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Dickson, B. (2015). The EU Charter of Fundamental Rights in the case law of the European Court of Human Rights. *European Human Rights Law Review*, *2015*(1), 27-40.

Published in:
European Human Rights Law Review

Document Version:
Peer reviewed version

The EU Charter of Fundamental Rights in the Case Law of the European Court of Human Rights

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Abstract

The European Court of Human Rights has begun to refer to the EU Charter of Fundamental Rights in order to support its reasoning for interpreting the European Convention on Human Rights in a particular way. But the EU Charter does not yet have any special status in that regard, being treated by the Court as on a par with numerous other documents of international law. The Court's use of the Charter began in connection with arts.8 and 12 of the Convention (the right to a family life and the right to marry) but in subsequent years it has been extended to many other Articles of the Convention. It is in relation to art.6 (the right to a fair trial) that the Charter's influence has been most noticeable so far, the Court having changed its position on two important aspects of Article 6 partly because of the wording of the EU Charter. But the influence on art.3 (in relation to the rights of asylum seekers), art.7 (in relation to retroactive penal laws), art.9 (in relation to the right to conscientious objection) and art.11 (in relation to rights of trades unions) has also been significant. The potential for the Charter to have greater influence on the Court's jurisprudence in years to come remains considerable.

The attitude of the European Court of Human Rights to the interpretation of the ECHR

In order to understand the way in which the EU Charter of Fundamental Rights is used by the European Court of Human Rights it is necessary to bear in mind the basic principles which the European Court has developed concerning its interpretation of the ECHR. Amongst these are the commitments to interpret the ECHR in line with its object and purpose, to treat it as "a living document" and to apply it in an "evolutive and dynamic" way in light of present-day conditions. The interpretation should also be undertaken with a view to ensuring that the protection afforded by the ECHR is "practical and effective, not theoretical and illusory".[1]

For many years the European Court has been willing to look at other international documents on human rights when considering how to interpret the ECHR. To some extent it does so because of the general rule of interpretation set out in art.31 of the Vienna Convention on the Law of Treaties 1969, although of course that Convention is binding only on states which have ratified it and the Council of Europe is not one of those "states". It is generally accepted, however, that art.31 reflects the position adopted by customary international law regarding the interpretation of treaties, which in turn is based on traditional state practice and custom. Article 31(1) says that a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

* This article emerged from a paper given at a Colloquium held by the Franco-British Lawyers' Society in Belfast on November 22, 2013. I am grateful to responses provided on that occasion.

[1] See, generally, K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 4th edn (London: Sweet & Maxwell, 2011), pp.57–73; P. Leach, *Taking a Case to the European Court of Human Rights*, 3rd edn (Oxford: Oxford University Press, 2011), Ch.5; B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 6th edn (Oxford: Oxford University Press, 2014), Ch.4; D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), pp.5–18. In this article, references to "the European Court" are intended to relate to the European Court of Human Rights.

purpose". This might suggest that part of "the context" within which the ECHR should be interpreted is the fact that 28 of the 47 European states which have ratified the ECHR have also ratified the EU Charter. But art.31(2) negates such a suggestion in that it makes it clear that "the context" only comprises, in addition to the treaty's text, preamble and annexes, "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". It cannot reasonably be argued that the EU Charter was made "in connection with the conclusion" of the ECHR, since the latter pre-dated the former by more than 50 years. Article 31(3) is more helpful. It says that, together with "the context", states must take into account, when interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties". At a stretch this would allow the European Court to use the EU Charter to help interpret the ECHR in a case where the respondent state is a party to both. One has to say "at a stretch" because the rules of international law contained within the EU Charter are intended to regulate how each Member State in the EU treats people within its own jurisdiction and so cannot truly be said to be "applicable in the relations between the parties".

One of the recent cases in which the Grand Chamber of the European Court clearly set out its approach to how other provisions of international law could influence its interpretation of the ECHR is *Demir v Turkey*,[2] where what was at issue, as we shall see later, was the compatibility of Turkey's laws on trade unions with art.11 of the ECHR. During the course of its consideration of Turkey's laws the European Court said:

> "... the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties."[3]

The Court then went on to refer to the diversity of international texts and instruments used for the interpretation of the Convention, including "relevant international treaties that are applicable in the particular sphere" (e.g. the UN Convention on the Rights of the Child, and the ILO Forced Labour Convention), the "general principles of law recognised by civilized nations"[4] (e.g. the prohibition of torture), non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly but also the work of the European Commission for Democracy through Law ("the Venice Commission"), and the international law background to the legal question before it. Importantly, the Court stressed that in searching for common ground among norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent state. Thus, the Court was guided by the EU Charter of Fundamental Rights even before that instrument became binding on EU states on December 1, 2009. Summing up in *Demir v Turkey* the Court said:

> "The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases ... It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in

[2] *Demir v Turkey* (2009) 48 E H R R 54
[3] *Demir v Turkey* (2009) 48 E H R R 54 at [67]
[4] This phrase is also used in art.38(1)(c) of the Statute of the International Court of Justice

international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies."[5]

