of the ECtHR was almost automatically considered—but not explicitly quoted.¹¹¹ Likewise, the examination—and citation—of Strasbourg was considered inevitable in *M’Bodj* and *Abdida* that dealt with the removal of a third country national suffering a serious illness to a country where appropriate health treatment was not available.¹¹² The examination of Strasbourg in these cases can also be attributed to the reference to the case law of the ECtHR with respect to Article 3 ECHR (*Soering*) in the Explanations to Article 19(2) of the Charter which deals with protection in the event of removal, expulsion or extradition.¹¹³ Another example mentioned was *DEB* which deals with Article 47(3) of the Charter. The Explanations to Article 47(3) refer to the ECtHR judgment in *Airey* which was a reason to consider this (and subsequent) judgments of the ECtHR.¹¹⁴

Examination of Strasbourg case law also depends upon the extent to which the parties to the case have invoked the case law of the ECtHR, according to several interviewees.¹¹⁵

¹⁰⁶ K. Lenaerts and J.A. Gutiérrez Fons, ‘The Place of the Charter in the EU Constitutional Edifice’, in S. Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart 2014), paras. 55.03, 55.70 and 55.90.

¹⁰⁷ Rosas, n 4 *supra*, 9.

¹⁰⁸ Interview X.

¹⁰⁹ Another CJEU judge, for example, referred to the ‘Charter being the House and the Convention being the Chamber in the house’. Morano-Foadi and Andreadakis, n 10 *supra*, 44 and 24.

¹¹⁰ Interview A, E, X.

¹¹¹ Joined Cases 148/13 to 150/13, *A, B and C* [2014] nyr. Interview E.

¹¹² Case 542/13, *M’Bodj* [2014] nyr. Case 562/13, *Abdida* [2014]. Interview U.

¹¹³ The Explanations to Article 19(2) refer to *Ahmed v Austria*, ECHR [1996]-VI, p. 2206 and *Soering v United Kingdom*, ECHR [1989] Ser. A No. 161. There is also a general reference to the case law of the ECtHR with respect to Article 28, the right of collective bargaining and action.

¹¹⁴ *Airey v Ireland*, ECHR [1979] Ser. A No. p. 11. The Explanations are explicitly referred to in Case 279/09, *DEB* [2010] I-13849, para. 35. Interview Q. See also Prechal and Cath, n 103 *supra*, 14-15.

¹¹⁵ Interview B, C, D, N, V.

Maybe even more important is the intervention of the Commission, who submits its observations in every case, as well as the contributions of the Member States in important cases.¹¹⁶ All these interventions mean that judges and référendaires do not have to start from scratch or reinvent the wheel. All necessary elements for a judgment are usually already there before the hearing or the publication of the Opinion of the AG.¹¹⁷ One interviewee noted that 90 to 95% of the arguments in a case are usually brought up by the parties or by the agents of the intervening Member States. If a certain ECtHR inspired argument or a ECtHR specific judgment is not put forward, the chance is high that this argument is wrong or irrelevant.¹¹⁸ Especially when an ECtHR related argument is given by many (intervening) parties and/ or repeated during the oral hearing, this is taken by the Court as a message that the argument must be closely studied.¹¹⁹ What usually happens in practice is that référendaires check the arguments of the (intervening) parties. They, for example, check whether the invoked legislation and case law is relevant or subject to new developments.¹²⁰

The absence of lengthy discussions about Strasbourg stems from the limited time for judges and their référendaires who are not the judge rapporteur to consider and discuss all the intricacies of the case in-depth.¹²¹ Judge Prechal, for example, noted that she does not have much time to do research of her own: ‘in a case in which you are the reporting judge, it may be necessary to do some background reading for the very simple reason that the reporting judge has the lead.’¹²² The time spent on a particular case is surprisingly small. One Judge is roughly dealing with 30 cases at the same time.¹²³ The amount of time between receiving the first draft of the judgment and the first (and last) debate about it is often a matter of days rather than weeks. During this short period, judges also have to deal with other cases and hearings.¹²⁴ There is a pressure to issue ‘an adequate judgment soon rather than a better judgment later’, especially in smaller Chambers.¹²⁵ As will be discussed in the next section, the workload and pressure on judges also means that it is primarily up to the Reporting Judge to decide whether or not to cite the ECtHR.

¹¹⁶ Interview B, O, Q, Z.

¹¹⁷ Interview U, X.

¹¹⁸ Interview Z.

¹¹⁹ Interview U, W.

¹²⁰ Interview Z.

¹²¹ Interview E, N, P, W.

¹²² Prechal, n 90 *supra*. See also E. Sharpston, ‘Making the Court of Justice of the European Union more productive’, *Maastricht Journal of European and Comparative Law*, vol. 21, no. 4 (2014), 763-770, 765-766.

¹²³ Interview N.

¹²⁴ Interview N. Prechal, n 90 *supra*.

¹²⁵ Schiemann, n 16 *supra*, 294.

The extent to which Strasbourg is examined depends very much upon the personal interests and expertise of référendaires and judges. Judges and référendaires who worked earlier in or with Strasbourg are obviously more sensitive towards ECtHR case law.¹²⁶ There are several factors which have contributed to a greater awareness of the ECtHR among these and other CJEU officials. There are some informal mechanisms that ensure that judges and référendaires at the CJEU are kept informed about the case law of the ECtHR. The most obvious way is the ‘Reflets’, a newsletter that appears twice or three times a year and that contains ‘quick information on legal developments of European Union interest’.¹²⁷ The *Reflets* include short summaries of the most important judgments of the ECtHR as well as national courts and some international courts or tribunals. Some interviewees also regularly consult the website of the ECtHR or read monthly overviews of the judgments of ECtHR.¹²⁸ Important judgments of the ECtHR (or national courts) are sometimes circulated via email.¹²⁹ Some Cabinets also discuss recent interesting judgments of the CJEU, ECtHR or other (inter)national courts during monthly lunch meetings.¹³⁰ The disadvantage of the *Reflets*, which comprise sometimes more than 70 pages, or some of the other mechanisms is that interviewees read about cases that are not necessarily relevant at that moment.¹³¹ An additional problem is the earlier mentioned workload.¹³² One interviewee noted that he/she received 40 or 50 centimeters of paper for which he/she has not more than 15 minutes reading time.¹³³ Another mechanism which has contributed to a higher awareness of the ECtHR among CJEU judges are regular meetings with ECtHR judges which take place usually once or twice a year.¹³⁴ During these meetings, there are general discussions about matters of common interest and similar (upcoming) legal questions, but no discussions on pending cases.¹³⁵ There have, for example, been discussions about the institutional and procedural matters that would flow from the EU’s accession to the ECHR.¹³⁶ Judges also meet on other occasions, such as conferences and roundtables, or they invite each other to give speeches at

¹²⁶ Interview B, N, V.

¹²⁷ The *Reflets* have appeared since 1999 in French and since 2010 in English at: http://curia.europa.eu/jcms/jcms/Jo2_7063/ [last accessed 4 May 2015]. Interview M, N, R, Z.

¹²⁸ Interview M, R, V. Rosas, n 4 *supra*, 9. Morano-Foadi and Andreadakis, n 10 *supra*, 42.

