
The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence

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Abstract

This article, based on a broader project, focuses on the interaction between the two European Courts (the Court of Justice of the European Union – ECJ and the European Court of Human Rights – ECtHR) and uses the specific area of expulsion/deportation of third country nationals (non-EU nationals) from European territory as a case study. The work examines the ECJ's and ECtHR's divergent approaches in this area of law, and it then provides some preliminary reflections on the potential of the EU Charter of Fundamental Rights and the EU's accession to the European Convention of Human Rights (ECHR) to achieve a more harmonious and convergent human rights system in Europe. It finally argues that the post-Lisbon era has the potential to enhance the protection of fundamental rights within the continent.

1 Introduction

Scholars have affirmed that law requires unity and a single final authority. Even when there are multiple agents involved in the decision-making process, a compromise

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needs to be reached and a single voice expressed.¹ This seems to be a problem in Europe as there are two supreme legal systems, and for each of them one Court which abides to a specific corpus of laws and principles set by Treaties and Conventions. The European legal framework is itself conceptually divergent,² being composed of two diverse legal systems – the Council of Europe and its ECHR and the European Union and its Treaties (founding and accession treaties and their protocols) – and two courts. The Lisbon Treaty empowers the two Courts to build a bridge and revisit their relationship with respect to protection of human rights in Europe.

The questions this article explores are whether this conceptual divergence constitutes a serious threat to the legal coherence of the law in Europe or whether the two Courts are somehow working on similar principles and approaches implying a very small extent of amalgamation. Through an analysis of the jurisprudence of these two European Courts, the work investigates the inconsistency of the Courts' respective approaches in relation to the specific area of deportation of non-EU citizens. Then, the article considers problems arising from the post-Lisbon developments and examines the role of the Charter of Fundamental Rights before the EU's formal accession to the ECHR.³ The aim is to provide some preliminary reflections on how the Treaty of Lisbon and the EU's accession to the ECHR can shift towards common concepts and understanding via the fundamental rights discourse.

To achieve its objectives, the article uses a comparative methodology. It contrasts the approach employed by the ECJ with the one applied by the ECtHR relative to the protection of third country nationals, particularly in relation to their expulsion from the European territory. The ECJ has so far adopted the nationality/citizenship lens to deal with rights of non-EU citizens. By contrast, the ECtHR has interpreted the Convention with the sole consideration of human rights regardless of the country of origin of the individual.

The ECJ and the ECtHR have long been seeking to adjust each other's case law on fundamental rights. This process gained momentum as a result of a rapidly growing number of issues of relevance to both legal systems. It seems that both Courts are aware that any discrepancies in the interpretation of the same fundamental rights would be detrimental for citizens and Member States alike.⁴ Until 1993, the ECJ was the Court of the European Economic Community (EEC), a community created to foster economic integration. In the late 1950s, the ECJ refused to consider human rights, as it lacked competence to deal with them. Though, progressively, this institution

¹ Prechal and Van Roermund, 'Building Unity in EU Legal Order: An Introduction', in S. Prechal and B. Van Roermund (eds), *The Coherence of EU Law – The Search of Unity in Divergent Concepts* (2008), at 1.

² *Ibid.*, at 7.

³ For further reflections on the architecture of the EU in the post-Lisbon era and the role of the Charter in the new EU legal order see Morano-Foadi and Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: the European Judicial Approach to Fundamental Rights', 17 *European Law Journal* (2011) 595, Special Issue 'The Institutionalisation of Regional Trade Agreements Worldwide: New Dynamics and Future Perspectives', edited by S. Morano-Foadi and F. Duina.

⁴ Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony', 6 *EHRLRev* (2009) 769.

became a jurisdictional protector of fundamental rights within the EU's legal order.⁵ In 1974, the ECJ made the first specific reference to the ECHR as a source of 'guidelines [to be] followed within the framework of community law'.⁶ The past 20 years were characterized by numerous references to individual articles of the ECHR,⁷ and in 1998 the ECJ in *Baustahlgewebe*⁸ directly and expressly relied on 'Strasbourg's jurisprudence' and the judges in Luxembourg 'acted as genuine human rights judges'.⁹

In 2005, in *Pupino*,¹⁰ the ECJ adopted the ECtHR's case law and thus extended the protection of fundamental rights in criminal matters. Overall, in the period between 1974 and 1998 more than 70 ECJ judgments and opinions referred to the ECHR. In the period between March 2001 and March 2003, 37 ECJ judgments and 22 Court of First Instance (CFI, now General Court) judgments explicitly addressed fundamental rights.¹¹

With the Treaty of Lisbon the EU made itself subject to some extent to the jurisprudence of the Strasbourg Court. The Charter, now as binding as a Treaty, is the principal vehicle through which the jurisprudence of the ECtHR is incorporated into EU law, and thus is to be respected by the EU. Article 52(3) of the Charter suggests the use of the ECHR as a minimum standard of protection.