The attitude of the European Court of Human Rights to EU law

Having clarified the European Court's attitude to the use of international law when interpreting the ECHR, it is now pertinent to consider whether the Court gives any special attention to EU law. The answer seems to be no. This is because the occasions on which the European Court is confronted with EU law tend to be ones where the issue is whether EU law is compatible with the ECHR, not whether it can influence the interpretation of the ECHR. When assessing EU law's compatibility with the ECHR the Court seems to assume that the intention of those responsible for making EU law is that it *should* be compatible. The European Court of Human Rights is certainly of the view that the Court of Justice of the EU (formerly the European Court of Justice) applies the ECHR when adjudicating on matters of EU law. Thus, in *Bosphorus Hava Yollari Turizm v Ireland*,[6] the Grand Chamber of the European Court of Human Rights said:

> "While the founding treaties of the European Communities did not contain express provisions for the protection of human rights, the ECJ held as early as 1969 that fundamental rights were enshrined in the general principles of Community law protected by the ECJ. By the early 1970s the ECJ had confirmed that, in protecting such rights, it was inspired by the constitutional traditions of the member States and by the guidelines supplied by international human rights treaties on which the member States had collaborated or to which they were signatories. The Convention's provisions were first explicitly referred to in 1975, and by 1979 its special significance amongst international treaties on the protection of human rights had been recognised by the ECJ. Thereafter the ECJ began to refer extensively to Convention provisions (sometimes where the Community legislation under its consideration had referred to the Convention) and latterly to this Court's jurisprudence, the more recent ECJ judgments not prefacing such Convention references with an explanation of their relevance to Community law."

So by mid-2005 it was clear that the two supra-national courts wished to adopt the same interpretation of the ECHR. The *Bosphorus* case itself concerned the seizure by Irish authorities of an airplane which they deemed was being used in a way which breached an EU trade embargo with the Former Republic of Yugoslavia (the FRY).[7] The FRY owned the plane but had leased it to an airline based in Turkey. It was seized in Ireland because it was being serviced there. The Irish Supreme Court referred to the ECJ the question whether the EC Regulation in question applied to the airplane. The ECJ answered affirmatively[8] and the Irish Supreme Court applied that ruling.[9] But by then the embargo had been lifted and so the plane was returned to Yugoslav Airlines. The Turkish airline then applied to the European Court of Human Rights, claiming that its right to peaceful enjoyment of its possessions, guaranteed by art.1 of Protocol 1 to the ECHR, had been violated. But the European Court rejected the claim, pointing out that Ireland had no option but to apply the EC Regulation.[10] At the time, of course, it was not possible for the Turkish airline to claim against the European Communities in Strasbourg because only nation states were able to ratify the ECHR and thereby acquire obligations to protect Convention rights.

[5] *Demir v Turkey* (2009) 48 E H R R 54 at [85]–[86].
[6] *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 E H R R 1 at [73].
[7] The EU embargo purported to implement a Resolution of the UN Security Council.
[8] *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications* (C-84/95) [1996] E C R I-3953.
[9] *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1997] 2 I R 1.
[10] *Bosphorus v Ireland* (2006) 42 E H R R 1. See, generally, Gernot Biehler, "Between the Irish, the Strasbourg and the Luxembourg Courts: Jurisdictional Issues in Human Rights Enforcement" (2006) 28 Dublin Univ L J 317.

The European Court admitted that the Charter was not yet binding law within the EU and it refrained from openly stating that the ECHR should always be interpreted in a way which keeps pace with how corresponding rights in the Charter are interpreted. But strongly implicit in the European Court's judgment is the assumption that there should not be a conflict of opinion between the two supra-national courts over the interpretation of rights which are common to both treaties.

In reaching the conclusion that there had been no violation of art.1 of Protocol 1 the Grand Chamber cited art.52(3) of the EU Charter of Fundamental Rights, which reads:

> "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."[11]

~~It was somewhat presumptuous on the part of the European Court, which has no jurisdiction over claims~~ that there has been a violation of the EU Charter, to assert so ~~categorically that the meaning~~ and scope of rights in the Charter "shall be the same as" ~~the~~ corresponding rights in the ECHR. But the assertion again demonstrates ~~that the Strasbourg Court does not wish any conflict of opinion to arise between the two supra-national courts over the interpretation of rights that are common to both treaties.~~

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This is doubtless a desirable goal but, because the precise question confronting the two courts in relation to the same facts may not always be identical, it is possible to imagine situations where the conclusions reached by the courts appear to be inconsistent. One can think, for instance, of the cases that went to both Luxembourg and Strasbourg concerning the legality of providing information within Ireland about abortion services available outside Ireland. The position under EC law came before the ECJ in *Society for the Protection of the Unborn Child (SPUC) v Grogan*,[12] where a pro-life organisation had obtained an injunction against students' unions in Ireland preventing them from publicising the addresses of abortion clinics in Great Britain.[13] The ECJ upheld the legality of the injunction because the student unions did not themselves provide abortion services outside Ireland (or at all) and so had no right to advertise such services in Ireland. The ECJ said that, in cases involving national legislation "lying outside the scope of Community law", it had no jurisdiction to "provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of [national] legislation with the fundamental rights—as laid down in particular in the European Convention on Human Rights".[14]

Two counselling agencies in Dublin then proceeded with their claim that the injunction obtained by SPUC violated the agencies' rights to freedom of expression as guaranteed by art.10 of the ECHR.[15] In *Open Door Counselling and Dublin Well Woman Centre v Ireland*[16] the Strasbourg Court held, by 15 to eight,[17] that the injunction was indeed a violation of art.10. It also violated women's rights under art.10 to *receive* information. Despite Ireland's legitimate interest in protecting the life of the unborn, the injunction was a disproportionate way of doing this because it imposed a blanket ban and created a health risk to some women. Now that the EU Charter is part of EU law one might imagine that the decision of the ECJ in *SPUC v Grogan* is no longer good law because the Charter unequivocally protects the right to freedom of expression.[18] But it has to be remembered that the EU Charter applies "to the institutions, bodies, offices and agencies of the Union … and to the Member States only when they are implementing Union law".[19] When regulating the availability of information on abortion facilities a Member State is still not "implementing Union law".