¹²⁹ Interview M, R.

¹³⁰ Interview R.

¹³¹ Interview M, N, R.

¹³² Interview O, Q, R, V, X.

¹³³ Interview N.

¹³⁴ These meetings have taken place since 1998. Usually between 15 and 20 Judges or AGs from the CJEU participate in these meetings. Interview Q. Scheeck, n 10 *supra*, 6. Jacobs, n 6 *supra*, 552. McCrudden, n 9 *supra*, 390. C. Timmermans, ‘The relationship between the European Court of Justice and the European Court of Human Rights’, in A. Arnulf *et al.* (eds), *A constitutional order of states* (Oxford: Hart 2011), 151-160, 153.

¹³⁵ Interview N, Q, T, W. Morano-Foadi and Andreadakis, n 10 *supra*, 45.

¹³⁶ Interview B, N.

each other's courts.¹³⁷ The regular meetings and encounters were considered helpful by almost all interviewees.¹³⁸ Judges noted that the meetings 'enhance the relationship of trust' and give an opportunity to meet and know each other.¹³⁹ The regular meetings also offer an opportunity for the CJEU to explain to the Strasbourg judges the complicated EU context with respect to mutual trust and mutual recognition in order to avoid misunderstandings.¹⁴⁰ Some interviewees also noted that these meetings have contributed to a bigger impact of the case law of the ECtHR on the CJEU.¹⁴¹ The meetings, for example, have offered a chance to inquire whether there might be recent or upcoming judgments that would otherwise be overlooked.¹⁴²

3. Explicit references to the case law of the ECtHR

Despite the CJEU's reluctance from a formally legal and jurisdictional point to accept that it is explicitly bound by the ECHR as interpreted by ECtHR (see section 1.2), it is willing to take account of the case law of the ECtHR (see section 1.1). Section 3.1 will examine the practice of citing Strasbourg post-Lisbon, while section 3.2 will try to shed some light on the reasons which have been given by the interviewees for (not) citing the ECtHR, which are rarely spelled out by CJEU in its judgments.¹⁴³

3.1. How? An overview of references to the ECtHR in the judgments of the CJEU post-Lisbon

Post-Lisbon, the CJEU has continued referring to the case law of the ECtHR in its judgments, albeit less frequently than before the entry into force of the Charter. The case law of the ECtHR is sometimes used as a source of inspiration¹⁴⁴, sometimes 'by analogy'¹⁴⁵ and, at other times, the judgments of the ECtHR are directly relied upon as if they are the CJEU's own judgments.¹⁴⁶ Some judgments only make a passing reference to the ECtHR¹⁴⁷, while

¹³⁷ Interview N, V.

¹³⁸ Interview A, B, N, O, Q, T.

¹³⁹ Morano-Foadi and Andreadakis, n 10 *supra* 43.

¹⁴⁰ Interview A.

¹⁴¹ Interview B, O, Q, T.

¹⁴² Interview W.

¹⁴³ Harpaz, n 12 *supra*, 109.

¹⁴⁴ See, for example, AG Bot in Case 43/12, *European Commission v European Parliament* [2014] nyr, para. 65.

¹⁴⁵ See, for example, *Joined Cases 293/12 and 594/12, Digital Rights Ireland* [2014] nyr, para. 47, 54 and 55. AG Jääskinen in *Joined Cases 201/11 P, C-204/11 P and 205/11 P, UEFA* [2012] nyr, para. 38- 41.

¹⁴⁶ See, for example, *Joined Cases 92/09 and 93/09, Schecke* [2010] I-11063, para. 52. For a case of the GC, see *T-380/10, Wabco* [2013] nyr, para. 46.

others extensively discuss the content of the judgments of the ECtHR.¹⁴⁸ The most often mentioned judgments are *Kadi I*¹⁴⁹ and *NS*.¹⁵⁰ What is more, sometimes the ECHR and the case law of the ECtHR are not referred to at all, even though this might have been possible or desirable.¹⁵¹ This would, for example, be the case if (one of) the parties referred to the ECtHR¹⁵², or when national courts explicitly asked about conformity with the EC(t)HR in their preliminary references.¹⁵³ Likewise, there could be reason for the CJEU to do so when the AG paid extensive attention to the EC(t)HR in his or her Opinion.¹⁵⁴

There has, however, been a change post-Lisbon as to the frequency of express citations of the ECtHR. Almost all interviewees noted the tendency after Lisbon to refer less often to the ECHR and the case law of the ECtHR and instead rely (exclusively) on the Charter and the own case law of the CJEU.¹⁵⁵ This view is also confirmed by De Búrca who examined the period between 2009 and 2012 from a quantitative point of view.¹⁵⁶ These views thus confirm the proposition presented in the introduction that the CJEU has increasingly relied on its ‘own’ instrument. The best example is the CJEU’s case law with respect to Article 47 of the Charter. The CJEU held several times that: ‘Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47’.¹⁵⁷ CJEU Judge Safjan counted that only 16 out of the approximately 60 post-

¹⁴⁷ See, for example, Case 291/12, Schwarz [2013] nyr, para. 27.

¹⁴⁸ Case 400/10 PPU, J. McB. v L.E [2010] I-08965, para. 53. Case 279/09, DEB [2010] I-13849. Both De Witte and Marguery mentioned these cases as examples of careful analysis of the case law of the ECtHR by the CJEU. Marguery, n 6 *supra*, 285. De Witte, n 3 *supra*, 34.

¹⁴⁹ Joined Cases 402/05 P and C-415/05 P, Kadi [2008] I-06351. Interview B, Q, Z. F. Fabbrini and J. Larik, ‘Dialoguing for due process: Kadi, Nada, and the accession of the EU to the ECHR’, *Working paper No. 125* (2013), 6. Timmermans, n 134 *supra*, 153.

¹⁵⁰ Joined Cases C-411/10 and C-493/10, N.S. and Others [2011] I-13905. Interview V, W. De Baere, n 74 *supra*, 14. Timmermans, n 7 *supra*, 10.

¹⁵¹ De Witte, for example, noted that there is an extensive case law of the ECtHR in relation to the detention of irregular migrants, which was not referred to in Case 357/09, Kadzoev [2009] I-11189. De Witte (2011), 32

¹⁵² See, for example, Case 69/10, Samba Diouf [2011] I-07151. Case 534/11, Arslan [2013] nyr. Case 239/12 Abdulrahim v Council [2013] nyr.

¹⁵³ See, for example, Case 70/10, Scarlet [2011] I-11959. Case 416/10, Križan [2013] nyr. Case 361/12, Carratu [2013] nyr. Case 617/10, Åkerberg Fransson [2013] nyr, paras. Case 283/11, Sky Österreich [2013] nyr. AG Kokott also noted that Sky Österreich only examined the Charter despite the national court asking about Additional Protocol No 1 to the ECHR. AG Kokott in Case 398/13 P, Inuit Tapiriit Kanatami [2015], para. 67.