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The European Court has cited the EU Charter in a number of contexts, including art.2 of the ECHR (the right to life), art.3 (the right not to be ill-treated), art.5 (the right to liberty), art.6 (the right to a fair trial), art.7 (the right to no punishment without law), art.8 (the right to a private and family life), art.9 (the

[11] The second sentence was not relevant to the facts of this case because EU law did *not* provide more extensive protection of the right to property
[12] *SPUC v Grogan* (C-159/90) [1991] E.C.R. I-4685.
[13] *SPUC (Ireland) Ltd v Grogan (No.1)* [1989] I.R. 753.
[14] *SPUC v Grogan* (C-159/90) [1991] E.C.R. I-4685 at [31].
[15] *Attorney General v Open Door Counselling Ltd and Dublin Well Woman Centre Ltd* [1988] I.R. 593 (High Court and Supreme Court).
[16] *Open Door Counselling and Dublin Well Woman Centre v Ireland* (1992) 15 E.H.R.R. 244.
[17] The Irish judge, John Blayney, was one of the dissenters.
[18] Article 11(1).
[19] Article 51(1). See, generally, K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 E.C.L. Rev. 375.

right to freedom of belief), art.10 (the right to freedom of expression), art.11 (the right to freedom of association), art.12 (the right to marry) and art.1 of Protocol 1 (the right to property). It is in relation to art.6 that the Charter has had the largest influence, its role in the other fields being a minor supportive one. We shall begin this survey by looking at arts 8 and 12, since it was in relation to them that the EU Charter was first mentioned by the European Court. The rest of the articles will then be considered sequentially.

Articles 8 and 12

The first reference to the Charter by the European Court was in its judgment in *Goodwin v United Kingdom* in 2002, just 19 months after the Charter was signed on December 7, 2000.[20] In fact, when setting out the relevant "International Texts" in that case, the only document cited by the Court was the EU Charter, in particular art.9, which states:

> "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

In reaching its decision the European Court departed from its prior position on the rights of transsexuals, extending to those individuals for the first time rights under both art.8 of the ECHR (the right to a family life) and art.12 (the right to marry). To justify its change of position the Court cited "major social changes in the institution of marriage since the adoption of the Convention as well as dramatic change brought about by developments in medicine and science in the field of transsexuality".[21] Noting that art.12 of the ECHR conferred the right to marry only on "men and women of marriageable age", it added:

> "The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women."[22]

The Court held unanimously that there had been violations of both art.8 and art.12 in this case.

There have been further cases on the right to marry in which the EU Charter has been cited. One is *Schalk v Austria*,[23] where two gay men claimed the right to marry. Article 9 of the EU Charter was again cited, as were two paragraphs from a semi-official commentary on the Charter.[24] The Court stressed that the wording of art.9 meant that it was still up to national laws to determine what rights to give to same-sex couples but that the wording did *permit* marriage between same-sex couples. Citing what it had said in *Goodwin*, the Court observed:

> "Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 [of the ECHR] must in all circumstances be limited to marriage between two persons of the opposite sex."[25]

This is a clear example of the Court using the Charter to develop its interpretation of a Convention right, but it ~~may~~ have reached the same decision even in the absence of the Charter. This is because the Court paid as much, perhaps more, attention to two EU Directives. The first was Directive 2003/86/EC on the right of family reunification (which says that "Member States may … authorise the entry and residence

[20] *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18.
[21] *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at [100].
[22] *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at [100].
[23] *Schalk v Austria* (2011) 53 E.H.R.R. 20. See, generally, L. Hodson, "A Marriage By Any Other Name: Schalk and Kopf v Austria" (2011) 11 H.R.L.R. 170; S.L. Cooper, "Marriage, Family, Discrimination and Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights" (2011) 12 German L.J. 1746.
[24] This was published by the EU Network of Independent Experts on Fundamental Rights in June 2006 and is available at *http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf* [Accessed ~~July 16, 2014~~]. See also fn.43 below.
[25] *Schalk v Austria* (2011) 53 E.H.R.R. 20 at [61].

... of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship"). The second was Directive 2004/38/EC on the rights of citizens of the EU and their family members to move and reside freely within the territory of the Member States. Moreover the approach of the European Court in *Schalk v Austria* is facilitative rather than mandatory: it is telling Member States what they *may* do, not what they *must* do. On the facts before it the Court held unanimously that there had been no violation of art.12 and by four votes to three that there had been no violation of art.8. In a rather question-begging joint dissent, Judge Malinverni from Switzerland and Judge Kolver from Russia said there was no need for the Court to look to other international documents when interpreting art.12 because according to the ordinary meaning of the word "marriage" it has to be a union between persons of the opposite sex.

In the recent case of *Vallianatos v Greece*[26] the Grand Chamber took a further step towards the recognition of a right to same-sex marriage. It had to consider a Greek law which permitted "civil unions", but only between adults of different sex. By 16 votes to one (the dissenter being Judge Pinto de Albuquerque from Portugal) the Court held that there had been a violation of art.14 of the ECHR taken in conjunction with art.8. In the course of its judgment the Court cited art.7 (the right to family life), art.9 (the right to marry) and art.21 (the right to non-discrimination) of the EU Charter and also the semi-official commentary.[27]

The Charter has also arisen in a tug-of-love case, *Neulinger v Switzerland*,[28] where a mother had taken her child from Israel to Switzerland in order to escape the clutches of her husband, the father of the child, because he had become a member of the ultra-orthodox Lubavitch movement. On this occasion the Grand Chamber cited art.24 of the Charter, which provides as follows:

> "(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
>
> (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
>
> (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

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These provisions obviously go beyond what the ECHR says about children's rights (which is virtually nothing). The Court relied on paras (2) and (3) of art.24 to substantiate its finding (again by 16 votes to one) that there would be a violation of art.8 of the ECHR if the boy Noam were returned to Israel. The decision caused some consternation because it appeared to run counter to the principles of the Hague Convention on the Civil Aspects of International Child Abduction of 1980, which most European states have ratified. In November 2013, in *X v Latvia*,[29] the Grand Chamber of the European Court (again after citing but not relying upon arts 7 and 24 of the EU Charter) clarified its position on the interplay between the two Conventions. It admitted that its judgment in *Neulinger* may have given the impression that before returning a child in compliance with the Hague Convention domestic courts are required to conduct an in-depth examination of the entire family situation and of a whole series of other factors. But the Court observed that its judgment in *Neulinger* did not in fact set out any principle for the application of the Hague Convention by domestic courts and it added:

> "The Court considers that a harmonious interpretation of the European Convention and the Hague Convention can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles

[26] *Vallianatos v Greece* (2014) 59 E H R R 12
[27] See fn 25 above
[28] *Neulinger v Switzerland* (2012) 54 E H R R 31
[29] *X v Latvia* (2014) 59 E H R R 3

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> 12, 13 and 20 of the [Hague] Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That [domestic] court must then make a decision that is sufficiently reasoned on this point, in order to enable the [European] Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention."[30]

On the facts in *X v Latvia* the Grand Chamber held by nine votes to eight that because the Latvian court had not carried out the required assessment, there was a violation of art.8. The influence of the EU Charter on this decision is therefore identifiable, but rather indirect.

More generally, the potential influence of the EU Charter on the Strasbourg Court's interpretation of the right to a private and family life, and home, protected by art.8 of the ECHR, is minimal, given the identical wording of that article and art.7 of the Charter. The former goes on to refer to the right to respect for one's "correspondence" while art.7 uses the word "communications", but to date no decision of the Strasbourg Court has alluded to this difference and it is likely to be considered legally insignificant.

Article 2

As regards art.2 of the ECHR, the impact of the EU Charter has so far been minimal. In *Vo v France*[31] the Grand Chamber referred to many international documents—but not the EU Charter—when considering whether unborn children have any rights under the ECHR. However, one of the dissenting judges, Georg Ress from Germany, cited art.3(2) of the Charter, which prohibits the reproductive cloning of human beings, to support his view that "the protection of life extends to the initial phase of human life". In the important case of *A v Ireland*,[32] which led to the enactment of the Protection of Life During Pregnancy Act 2013 in Ireland,[33] the EU Charter was not cited by the European Court except to note that during the negotiations around the Treaty of Lisbon the Irish government secured a legally binding Decision of the Heads of State or Government of all the other EU Member States making it clear that:

> "Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty … affects in any way the scope and applicability of the right to life in Article 40.3.1, 40.3.4 and 40.3.3 … provided by the Constitution of Ireland."

Article 3

As regards art.3, there have been three important cases arising in the context of migration. In the first of these, *MSS v Belgium*,[34] a complaint was raised that the procedures used in Greece for handling asylum-seekers were so bad that they amounted to ill-treatment for the purposes of art.3. Famously, the ECHR does not contain any right to asylum, the prevailing thought in 1949, when the Convention was being drafted, being that states should be left to decide for themselves whom they would allow across their borders. The drafters were aware, as well, that negotiations for an international treaty on asylum-seeking were already taking place in Geneva under the auspices of the United Nations. By way of contrast with the ECHR, art.18 of the EU Charter provides that:

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

[30] *X v Latvia* (2014) 59 E H R R 3 at [105]–[106]
[31] *Vo v France* (2005) 40 E H R R 12
[32] *A v Ireland* (2011) 53 E H R R 13
[33] Brought into force on January 1, 2014.
[34] *MSS v Belgium* (2011) 53 E H R R 2

However, in holding that Greece was in violation of art.3 of the ECHR as regards both the conditions of detention for asylum-seekers in Greece and their living conditions in that country more generally, while Belgium was in violation of art.3 because it returned asylum-seekers to Greece and thereby exposed them to ill-treatment, the European Court did not rely so much on the EU Charter as on the broader idea of "fundamental rights". This is because the Treaty of the European Union, as amended by the Treaty of Lisbon as from December 1, 2009, provides not just that the EU "recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights" but also that "fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". This again illustrates the point that, as far as the protection of human rights between the 28 states in the EU and the 47 states in the Council of Europe is concerned, there is a two-way street: the European Court can look to the EU Charter as a source of rights, but likewise (and to a greater extent) the Court of Justice of the EU can look to the ECHR as a source of rights. A further source common to both courts is "the constitutional traditions common to the Member States". In the later case of *Tarakhel v Switzerland*,[35] the Grand Chamber in Strasbourg applied its reasoning in *MSS v Belgium* when holding that it would be a violation of art.3 of the ECHR if an Afghani couple and their six children were to be returned by Switzerland to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the family would be kept together and taken charge of "in a manner adapted to the age of the children".[36] The Swiss authorities had not yet been given sufficient assurances to that effect.