¹⁵⁴ See, for example, Case 550/07 P, Akzo Nobel v Commission [2010] I-08301. C-272/09 P, KME v Commission [2011] I-12789. Joined cases C-71/11 and C-99/11, Y and Z [2012] nyr. Case 60/12, Marián Baláž [2013] nyr. Case 146/14 PPU, Ali Mahdi [2014] nyr. Joined Cases 473/13 and 514/13 and in Case 474/13, Bero [2014]. C-314/12, UPC Telekabel Wien [2014] nyr. C-169/14 PPU, Morcillo [2014] nyr. C-129/14 PPU, Spasic [2014] nyr.

¹⁵⁵ Interview A, C, D, N, Q, R, S, V and W. Only one interviewee noted an increase in references to the ECtHR. Interview B.

¹⁵⁶ De Búrca, n 7 *supra*, 174-176. Eckes, however, found more references to the ECHR (the Convention instead of the ECtHR) in period 2010-2012 than in 2007-2009. Eckes, n 6 *supra*.

¹⁵⁷ See, for example, Case 386/10 P, Chalkor v Commission [2011] ECR I-13085, para. 51. Case 71/11, Otis [2012] nyr, para. 47. Case 396/11, Radu [2013] nyr, para. 32.

Lisbon cases dealing with effective judicial protection referred to Strasbourg, something which CJEU Judge Prechal qualified as understandable because Article 47 is a self-standing principle.¹⁵⁸ As will be discussed in the next subsection, this increased reliance on the Charter aims to underline the autonomy of the EU legal order and the Charter.¹⁵⁹

3.2. Why? Reasons for the CJEU (not) to quote in particular cases

As discussed in the section 2, there is no decision, strategy or common plan within the CJEU on how to deal with the case law of the ECtHR. This is also holds true for the matter of expressly citing Strasbourg. It depends very much upon the judges involved, and especially the judge rapporteur and his/her référendaires, whether references to Strasbourg are included in the judgment.¹⁶⁰ Every judge has a different writing style based on his or her preferences, legal education and professional experience. Some have a more succinct style, while others are more elaborate. Some prefer a (systematic) case law approach, while others are more interested in solving the case at hand.¹⁶¹ The existence of these personal differences and differences between formations, does not mean that there are no overarching ideas as to whether or not citation of the case law of the ECtHR is desirable. This section discusses several considerations emerging from the interviews conducted that have shaped the readiness of judges and référendaires to cite the Strasbourg case-law.

Emphasis on solving the dispute and persuading the parties, the general public and national courts

There is a great emphasis on solving the case at hand.¹⁶² The CJEU primarily sees its judgment as a device to explain the outcome towards the parties.¹⁶³ Former Judge Schiemann, for example, noted that it is the CJEU's task to come up with a solution in a concrete case and explain why the loser has lost instead of giving an academic treatise.¹⁶⁴ When several (intervening) parties explicitly relied on the case law of the ECtHR in their written and oral pleadings, the CJEU feels also more compelled to explicitly refer to Strasbourg, because this

¹⁵⁸ M. Safjan, 'A Union of effective judicial protection. Addressing a multi-level challenge through the lens of Article 47 CFREU', *King's College London*, February 2014, 9. Prechal and Cath, n 103 *supra* 14.

¹⁵⁹ One interviewee noted that this should, however, not be seen as a deed of animosity. Interview C.

¹⁶⁰ Interview B, E, N, T, V, Z..

¹⁶¹ Interview A, B, C, N, O, R. One interviewee disagreed that personal differences played a role. Interview X.

¹⁶² Interview D, U. Prechal, n 90 *supra*.

¹⁶³ Interview C, I.

¹⁶⁴ Schiemann, n 16 *supra*, 287. Schiemann (2005), 742. Mak, n 9 *supra*, 444.

shows that it has taken into account the arguments put forward.¹⁶⁵ The CJEU's judgment is also seen as an explanation towards the general public. This also means that when a judgment deals with a sensitive or complex matter, where the CJEU's decision is not self-evident, there is more reason for the CJEU to refer to Strasbourg.¹⁶⁶ With a citation, the CJEU could emphasise that it is not alone and has not done a 'very special discovery'.¹⁶⁷ Especially in landmark cases, such as *Kadi* and *NS*, there is a need to fortify arguments and bolster the persuasive force of CJEU judgments.¹⁶⁸ Former CJEU Judge Timmermans, for example, held that references to the ECtHR in CJEU judgments: 'may possibly increase their legitimacy and improve the acceptance of [the CJEU's] own case law'.¹⁶⁹ Likewise, former AG Maduro argued that citations 'provide an added guarantee for the social acceptance of its decisions and its smoother application by national courts'.¹⁷⁰ This was also put forward by an interviewee who noted that citing ECtHR could reassure national (constitutional) courts and secure compliance with a CJEU judgment, because it makes it more difficult for national courts to object.¹⁷¹

The CJEU does not regard the ECtHR as its relevant audience. Explicitly referring to ECtHR as a signal to Strasbourg that the CJEU has taken into account (or is obedient to the ECtHR) is therefore not considered a very strong reason for doing so, even though this is sometimes mentioned in the literature as a motive for citing.¹⁷² It was noted that national courts are not doing that either.¹⁷³ One interviewee told about a 'corridor joke' in the CJEU that Strasbourg is almost begging the CJEU to cite it, because there is a great concern in Strasbourg about the more limited citations of the ECtHR post-Lisbon. But the CJEU is not referring to the ECtHR to make judges in Strasbourg happy.¹⁷⁴

The focus on solving the dispute and on explaining the decision to the parties of the case also means that the CJEU is reluctant to go beyond the case file and the specific

¹⁶⁵ Interview U, V, W

¹⁶⁶ Interview C, V. Iglesias Sánchez, n 27 *supra*, 1604.

¹⁶⁷ Interview A and B. For similar arguments in the literature, see McCrudden, n 68 *supra*, 514, 519 and 523. A.M. Slaughter, 'A typology of transjudicial communication', *University of Richmond Law Review* (1994), 99-137, 118. C.N. Kakouris, 'Use of the comparative method by the Court of Justice of the European Communities', *Pace International Law Review*, vol. 6, no. 2 (1994), 267-283. Lenaerts, n 68 *supra* (2003), 875.

¹⁶⁸ Bronckers, n 43 *supra*. Douglas-Scott, n 16 *supra*. Senden, n 24 *supra*, 367.

¹⁶⁹ Timmermans, n 134 *supra*, 153.

¹⁷⁰ M.P. Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies*, vol. 1, no. 2 (2007), 6. See also Scheeck, n 10 *supra*, 16. Slaughter, n 167 *supra*, 114-116.

¹⁷¹ Interview X.

¹⁷² Interview O, Z.

¹⁷³ Interview A.