In the third case on art.3, *Hirsi Jamaa v Italy*,[37] the European Court had to consider whether Italy had violated art.3 by stopping a boat full of potential asylum-seekers on the High Seas (in the Mediterranean) and returning them to Libya. The Court cited art.19(2) of the EU Charter, which reads:

> "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

The Court obviously used this as further support for the principle of *non-refoulement*, which it has long espoused. It would have reached the same conclusion even if it had not cited the EU Charter at all. As with art.2, the influence of the EU Charter on the Court's interpretation of art.3 of the ECHR has been very slight indeed.

Article 5

In relation to art.5 (the right to liberty), the Court has once again made only fleeting use of the EU Charter. This was in *Saadi v United Kingdom*,[38] where an Iraqi doctor had been detained in the UK while awaiting a decision on his application for asylum, even though he had applied for asylum immediately upon arrival in the country and was not a person likely to refuse to notify his whereabouts. The UK Government argued that his detention was a matter of administrative convenience, allowing his application to be dealt with more expeditiously, and the domestic appeal courts accepted that point of view.[39] When the case reached Strasbourg it was, amazingly, the first occasion on which the Court had had to interpret art.5(1)(f) of the ECHR, which permits a deprivation of liberty "to prevent [the detainee] effecting an unauthorised entry into the country". While agreeing with the domestic appeal courts by 11 votes to six that this wording

[35] *Tarakhel v Switzerland* (App No 29217/12), judgment of November 4, 2014. The Court cited, with apparent approval, the words of Lord Kerr in the decision of the UK Supreme Court in *R. (EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12 at [42], where he pointed out that violations of art 3 do not require that the conditions complained about be the product of systemic shortcomings.

[36] *R. (EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12 at [122].

[37] *Hirsi Jamaa v Italy* (2012) 55 E.H.R.R. 21.

[38] *Saadi v United Kingdom* (2008) 47 E.H.R.R. 17.

[39] *R. (Saadi) v Secretary of State for the Home Dept* [2001] EWCA Civ 1512, [2002] 1 W.L.R. 356, [2002] UKHL 41, [2002] 1 W.L.R. 3131.

extended to people who had actually entered the country before immediately applying for asylum, the Court relied principally on the Vienna Convention on the Law of Treaties and on "relevant rules and principles of international law applicable in relations between the Contracting Parties", citing *Bosphorus v Ireland* (discussed above[40]). Article 18 of the EU Charter, on the right to asylum, was merely cited *en passant*.[41] The six dissenting judges placed greater reliance on art.18, but they focused more on Council Directive 2005/85/EC, which stipulates minimum standards on procedures for granting and withdrawing refugee status. Article 18(1) of that Directive reads:

> "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum."

Article 6

The decisions of the European Court of Human Rights relating to art.6 in this context are all significant, although it would be improper to suggest that any of them were reached specifically and only because of relevant provisions in the EU Charter.

In *Eskelinen v Finland*[42] the question arose as to which category of public servants could benefit from the protections afforded to litigants by art.6. Traditionally art.6 has been limited to non-public servants because claims made by public servants were taken as not constituting claims relating to "civil rights and obligations" as required by art.6. The category of people eligible for protection was extended in *Pellegrin v France*,[43] but very soon that test came under new scrutiny as well. In *Eskelinen* the Court extended the eligible category still further and in doing so cited art.47 of the EU Charter, which reads (in part):

> "(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

The Court cited from the "Explanations" relating to the EU Charter which were prepared under the Praesidium of the Convention that drafted the Charter (led by former French President Giscard D'Estaing) and integrated into the Final Act of the Treaty establishing a Constitution for Europe (the version prior to the Treaty of Lisbon).[44] The Court said that these Explanations were "a valuable tool of interpretation intended to clarify the provisions of the Charter" and it observed that in EU law the right to a fair hearing was not confined to disputes relating to civil rights and obligations and to criminal matters. The Court added: "in this respect the Charter codified existing case law of the Court of Justice of the European Communities", citing *Johnston v Chief Constable of the Royal Ulster Constabulary*.[45] In *Eskelinen* the Court found a violation of art.6(1) of the ECHR in relation to the length of proceedings (by 14 v 3) but no violation in relation to the lack of an oral hearing (unanimously). It also found a breach of art.13 (by 15 v 2). It was developments in EU law (not just through the Charter) which mainly prompted the Court to change its stance in this case, even though to support its view that "European law generally … provides

[40] See the text at fnn 7–9.
[41] *Saadi v United Kingdom* (2008) 47 E.H.R.R. 17 at [39].
[42] *Eskelinen v Finland* (2007) 45 E.H.R.R. 43.
[43] *Pellegrin v France* (2001) 31 E.H.R.R. 26.
[44] *Eskelinen v Finland* (2007) 45 E.H.R.R. 43 at [30]. The Explanations are available at *eur-lex.europa.eu LexUriServ LexUriServ.do?uri OJ:C:2007:303:0017:0035:en:PDF* [Accessed January 9, 2015]. They should not be confused with the Commentary cited at fn 25 above.
[45] *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1986] E.C.R. 1561, [1987] Q.B. 129.

useful guidance" it cited only Strasbourg case law, namely *Goodwin v United Kingdom*,[46] *Posti v Finland* (2002)[47] and *Meftah v France* (2002).[48]

In *Micallef v Malta*[49] the applicant's sister had been injuncted in an ~~Exp.~~ hearing from hanging out clothes to dry above the courtyard of another person's apartment. Up to then the European Court had not extended the protection of art.6 to interim decisions, even if they affected civil rights and obligations, but in this case it again decided to change its position. Citing its obligation to adopt an evolutive approach, and referring to art.47 of the EU Charter (quoted above), it held that a new approach was called for. On the facts, it held by 11 votes to six that art.6(1) had been violated as far as its requirement of impartiality was concerned. The Court also relied on a decision of what was then the ECJ in *Denilauler v SNC Couchet Frères*,[50] which had held that provisional measures taken by a court without hearing the defendant could not be recognised under EU law.

Finally, in relation to art.6, in *Michaud v France*[51] a lawyer challenged the French National Bar Council's decision to adopt regulations on procedures for requiring lawyers to notify their suspicions that their clients may have been involved in money laundering or terrorist financing. He argued that this violated the principles of confidentiality and independence concerning lawyers, which he saw as essential aspects of the fundamental right to a fair trial. But the CJEU had already found against the Belgian Bar Associations on this issue in 2007, and the Court at Strasbourg held unanimously that art.6 had not been violated. In the course of its judgment the Court endorsed the approach it took to EU law in the *Bosphorus* case (discussed above), while noting that the two cases were different because there the EU law in question had been a set of Regulations (not a Directive, as in *Michaud v France*) and in *Bosphorus* the Irish Supreme Court had referred the issue to Luxembourg whereas in *Michaud v France* the Conseil d'État had not done so.

In the seminal case of *Salduz v Turkey*[52] the Grand Chamber of the European Court finally established that persons being questioned by the police while in detention are entitled to access legal advice. The Court briefly referred to art.48 of the EU Charter, once more by way of a belt-and-braces approach to its reasoning. Article 48(2) provides that:

> "Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

The Court again cited art.52(3) which, as mentioned above, states that the meaning and scope of the right guaranteed under provisions such as art.48 are the same as the equivalent right laid down by the ECHR.

Article 7

One of the clearest examples of the European Court making explicit use of the EU Charter in its interpretation of the ECHR occurred in *Scoppola v Italy (No.2)*.[53] The applicant was arguing that the sentence he had received for serious crimes should have been imposed in accordance with the law which was in place at the time he was sentenced, not at the time he committed the offences. Article 7 of the ECHR says that a heavier penalty must not be imposed than the one that was applicable at the time the offence was committed, but it does not say the converse. However, art.49(1) of the EU Charter (under the rubric "Principles of legality and proportionality of criminal offences and penalties") provides that "[i]f,

[46] *Goodwin v United Kingdom* (2002) 35 E H R R 18

[47] *Posti v Finland* (2003) 37 E H R R 6 This was a decision holding that restrictions on fishing rights did engage and violate art 6 because they did not allow professional coastal fishermen to challenge their impact on the right to peaceful enjoyment of possessions.

[48] The Court found no violation in the Cour de Cassation's insistence on legal representatives being members of a specialist lawyers' association but that there was a violation in that the Advocate General's submissions to the Cour were not communicated to the applicants

[49] *Micallef v Malta* (2010) 50 E H R R 37

[50] *Denilauler v SNC Couchet Frères* (125/79) [1980] E C R 1553

[51] *Michaud v France* (2014) 59 E H R R 9

[52] *Salduz v Turkey* (2009) 49 E H R R 19

[53] *Scoppola v Italy (No 2)* (App. No.10249/03), judgment of September 17, 2009

subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable". In *Scoppola* the European Court cited art.49(1) as one reason for departing from its previous position, confirmed just six years earlier in 2003,[54] that more lenient laws should not be any more retroactive than more stringent laws should be. Amongst the other reasons given for this *volte-face* were that the CJEU had already held the principle of the retroactive application of the more lenient penalty to be part of the constitutional traditions common to EU Member States,[55] and that the principle had also been included in the Rome Statute of the International Criminal Court[56] and affirmed in the case law of the International Criminal Tribunal for the Former Yugoslavia.[57]

Article 9

In relation to art. 9 of the ECHR the most interesting decision by the European Court in this context is *Bayatyan v Armenia*,[58] the first case to be decided against Armenia. It concerned the right to conscientious objection to military service and the Grand Chamber held by 16 votes to one (with the Armenian judge dissenting) that such a right should indeed be read into art.9. To support this conclusion the Court cited art.10(2) of the EU Charter, which specifically recognises the right to conscientious objection, albeit "in accordance with the national laws governing the exercise of this right". The Court said:

> "Such explicit addition is no doubt deliberate ... and reflects the unanimous recognition of the right to conscientious objection by the Member States of the European Union, as well as the weight attached to that right in modern European society."[59]