¹⁷⁴ Interview W. One interviewee, however, noted that a reason to explicitly cite the ECtHR is to show Strasbourg that the CJEU still deserves the *Bosphorus* presumption of equivalent protection. Interview B.

constellation of the facts. Several interviewees noted that the CJEU aims to solve the case within these boundaries without adding an *obiter dictum*.¹⁷⁵ CJEU judges are anxious to restrict their judgments to the ‘smallest possible compass’ rather than laying down broad or abstract guidelines for all cases that might pop up in future.¹⁷⁶ If a case incidentally deals with fundamental rights, the CJEU will not use that case as a pretext to give its broader reflections on such fundamental rights issues.¹⁷⁷ This is because of the risk that the CJEU develops something that does not fit well with the case.¹⁷⁸ Judges are cautious and prefer to follow a step by step approach dealing with one case at a time, because they are interested in the CJEU’s legitimacy in the long term.¹⁷⁹ De Búrca also noted that the CJEU thinks that its legitimacy and the acceptability of its judgments is best served by a cautious and minimalist stance.¹⁸⁰ There is thus a concern to remain within EU competences and resist a ‘federal temptation’ whereby fundamental rights are used to transform the EU legal order on the CJEU’s own initiative.¹⁸¹ These considerations mean that the ECtHR will only be explicitly cited when this is really necessary or very relevant for the solution of the case.¹⁸² One example of a case which has been criticised for the fact that it did not refer to the case law of the ECtHR was *Google Spain* about the right to be forgotten. One interviewee held that this case was not regarded as the right occasion to deal explicitly with access to information as being part of the right to freedom of expression, since the case did not involve a person with political relevance where that would play a role.¹⁸³ This interviewee noted that the CJEU has to wait for another opportunity to express itself upon these matters. Another example is *Radu*, where the CJEU held that Romanian authorities could not refuse to execute a European arrest warrant issued by the German authorities for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the German authorities before the arrest warrant was issued. According to some, the CJEU paid insufficient attention to fundamental rights considerations, including the case law of the ECtHR, and failed to

¹⁷⁵ Interview C, O, U. The CJEU is also hesitant to apply the case law of the ECtHR *ex officio*, unless it is obvious that something is contrary to ECHR. Interview Q.

¹⁷⁶ Interview N.

¹⁷⁷ Interview Z.

¹⁷⁸ Interview I.

¹⁷⁹ Interview C. Another consideration is that it is also difficult and not desirable for the CJEU to reverse its own judgments (all too often). Interview O.

¹⁸⁰ De Búrca, n 7 *supra*, 178.

¹⁸¹ Polakiewicz, n 7 *supra*, 9. P. Cruz Villalón, ‘Rights in Europe. The Crowded House’, *King’s College Working Paper*, no. 1 (2012), 11.

¹⁸² Interview D, E, O, W, Z. One interviewee noted that there are less than a handful of cases within one year (Z).

¹⁸³ Interview C. Case 131/12, *Google Spain* [2014] nyr. In its case law, the ECtHR has given more prominence to the right to freedom of expression and the right to access and receive information. E. Frantziou. ‘Further developments in the right to be forgotten’, *Human Rights Law Review*, vol.14 (2014), 761-777, 772.

transpose its *N.S.* logic to this case.¹⁸⁴ Several interviewees noted that fundamental rights considerations or the Charter did not play a role at all and that it would be dangerous had the CJEU gone into that.¹⁸⁵ Interviewees felt that *Radu* was not the proper case to express itself on fundamental rights concerns that certainly exist with respect to the EAW, and thus had to await another case in future. *Radu* only dealt with the surrender of Radu by the Romanian authorities and not the role of the fundamental rights in the subsequent trial process in Germany.¹⁸⁶

The tendency to only solve a dispute without offering an ‘academic treatise’ also reflects a reluctance to frame everything in terms of fundamental rights.¹⁸⁷ There is a strong consciousness among the interviewees that the CJEU is not a human rights or fundamental rights court.¹⁸⁸ President Skouris, for example, held in May 2014 that: ‘the Court of Justice is not a human rights court; it is the Supreme Court of the European Union’.¹⁸⁹ Several interviewees considered fundamental rights not to be the centre of the problem in many cases before the Court. Only in a handful of cases are they essential to the problem.¹⁹⁰ Cases are preferably solved on the basis of secondary legislation, especially when there is secondary legislation that contains a certain balance between clashing fundamental rights.¹⁹¹ One example given during the interviews was *Abdullahi* where the CJEU had to answer the rather factual question what the first asylum seeker’s country of entry was, Greece or Hungary. This was not considered a fundamental rights question that warranted an ECHR analysis despite the fact that the Austrian court referred to the ECtHR and *M.S.S.* in its preliminary questions to the CJEU.¹⁹²

¹⁸⁴ Case 396/11, *Radu* [2013] nyr.

¹⁸⁵ Interview I, X, Z.

¹⁸⁶ One interviewee noted that this trial phase does not fall within the scope of EU law and, thus, the Charter. It would be dangerous had the CJEU nonetheless dealt with this, since this would suggest that Union law is applicable even though there is no EU competence. What’s more, as the CJEU also noted in its judgment, an arrest warrant must have a certain element of surprise and prevent the person concerned from taking flight, which was seen as a real risk by one interviewee. Case 396/11, *Radu* [2013] nyr, para. 40. Interview I.

¹⁸⁷ Interview C.

¹⁸⁸ Interview N, X, Q. This despite some wishful thinking assertions in the literature that fundamental rights are truly decisive. S. Morano-Foadi and S. Andreadakis, ‘Reflections on the architecture of the EU after the Treaty of Lisbon: the European judicial approach to fundamental rights’, *European Law Journal*, vol. 17, no. 5 (2011), 595-610.

¹⁸⁹ L. Besselink, ‘The CJEU as the European ‘Supreme Court’: Setting Aside Citizens’ Rights for EU Law Supremacy’, 18 augustus 2014, at: <http://www.verfassungsblog.de/CJEU-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/>. Interview Q.

¹⁹⁰ Interview A (only 5%), E, N, Q (less than 20%), U, Z (20% would be a lot). McCrudden, n 9 *supra*, 407.

¹⁹¹ Interview E.

¹⁹² Case 394/12, *Abdullahi* [2013] nyr. Interview W.

Keepings judgments as concise as possible

Closely related to the first point of solving the dispute at hand is the desire to keep judgments to the essential and as concise as possible.¹⁹³ This also relates to the continental or French approach of the CJEU with a fairly minimalist, formulaic and impersonal style of reasoning.¹⁹⁴ This minimalist style of referencing in judgments also exists with respect to the CJEU's own precedents, as some interviewees noted.¹⁹⁵ The tendency to limit judgments to the essential means that if the judge rapporteur agrees with the AG and follows his or her Opinion, it is not always found necessary to repeat the AG's analysis and citations of ECtHR.¹⁹⁶ This also explains why many judgments of the CJEU do not refer to the case law of the ECtHR, despite extensive discussion in the Opinion of the AG.¹⁹⁷ Keeping judgments to the essential also means that quite often initial references to the ECtHR in the draft written by the judge rapporteur are struck out at the deliberation stage if they are not strictly necessary, because they unnecessarily lengthen the judgment.¹⁹⁸ This happened, for example, in *Pupino*, where the final judgment quoted the ECtHR less extensively than the initial draft.¹⁹⁹ An argument for omitting explicit references to Strasbourg is that it is already evident that the EC(t)HR is taken into account, because of the obligation of Article 52(3) of the Charter.²⁰⁰ There is thus no need to stress that in the judgment itself. Likewise, one interviewee noted that because the ECtHR has already held that the fundamental rights protection within the EU is presumed to be at least equivalent, there is no need to quote Strasbourg either.²⁰¹

There are several reasons for the minimalistic style of referencing to (inter)national courts, including the ECtHR. Firstly, the fact that the CJEU works on the basis of a single collegiate judgment adopted by consensus. The more things to be discussed and included in a certain judgment, the greater the risk of divisions among judges.²⁰² Every sentence is examined by many eyes and can potentially give rise to disagreement.²⁰³ This thus favours

¹⁹³ Interview I, N, O, U, Z.

¹⁹⁴ Harpaz, n 12 *supra*, 109. McCrudden, n 9 *supra*, 403.

¹⁹⁵ Interview D, T. Tridimas, n 38 *supra*, 316. More generally, the CJEU does not make detailed reference to comparative examination of judgments of (inter)national courts that has preceded its judgment, if at all. Kakouris, n 167 *supra*, 275. De Búrca, n 7 *supra*, 179. Interview A, O, R.

¹⁹⁶ Interview B, Q, S, X. Lenaerts, n 68 *supra* (2003), 875.

¹⁹⁷ N 154 *supra*.

¹⁹⁸ Interview A, E, N, S.

¹⁹⁹ Case 105/03, *Pupino* [2005] I-05285. This was based on information from an interview with a CJEU judge. Scheeck, n 10 *supra*, 17.

²⁰⁰ Interview A.

²⁰¹ Interview D.

²⁰² Interview I.

²⁰³ Schiemann, n 16 *supra*, 290.

brevity and means that the judgment is limited to the very essential.²⁰⁴ Secondly, the inclination to keep judgments short is also inspired by more practical considerations, such as the wish to get through the caseload as quickly and efficiently as possible given the heavy workload of the CJEU and the limited time available.²⁰⁵ Thirdly, the tendency to keep judgments short also stems from the cautiousness of judges. Some interviewees noted that the more references are put in a judgment, the bigger the risk is that a mistake is made in terms of referring to wrong or outdated case law or cases that have a completely different factual context.²⁰⁶ Former Judge Schiemann likewise noted that the ‘simplest course for the judge is not to mention any foreign influences’, because if a judge cites ‘a mere snippet’ this would leave him exposed to criticism that he has not grasped the entire context.²⁰⁷ Some interviewees therefore expressed the idea that it is better not to quote at all, because if you only quote on some occasions, while not on other occasions, this might create the impression that the case law of the ECtHR has not always been taken into account.²⁰⁸ A wrong citation could also attract negative attention and criticism.²⁰⁹ A complicating factor with respect to the case law of the ECtHR is that it is difficult to really keep track of all the developments in Strasbourg, also because commentaries on the ECHR sometimes lag behind a couple of years with respect to certain fields of law. This makes it really difficult for the CJEU to be completely sure about whether they have arrived at a complete picture.²¹⁰

Solving the case on the basis of the CJEU’s own case law and secondary EU legislation

There is an inclination to solve a case as far as possible on the basis of the CJEU’s own case law and secondary EU legislation.²¹¹ It is not felt necessary to quote Strasbourg when the reasoning in the judgment can be solidly based on the CJEU’s own case law, Union law and/or the legal text of the Charter and the Explanation thereto.²¹² Interviewees noted that the case law of the ECtHR should really have ‘added value’ or have been ‘decisive’ in the

²⁰⁴ K. Lenaerts, ‘How the ECJ thinks: a study on judicial legitimacy’, *Fordham International Law Journal*, vol. 36 (2013), 1302-1371, 1351.

²⁰⁵ Another consideration is avoiding (excessive) translation costs. Interview N. E. Sharpston, n 122 *supra*, 765-767. De Búrca, n 7 *supra*, 178.

²⁰⁶ Interview I, R. According to De Búrca, the CJEU also tries to avoid cherry-picking. De Búrca, n 7 *supra*, 178. See also Mak, n 9 *supra*, 443.

²⁰⁷ Schiemann, n 16 *supra*, 287.

²⁰⁸ Interview A, I, R.

²⁰⁹ Interview Z.

²¹⁰ Interview R.

²¹¹ Interview E, W, X, Z.

²¹² Interview C, I, Q, S, V, Z. If it is just a matter of a very general principle, these can also often be found in the CJEU’s own case law. Interview S. See also Douglas-Scott, n 16 *supra*, 161. Iglesias Sánchez, n 27 *supra*, 1603-1604.

deliberative phase in order for it to be cited. Otherwise the CJEU would just refer to its own precedents only.²¹³ Referring to Strasbourg thus happens when a Charter provision has never been applied or interpreted before or when there is no corresponding principle in the Charter or the CJEU's own case law.²¹⁴ One example is *DEB*, where the solution to the case (legal aid to legal persons) could not be immediately derived from the Charter and where different interpretations were possible.²¹⁵ The CJEU turned to the ECtHR for inspiration and performed a 'lengthy examination' even though it was not requested by the referring court to do so.²¹⁶ By contrast, the case law of ECtHR with respect to detention of illegal migrants was considered, but not quoted, in the context of *Kadzoev*, since there was a clear source of EU law (Directive) which gave all the indications needed to deal with the case.²¹⁷ Likewise, as mentioned earlier, the case law of the ECtHR was duly considered in the refugee protection cases of *A, B & C* and *X, Y & Z*, but not cited because the case could be solved by solely interpreting secondary legislation (implicitly) in line with fundamental rights.²¹⁸ The latter also implies, as several interviewees stressed, that the CJEU is not citing simply for the sake of citing or citing for purely ornamental purposes as window-dressing.²¹⁹ When a certain result or interpretation is obvious, there is no need to cite the ECtHR. One interviewee said that quoting in a pretty obvious situation is the same as saying 'it rains' when water is coming out of the air.²²⁰

Another expression of this tendency to rely on the CJEU's own precedents is the feeling that it is not necessary to constantly refer back to Strasbourg precedents, or in the words of two interviewees to 'Adam and Eva' or 'Noah's ark'.²²¹ The preferred route is to only refer to the CJEU's own precedent in which the case law of the ECtHR was considered and quoted for the first time. One example is *Åkerberg Fransson*, which referred back to *Bonda* which examined the ECtHR's Engel-criteria determining whether a prosecution is criminal in nature.²²² Likewise, *Kaveh Puid* only cited the CJEU's own precedent of *N.S.* and

²¹³ Interview Q and I respectively and P and W.

²¹⁴ Interview Q, S, U.

²¹⁵ Interview W.

²¹⁶ P. Oliver, 'Case C-279/09', *Common Market Law Review*, vol. 48, no. 6 (2011), 2023–2040, 2034. S. Morano-Foadi and S. Andreadakis, n 188 *supra*, 605. Iglesias Sánchez, n 27 *supra*, 1603-1604.

²¹⁷ Interview U. Case 357/09, *Kadzoev* [2009] I-11189.

²¹⁸ Interview E.

²¹⁹ Interview O, Q, T, U, Z. Interviewees were thus skeptic of the literature that posits that foreign law citation 'adds luster to an argument already available in the host legal system' or is mainly ornamental and rhetorical and irrelevant for the result. Bell, n 66 *supra*, 8 and 11.

²²⁰ Interview S. See also interview T.

²²¹ Interview C, X.