The Court also cited *Goodwin v United Kingdom*[60] and noted that in 2010 the Committee of Ministers of the Council of Europe had cited art.10(2) of the EU Charter when recommending that Member States of the Council of Europe should ensure the right of conscientious objection to conscripts. The EU Charter was also relied upon by NGO interveners in the case, including Amnesty International, the International Commission of Jurists and the Quakers (through the Friends World Committee for Consultation).[61]

Article 10

Article 10 of the ECHR has also been interpreted by the European Court with the help of the EU Charter. An example is *Centro Europa 7 SRL and Di Stefano v Italy*,[62] where the applicants were complaining that the failure to allocate them the necessary frequencies for television broadcasting infringed art.10. The Grand Chamber, with one dissenter, held in their favour and referred indirectly to art.11(2) of the EU Charter, which reads simply: "The freedom and pluralism of the media shall be respected". This provision was not listed in the judgment as a "relevant international law" but it was referred to by the European Parliament in one of its cited resolutions on the ownership of the media.

[54] In *Zaprianov v Bulgaria* (App. No 41171/98), judgment of March 6, 2003

[55] *Berlusconi* (C-387/02, C-391/02 and C-403/02), [2005] E C R I-3565, judgment of May 3, 2005. Strangely, in coming to its conclusion in these cases, the CJEU did *not* rely on the EU Charter, even though the Charter had been proclaimed more than four years earlier by the European Commission, the European Parliament and the Council of the EU at the European Council meeting in Nice on December 7, 2000

[56] Article 24(2). The Statute was adopted in 1998 and came into force in 2002

[57] In the *Dragan Nikolic* case, IT-94-2-A, Appeals Chamber, judgment of February 4, 2005

[58] *Bayatyan v Armenia* (2012) 54 E H R R 15

[59] *Bayatyan v Armenia* (2012) 54 E H R R. 15 at [106]

[60] *Goodwin v United Kingdom* (2002) 35 E.H R R 18

[61] Interestingly, the Court relied ~~recently~~ on the little-known Ibero-American Convention on Young People's Rights and on comments by the Inter-American Commission on Human Rights during a friendly settlement in a case involving Bolivia.

[62] *Centro Europa 7 SRL and Di Stefano v Italy* (App. No 38433/09), judgment of June 7, 2012

Article 11

The EU Charter has featured quite significantly in at least three cases involving art.11 of the ECHR (the right to freedom of assembly and association), more particularly in the context of trade union activity.

In *Sorensen v Denmark*[63] two workers complained about closed-shop agreements. The Court referred to art.12 of the EU Charter, which reads:

> "Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests."

It ~~then~~ observed that the provisions of the preceding Community Charter of the Fundamental Social Rights of Workers, adopted in 1989 by 11 of the then 12 EC states (the UK having opted out), "are of obvious relevance for the interpretation of the scope of Article 12". The Court then used the EU Charter as evidence for the view that "there is little support in the Contracting States for the maintenance of closed-shop agreements and … the European instruments referred to above clearly indicate that their use in the labour market is not an indispensable tool for the effective enjoyment of trade union freedom". The Court found a breach of art.11 in relation to each of the applicants (by 12 to five in ~~Sorensen~~ and by 15 to two in ~~Rasmussen~~).

In *Demir v Turkey*,[64] cited at the beginning of this article to illustrate the way in which the European Court makes use of international law when interpreting the ECHR, the applicants claimed that their rights to form a trade union and to thereby engage in collective bargaining and collective agreements were being violated because under Turkish law municipal civil servants had no such entitlements. The Grand Chamber, in holding for the applicants, took specific account of arts 12 and 28 of the EU Charter. Article 12 has been cited above. Article 28 reads:

> "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

Reminding us that in previous cases such as *Goodwin v United Kingdom* (2005), *Sørensen v Denmark* (2006) and *Eskelinen v Finland* (2007), all discussed above,[65] the Court ~~had been~~ guided by the EU Charter even though it was not yet in force, the Court confirmed that "when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it".[66] It went on to note that the EU Charter "has adopted an open approach to the right to organise, declaring, in its Article 12(1), among other things, that 'everyone' has the right to form and join trade unions for the protection of his or her interests".[67] Here the Court held unanimously that Turkey had violated art.11 of the ECHR by interfering with the applicants' right to form a trade union and by annulling a collective agreement which had been entered into by a trade union with an employing authority. It needs to be remarked, however, that a far greater influence on the European Court ~~in this case~~ than the EU Charter was the Council of Europe's own European Social Charter, first adopted in 1961 and revised in 1996.[68] The Social Charter is not only home-grown and older, it has been extensively interpreted by the European Committee on Social Rights, the opinions of which are sometimes influential on the European

[63] *Sorensen v Denmark* (2008) 46 E.H.R.R. 29.
[64] *Demir v Turkey* (2009) 48 E.H.R.R. 54.
[65] *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18, *Sorensen v Denmark* (2008) 46 E.H.R.R. 29, *Eskelinen v Finland* (2007) 45 E.H.R.R. 43 respectively.
[66] *Demir v Turkey* (2009) 48 E.H.R.R. 54 at [76].
[67] *Demir v Turkey* (2009) 48 E.H.R.R. 54 at [105].
[68] C. Benelhocine, *The European Social Charter* (Strasbourg: Council of Europe Publications, 2011), G. de Búrca and B. de Witte, *Social Rights in Europe* (Oxford: Oxford University Press, 2005), esp. Chs 3–6.

Court of Human Rights.[69] The EU Charter does not yet have the same credentials, however great its potential might be.