²²² Case 617/10, *Åkerberg Fransson* [2013] nyr, para. 35. Case 489/10, *Bonda* [2012] nyr, para. 37. *Engel v Netherlands*, ECHR [1976], Ser. A No. 22. Interview C, X. In *Bonda*, the CJEU adopted a material test in line

not the ECtHR equivalent of *M.S.S.* that played an important role in the *N.S.* judgment.²²³ Likewise, the judgment of *Trade Agency* only referred to the CJEU's own judgment in *DEB* which discussed the ECtHR extensively.²²⁴ In these cases the ECtHR case law is thus implicitly or indirectly referred to.²²⁵ Some interviewees noted that referring to the older ECtHR precedent is risky in the sense that there might have been new developments in the ECtHR context. Checking this would require an additional effort, which is simply not undertaken if the CJEU does not really need the ECtHR reference.²²⁶

Different courts and different approaches

Another feature which has limited the applicability and the possibility of citing the Strasbourg case law is that the CJEU and the ECtHR are seen as completely different courts with completely different roles, as AG Maduro also noted in his Opinion in *Kadi I*.²²⁷ The ECtHR conducts an external and subsidiary review to ensure that fundamental rights of individuals are sufficiently protected in specific cases, whereas the task of the CJEU is to ensure the strict uniformity, primacy and effectiveness of EU law.²²⁸ Both courts also depart from different logics in another way. Given the prominence of economic freedoms, the CJEU, for example, examines the lawfulness of resorting to fundamental rights when these interfere with fundamental market freedoms, whereas the ECtHR merely examines the legality of a restriction on a certain fundamental right.²²⁹ This different approach was also highlighted by

with the ECtHR's *Engel* case law. A. Andreangeli, 'Ne bis in idem and Administrative Sanctions: Bonda', *Common Market Law Review*, vol. 50, no. 6 (2013), 1827–1842. Lenaerts and Gutierrez Fons, n 106 *supra*, para. 55.63.

²²³ Case 4/11, Kaveh Puid [2013] nyr. Interview I.

²²⁴ Case 619/10, Trade Agency [2012], nyr, para. 52. Interview D.

²²⁵ One interviewee noted that even though the case law of the ECtHR is 'lost', the 'advantage' of this type of cases is that the CJEU has internalised the case law ECtHR and has somehow made it its own precedent which consequently makes it more difficult for the CJEU to depart from. Interview X.

²²⁶ Interview I.

²²⁷ AG Maduro in Joined Cases 402/05 P and C-415/05 P, *Kadi* [2008] I-06351, para. 37. Interview V, Z. Douglas-Scott, n 17 *supra*, 649. McCrudden, n 9 *supra*, 407. J. Gerards, 'Pluralism, deference and the margin of appreciation doctrine', *European Law Journal*, vol. 17, no. 1 (2011), 80-120, 102.

²²⁸ Interview C. J.P. Costa, 'On the legitimacy of the European Court of Human Rights' judgments', *European Constitutional Law Review*, vol. 7 (2011), 173–182, 180. M. Safjan and D. Düsterhaus, 'A Union of effective judicial protection: Addressing a multi-level challenge through the lens of Article 47 CFREU', *Yearbook of European Law* (2014), 1–38, 36. Judge Safjan also noted that the dynamic of ensuring the effectiveness EU law 'fundamentally differs' from the Strasbourg Court's margin of appreciation. Safjan, n 158 *supra*, 10-11.

²²⁹ Examples include the *Vking* and *Laval* cases, where the CJEU considered whether trade union action was compatible with the freedom of services and establishment. A. Veldman, 'The protection of the fundamental right to strike within the context of the European internal market: implications of the forthcoming accession of the EU to the ECHR', *Utrecht Law Review*, vol. 9, no. 1 (2013), 113. Senden, n 24 *supra*, 316-318. Groussot and Gill-Pedro, n 35 *supra*, 240-241. Douglas-Scott, n 16 *supra*, 177.

AG Kokott in her Views in *Opinion 2/13*.²³⁰ In addition, many EU fundamental rights cases arise in the context of competition law where undertakings invoke the right against self-incrimination, access to legal aid and presumption of innocence. Such claims of legal persons might necessitate a different solution than fundamental rights claims of individuals in the ECHR context.²³¹ Several interviewees noted that the ECtHR has a more intergovernmental or state-centered perspective, whereas the CJEU also has to consider the more transnational and integrational aspects of EU law. This tension is especially apparent in the Area for Freedom Security and Justice, for example, with respect to the Dublin Regulation and the European Arrest Warrant.²³² The CJEU has to avoid that the system based on mutual trust and mutual recognition collapses by refusing that executing (national courts in other) Member States start to second guess decisions and procedures of other Member States all too easily.²³³ These views are also visible in *Opinion 2/13*, where the CJEU held that the ECHR obligation for Member States to check that other Member States have observed fundamental rights affects ‘the specific characteristics of EU law and its autonomy’. The CJEU emphasised that Member States are required under EU law to presume that fundamental rights have been observed, save only in exceptional circumstances.²³⁴ One interviewee noted that these EU law particularities of mutual trust and mutual recognition are not familiar for some Strasbourg judges as a result of which this different context is not always sufficiently taken into account by the ECtHR.²³⁵

Several interviewees also noted that it is also unnecessary or sometimes even wrong to refer to the ECtHR if the case before the CJEU is different from a Strasbourg precedent.²³⁶ Situations should really be the same.²³⁷ The case law of the ECtHR is not always considered very useful, because it has a rather casuistic and detailed approach concentrating very much

²³⁰ Opinion 2/13 [2014] nyr, para. 206.

²³¹ Douglas-Scot, n 16 *supra*, 177.

²³² Interview I, Q, X.

²³³ Interview I, W, X.

²³⁴ Opinion 2/13 [2014] nyr, para. 192-193. These views also explain the stance of the CJEU in *Melloni*, where the CJEU set a maximum level of fundamental rights protection in order to protect to primacy, unity and effectiveness of EU law. Interview I. Case 399/11, *Melloni* [2013] nyr.

²³⁵ Interview A.

²³⁶ There are some examples of misplaced references to the ECtHR. In *Varec*, the CJEU, for example, referred to ECtHR judgment in *Peck* and *Colas Est* to support its finding that the disclosure to an undertaking of a competitor’s tender application would infringe that competitor’s respect for private life under Article 8 ECHR. *Colas Est* did, however, not deal with ‘private life’, but respect for the domicile of a company, while *Peck* involved the broadcasting of a mentally ill person attempting suicide. Case 450/06, *Varec* [2008] I-00581, para. 48. *Société Colas Est v France* [2002] ECHR 2002-III. Groussot and Gill-Pedro, n 35 *supra*, 256.

²³⁷ Interview O, S, T.

on the national context and law.²³⁸ *Schwarz*, for example, made only a short reference to the ECtHR case of *S and Marper*. The reason for this was that there was a ‘huge difference’ between both cases.²³⁹ *Schwarz* involved an ordinary citizen who was denied a passport since he refused to give his fingerprints so that they could be stored on that passport, while *S and Marper* was about the retention of fingerprints, cellular samples and DNA profiles of two British suspects. There was thus no more than limited overlap and the case law of the ECtHR was considered only partially useful.²⁴⁰ The CJEU prefers to omit or limit references to the ECtHR in such cases instead of explaining in what way the cases are different, also because this would unnecessarily lengthen the judgment.²⁴¹ In *Google Spain*, there were no references to the case law of the ECtHR exactly because this case law did not entirely cover the subject, because judgments of the ECtHR to that date only dealt with a private person and a press agencies or newspapers instead of a search engine like Google.²⁴² In *Y&Z and X, Y & Z*, the ECtHR was felt to be of less importance, because the question was not so much whether a particular state lived up to the standards of the ECHR, but whether the criminalisation of, respectively, religious practices and homosexual acts constitute acts of persecution.²⁴³

Strategic reasons: developing an autonomous interpretation of the Charter

There are some more strategically oriented ideas that motivate the CJEU to cite the ECtHR or not.²⁴⁴ One interviewee noted that the less frequent citation of ECtHR might relate to the fear that by citing, the CJEU implicitly acknowledges that the ECtHR is superior.²⁴⁵ Another interviewee argued that it would be ‘problematic’ or ‘weird’ for a court to quote another court all too often, because that seems to imply that it lacks authority of its own.²⁴⁶ This fear of being seen as too reliant and, hence, losing authority is also discussed in the literature.²⁴⁷

²³⁸ The CJEU is confronted with legal questions which are generally more abstract. Interview Q, Z. Gerards, n 227 *supra*, 103.

²³⁹ Interview V.

²⁴⁰ Case 291/12, *Schwarz* [2013] nyr, para. 27. *S. and Marper v United Kingdom* [2008] ECHR 1581. Interview V.

²⁴¹ Interview R.

²⁴² Interview C. Case 131/12, *Google Spain* [2014] nyr.

²⁴³ Interview I. Joined Cases 71/11 and 99/11, *Y and Z* [2012] nyr. Joined Cases 199/12 to 201/12, *X, Y and Z* [2014] nyr. Note that the CJEU goes further than ECtHR, because the ECtHR has held that if a person can live discreetly and avoid punishment there would be no problem, whereas the CJEU considered the possibility of such concealment irrelevant. M. Den Heijer, ‘Protection for reason of sexual orientation’, *Common Market Law Review*, vol. 51 (2014), 1217-1234, 1230.

²⁴⁴ McCrudden, n 9 *supra*, 405.

²⁴⁵ Interview V.

²⁴⁶ Interview D.

²⁴⁷ Douglas-Scott, n 17 *supra*, 652. Mak, n 9 *supra*. Slaughter, n 167 *supra*, 118.

A more nuanced version of this ‘highest authority’ notion is the idea that there is no reason to explicitly quote the ECHR and the ECtHR when the Charter goes further than the ECHR or when a Charter right is not included in the ECHR.²⁴⁸ There is even a strong desire among several interviewees that the importance, autonomy and higher level of protection of the EU’s ‘own catalogue’ should be underlined by citing Strasbourg less often.²⁴⁹ Several interviewees noted that this is a natural and logical development, because the Charter was exactly developed with a view to giving the EU its own fundamental rights catalogue. It would, therefore, be strange had the CJEU continued with using the EC(t)HR as point of departure via the general principles of EU law.²⁵⁰ This was compared with the practice of some Constitutional Courts which (only) apply and interpret their own Constitution and omit any reference to the EC(t)HR.²⁵¹ The earlier mentioned *Chalkor* reasoning of ‘only’ referring to Article 47 Charter is the best example of ‘Charter-centrism’.²⁵² Likewise, AG Kokott, for example, dismissed the argument of the appellants in *Inuit II* that the General Court should have referred to the ECHR on the grounds that they failed to explain the ‘additional benefit’ in doing so. She implied that a reference to the ECHR would only be warranted if the ECHR is imposing higher requirements than the Charter.²⁵³

The search for autonomy might also explain why there has recently been a trend towards marginally checking the conformity with Strasbourg at the end of the deliberative process. This is also increasingly visible in the actual judgments where the Strasbourg-proofness of the judgment is mentioned at the end as a ‘by the way’ note. This underlines the CJEU’s wish to first develop its own vision.²⁵⁴ One example given by the interviewees was *Melloni*, where the CJEU mentioned at the end, without much elaboration: ‘This interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law

²⁴⁸ Interview N, X, W.

²⁴⁹ Interview D, O, X. One interviewee expressed the expectation that the older Charter will get, the more autonomous it will be interpreted. Interview C. See also Opinion 2/13 [2014] nyr, para. 170.

²⁵⁰ Interview C, Q, W.

²⁵¹ Interview A, C.

²⁵² Interview A. N 157 *supra*. CJEU Judge Lenaerts also referred to the Charter as a ‘shadow’ of EU law. Lenaerts and Gutiérrez Fons, n 106 *supra*, para. 55.26. Iglesias Sánchez, n 27 *supra*, 1601.

²⁵³ AG Kokott in Case 398/13 P, *Inuit Tapiriit Kanatami* [2015], paras. 69-70.

²⁵⁴ Interview C, V. Some AGs have also been relatively open about the need for an autonomous interpretation. AG Maduro, for example, proposed ‘an independent interpretation’ that does not depend on developments in the ECtHR case law. Case 465/07, *Elgafaji* [2009] I-00921, paras. 19 and 20. Likewise AG Cruz Villalón held that Article 47 has ‘acquired a separate identity and substance, which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR’. Case 69/10, *Samba Diouf* [2011] I-07151, para. 39. AG Cruz Villalón in Case 617/10, *Åkerberg Fransson* [2013] nyr, para. 87.

of the European Court of Human Rights'.²⁵⁵ The CJEU did something similar in *Elgafaj* when it referred to, but did not really discuss several judgments of the ECtHR: 'It should also, lastly, be added that the interpretation ... is fully compatible with the ECHR, including the case-law of the ECtHR'.²⁵⁶ Likewise, AG Szpunar offered a textual interpretation of Article 15(6) of the Return Directive 2008/115 in *Ali Mahdi* and subsequently noted that the case law of the ECtHR 'confirms that conclusion'.²⁵⁷ Another example is the observation of AG Sharpston in *M.*, after discussing the case law of the CJEU, that the 'Court's approach thus far seems to me not dissimilar from that of ECtHR'.²⁵⁸ This marginal cross-check relates to another practice pointed out by some interviewees that the CJEU has started to cite the ECtHR in order to differentiate and argue why a certain practice is *not* contrary to the ECHR.²⁵⁹ The CJEU, for example, held that the case law of the ECtHR with respect to Article 6 ECHR, more in particular the *Menarini* judgment, does *not* preclude a 'penalty' from being imposed by an administrative authority in the first instance when such a penalty can be reviewed by a judicial body that has full jurisdiction and can quash the decision of the authority.²⁶⁰ Likewise, the CJEU held in *Bonda* that the administrative nature of the measures provided for in the relevant Regulation 'is not called into question by an examination of the case-law of the European Court of Human Rights on the concept of 'criminal proceedings' within the meaning of Article 4(1) of Protocol No 7'.²⁶¹

4. Concluding remarks: the road ahead

This article tried to explain why the CJEU examines *and* cites the case law of the Strasbourg Court in some cases and not in others. It did so on the basis of interviews with those working in the Court of Justice. This article showed that the CJEU has continued examining and citing the case law of the ECtHR in several judgments post-Lisbon, even though the CJEU is not formally bound by the ECHR and the interpretation of the ECtHR. With the entry in force of

²⁵⁵ Case 399/11, *Melloni* [2013] nyr, para. 50. This proof-check at the end can be contrasted with the approach of AG Bot in his Opinion, who started with an analysis of the case law of the ECtHR. Interview V and X. A. Torres Pérez, 'Case note: Melloni in three acts: from dialogue to monologue', *European Constitutional Law Review*, vol. 10 (2014), 308-331, 313.