Most recently the EU Charter was referred to in passing by the European Court in *National Union of Rail, Maritime and Transport Workers v United Kingdom*,[70] where the union unsuccessfully challenged UK law relating to strike ballots and secondary strike action. Under "Relevant International Law" the Court again cited arts 12 and 28 of the EU Charter (and also Protocol 30 to the Lisbon Treaty[~~, the so-called "UK opt-out"~~][71]) but did not later refer to the Charter in its judgment. It was taken to task for this by the judge from Poland, Professor Krzysztof Wojtyczek, who in his otherwise concurring opinion observed that:

> "When a judgment of an international court refers to 'relevant international law', the reader may legitimately expect an explanation as to why and in which respect the documents referred to in it are relevant for the resolution of the instant case. I regret that the majority has not found necessary to explain clearly the relevance of the international law referred to for the interpretation of Article 11 of the Convention ... [I]n my view, the analysis of international law does not support the opinion that Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms should be interpreted in such a way that it encompasses the right to sympathy strikes. To hold otherwise exposes the Court to the risk of being legitimately criticised for judicial activism."[72]

Protocols to the ECHR

The EU Charter made a brief appearance in a case on art.1 of Protocol 1 of the ECHR, the right to peaceful enjoyment of one's possessions. This was in *Anheuser-Busch Inc v Portugal*,[73] a case where the applicant company was complaining that it had been improperly deprived of its right to use a trade mark. In confirming that art.1 of Protocol 1 embraces intellectual property the Court cited art.17(2) of the EU Charter, which explicitly states that "Intellectual property shall be protected".

A more significant contribution was made by the EU Charter to the interpretation of art.4 of Protocol 7, which enshrines the *ne bis in idem* principle (i.e. that a person should not be tried twice for the same crime). In *Zolotukhin v Russia*[74] the applicant had been convicted of committing "minor disorderly acts" in violation of Russia's Administrative Code (for swearing at a public official and not responding to reprimands after bringing his girlfriend on to a restricted military compound). Based on the same incident, the applicant was later convicted of committing "disorderly acts" under Russia's Criminal Code (for insulting, and threatening violence against, a public official). To enable it to reach the conclusion that art.4 of Protocol 7 should be interpreted so as to outlaw second trials based on the same facts (and not just second trials based on precisely the same offences) the European Court relied upon art.50 of the EU Charter, which reads:

> "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

[69] For example, in *Stefanetti v Italy* (App. No 21838/10), judgment of April 15, 2014, where (at [64]) the Court found guidance in the Committee's holding that a sum of €461 was inadequate as a minimum monthly pension and that pensions not exceeding €1,000 must be considered as providing for only basic commodities.

[70] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (App. No 31045/10), judgment of April 8, 2014. A request by the UK that this case be referred to the Grand Chamber was rejected in September 2014.

[71] On the effect of this [~~opt-out~~] and the impact of the EU Charter in the UK more generally, see Richard Clayton and Cian Murphy, "The Emergence of the EU Charter of Fundamental Rights in UK Law" (2014) 5 E.H.R.L.R. 469.

[72] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (App. No 31045/10), judgment of April 8, 2014, Concurring Opinion at [6] and [10].

[73] *Anheuser-Busch Inc v Portugal* (2007) 45 E.H.R.R. 36.

[74] *Zolotukhin v Russia* (2012) 54 E.H.R.R. 16.

However, as the wording of art.50 does not, in truth, seem any more directive on its face than that of art.4 of Protocol 7, one should not perhaps read too much into the Court's reliance on this provision. The case is perhaps another example of the Court pulling itself up by its own boot-straps.

Conclusion

In conclusion, it is clear that the EU Charter is well on its way to being a source of law for the European Court of Human Rights, even in cases where the respondent state is not a member of the EU—we have seen the EU Charter cited in cases involving Armenia, Russia, Switzerland and Turkey. It has also been referred to in relation to issues, such as police questioning and conscientious objection, which would ~~not~~ arise within EU states as part of their implementation of Union law, one of the constraints imposed by the Charter itself.[75] To date, however, the Charter has ~~very much~~ played a supportive rather than a leading role. It has not been, indeed cannot be, a primary source ~~that~~ in some way usurps the ECHR itself. If in future cases the CJEU interprets provisions in the Charter which overlap with those in the ECHR in a more generous way than the European Court has done to date, it will still be open to the European Court to maintain a different position. But a more likely scenario is that the CJEU will take its lead from the European Court. Occasionally a matter may need to be litigated in both courts, a highly undesirable phenomenon as regards both time and expense. Yet, failing the development of any reference procedure from Luxembourg to Strasbourg,[76] such duplicated litigation may become the reality. Given the breadth and generality of the provisions in the EU Charter, it is likely that many other instances will arise where the European Court is asked to use the EU Charter in ways that will justify the Court's development of the existing jurisprudence on the ECHR, but the exploration of those possibilities must await another day.

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[75] Article 51(1).

[76] The draft revised agreement on the accession of the EU to the ECHR (reached on April 5, 2013, *http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf* [Accessed January 9, 2015]) makes no provision for any such reference procedure. On the draft agreement, see J. Polakiewicz, "EU Law and the ECHR: Will the European Union's Accession Square the Circle?" (2013) 6 E.H.R.L.R. 592.

del. point / [insert words from below]

On December 18, 2014, the CJEU found the draft accession agreement to be incompatible with EU law: Opinion 2/13.