²⁵⁶ Case 465/07, *Elgafaji* [2009] I-00921, para. 44.

²⁵⁷ Case 146/14 PPU, *Ali Mahdi* [2014] nyr, para. 90.

²⁵⁸ AG Sharpston in Case 398/12, *M.* [2014] nyr, para. 35.

²⁵⁹ Interview D, Q, Z

²⁶⁰ Interview Q. *A. Menarini Diagnostics v. Italy* [ECHR] No 43509/08. *C-501/11 P, Schindler v Commission* [2013] nyr, para. 35-39. *Case 510/11 P, Kone v Commission* [2013] nyr, para. 22. *Case C-295/12 P, Telefónica v Commission* [2014] nyr, paras. 50-52.

²⁶¹ Case 489/10, *Bonda* [2012] nyr, para. 36. Interview Q, Z.

the Charter, the CJEU has, however, started to examine and cite the case law less frequently and extensively. From the interviews several factors can be distilled that actually work against an impact of the case law of the ECtHR on the CJEU. This includes, above all, the limited time available for the judges and their référendaires to extensively study and keep track of the case law of the ECtHR given their workload as well as the focus on the parties and the solving of the dispute. Especially with respect to the express citation of ECtHR judgments, more reasons *not* to cite were mentioned by the interviewees (see table for an overview). These reasons were summarized in five broader considerations limiting the readiness of judges and référendaires to cite the Strasbourg case-law. The latter two considerations are also reflected in the CJEU's *Opinion 2/13*.²⁶² A citation of ECtHR case law in a specific judgment is found necessary when that case law really had 'added value' in the deliberative phase, especially in sensitive or complex area, where a Charter provision had not yet been interpreted and applied or when the (intervening) parties relied on Strasbourg in their pleadings.

Broader considerations informing the readiness not to cite the ECtHR	More specific case specific considerations as to whether citation of the case law of the ECtHR is needed (or not)
An emphasis on solving the dispute and persuading the parties, the general public and national courts	Citation: <ul style="list-style-type: none"> • When (intervening) parties explicitly rely on case law • When it is a sensitive or complex matter No citation: <ul style="list-style-type: none"> • when this would go beyond the case file and the specific constellation of the facts • when fundamental rights are not at the heart of the case • to show the ECtHR that the case law was taken into account or to make Strasbourg happy
A tendency to keep judgments as concise as possible	No citation: <ul style="list-style-type: none"> • when references are not strictly necessary to solve the case • when the AG Opinion already quotes from the case law • when it is evident that the case law was already taken into account
An inclination to solve the case on the basis of the CJEU's own case law and secondary EU legislation	Citation: <ul style="list-style-type: none"> • when (Charter) provision has not yet been applied before • when case law had 'added value' or was 'decisive' No citation: <ul style="list-style-type: none"> • when the reasoning can be based on CJEU's own cases • when the result is obvious • when the case law can be referred to indirectly by mentioning the CJEU judgment that quoted the case law
An awareness that both courts are different courts and adopt diverse approaches	No citation: <ul style="list-style-type: none"> • when the (facts of the) cases are not really the same • when the case law needs explanation as to how it is different
Strategic reasons related to the	No citation:

²⁶² N 234 and 249 *supra*.

wish to develop an autonomous interpretation of the Charter	<ul style="list-style-type: none"> • when a Charter provision is not included in the ECHR or goes further than the ECHR • in order not to be seen as too reliant/ deferential
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It seems likely that this particular trend of examining and citing the case law of the ECtHR will continue. Accession of the EU to the ECHR will in any case take long, if it will ever happen, given *Opinion 2/13*. The redrafting of the accession agreement as well as the required ratification of the resulting agreement by the Member States of the EU and Council of Europe is expected to take quite a while, which means that the CJEU has ample time to develop and bolster its own fundamental rights case law. The CJEU could find tacit support for the priority it gives in the implicit “hierarchy” in Article 6 TEU, which refers to the Charter in the first paragraph. Accession to the EU is only mentioned in the second paragraph, while the supplementary role of the ECHR as general principles of EU law is listed in the third paragraph.²⁶³ The growing Charter jurisprudence of the CJEU might diminish the need to turn to Strasbourg even further and might even give rise to ideas among stakeholders that accession is redundant in the light of the high level of fundamental rights protection within the European legal order.

Even if the EU eventually accedes to the ECHR, the question remains whether that would fundamentally change something in the current practice of the CJEU with respect to the examination and citing of the ECtHR. AG Kokott, for example, noted in *Opinion 2/13* that accession will not alter in any fundamental respect the CJEU’s obligation to carefully *examine* the case law of the ECtHR on the basis of Article 6(3) TEU and Article 52(3) of the Charter.²⁶⁴ Likewise CJEU Judge Rosas argued that formal accession would not change things radically.²⁶⁵ On the other hand, accession might require (all) judges to know the case law of the ECtHR even better and to examine it more in-depth, because EU acts would be directly reviewable by the ECtHR and the CJEU could be overruled by the ECtHR.²⁶⁶ In addition, national courts will most likely also start asking the CJEU whether EU acts comply with ECHR after accession.²⁶⁷ As far as *citation* of Strasbourg goes, accession to the ECHR will not (legally) change things either, because the CJEU is in any case not required to

²⁶³ This internal logic was also noted by one interviewee. Interview D.

²⁶⁴ AG Kokott in *Opinion 2/13* [2014] nyr, para. 205.

²⁶⁵ Rosas, n 4 *supra*, 10. Former CJEU Judge Arestis also spoke about a ‘translation’ of the existing dialogue. Arestis, n 71 *supra*, 13. The view that ‘accession would merely confirm existing practices’ was also shared by interviewees. Interview A, Q. Scheeck, n 57 *supra*, 46.

²⁶⁶ Interview V and Z. One CJEU judge also held that the CJEU should be ‘more cautious’ and ‘more attentive’ after accession and ensure that all relevant ECtHR cases are considered. Morano-Foadi and Andreadakis, n 10 *supra*, 44. De Witte, n 3 *supra*, 24. Douglas-Scott, n 16 *supra*, 175-176.

²⁶⁷ De Witte, n 3 *supra*, 33.

explicitly cite the ECtHR. Nonetheless, accession might entail that the CJEU considers the ECtHR as its relevant audience for its judgments. Currently, this is not the case and interviewees noted that the CJEU solely “communicates” to the parties, the general public and national courts and is not citing to keep Strasbourg happy. Accession could, however, mean that the CJEU sees more reason for citing in order to show Strasbourg that it has paid due regard to the case law of the ECtHR with the idea of diminishing the chances of being overruled. The future will tell what will happen. For now, the Charter will remain the most logical anchor point.