On 19 January 2010 for the first time the ECJ in *Kücükdeveci*¹² refers to the legal status of the Charter of Fundamental Rights, as set out in Article 6 TEU as amended in the Lisbon Treaty. The case law following *Kücükdeveci* has referred to the Charter as a source of human rights rules.¹³

Until 2005, the Strasbourg Court did not make any reference to the case law of the ECJ. The Court was extremely careful in dealing with EC-related questions and in

⁵ Cohen-Jonathan, 'Les Rapports Entre la Convention Européenne des Droits de l'homme et les Autres Traités Conclus par les Etats Parties', in R. Lawson and M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers* (1994), iii, at 90–91.

⁶ Case 4/73, *J.Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR. 491.

⁷ See Case 36/75, *Rutili v. Ministre de l'intérieur* [1975] ECR 1219, Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Case 222/86, *Unectef v. Georges Heylens and others* [1987] ECR 4097.

⁸ Case 185/95 P, *Baustahlgewebe GmbH v. Commission of the European Communities* [1998] ECR I–8417.

⁹ G. Cohen-Jonathan, *Aspects Européens des Droits Fondamentaux* (3rd edn, 2002), at 184.

¹⁰ Case 105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I–5285.

¹¹ E. Guild and G. Lesieur (eds), *The European Court of Justice on the European Convention on Human Rights. Who Said What, When?* (1998) and Rosas, 'Fundamental Rights in the Luxembourg and Strasbourg Courts', in C. Baudenbacher et al. (eds), *The EFTA Court: Ten Years On* (2005), at 15.

¹² Case 555/07, *Kücükdeveci v. Swedex GmbH & Co. KG*, Judgment of 19 Jan 2010, not yet reported. For a commentary see Wiesbrock, 'Case Note – Case C-555/07, *Kücükdeveci v Swedex*, Judgment of the Court (Grand Chamber) of 19 January 2010', 11 *German LJ* (2010) 539.

¹³ See Case 323/08, *Mayor Ovidio Rodríguez et others v. Unclaimed estate of Rafael de las Heras Dávila and Sagrario de las Heras Dávila*, Judgment of 10 Dec 2009, not yet reported; Joined Cases 175–179/08, *Abdulla and others v. Bundesrepublik Deutschland* [2010] ECR I–1493; Case 578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken* [2010] ECR I–1839; Case 407/08 P, *Knauf Gips KG, formerly Gebrüder Knauf Westdeutsche Gipswerke KG v. European Commission*, not yet reported; Case 271/08, *Commission v. Germany*, not yet reported.

interfering in the EU's constitutional space, because the EU/EC was not a contracting party to the ECHR.¹⁴ However, through some very important cases,¹⁵ the ECtHR gradually undertook a more active role and started to monitor and scrutinize in much detail EU law issues. Eventually, in *Bosphorus*,¹⁶ the Court made clear its intention to wait for the EU's formal adherence to the ECHR before treating that entity in the same way as the Convention's contracting parties. On that occasion, the Court also declared that the EU no longer enjoyed what has previously been qualified as a 'total immunity' with regard to the ECHR.¹⁷

Despite an extent of cooperation, the two Courts adhere to separate legal systems and thus have divergent approaches to the same broad issues. For instance, in relation to the protection of foreigners against expulsion, fundamentally different provisions apply in the two European legal systems. In the EU law context, the status and rights of a person seeking protection from expulsion vary according to whether he or she is an EU citizen, has exercised his/her right of freedom of movement, is a family member of one of the former categories or none of the above.¹⁸ By contrast, the decisive consideration, when assessing whether protection from expulsion should be granted under Article 8 ECHR, will not so much be the nationality or legal status of the persons concerned, but rather the extent of his/her social integration into the host country.¹⁹

Citizenship presents two faces. For the insiders, those who belong to a political community or have certain allegiances with it, citizenship stands for inclusion and universalism. To outsiders it means exclusion. The inclusionary and exclusionary dimensions of citizenship are spatially and jurisdictionally separate and usually regarded as complementary.²⁰ These two aspects dramatically collide within the EU territory, creating numerous contradictions when it comes to the class of people EU law calls third country nationals (TCNs). These are transnational migrants, and their status differs from that of EU citizens and depends on their entry or residence conditions. They are aliens or non-EU citizens as they enter the borders. Thus, as outsiders, they are always potentially subject to deportation by the host EU Member State.

¹⁴ Scheeck, 'The Relationship Between the European Courts and Integration through Human Rights', 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) 837, 857–858.

¹⁵ Amongst others, App. No. 13258/87, *M & Co. v. The Federal Republic of Germany, Procola v. Luxembourg*, ECHR (1993), Series A, No. 326, *Cantoni v. France*, ECHR (1996), No. 17862/91 and App. No. 24833/94, *Matthews v. United Kingdom*.

¹⁶ App. No. 45036/98, *Bosphorus Hava Yollari Turizm v. Ireland*, ECHR (30 June 2005).

¹⁷ Scheeck, *supra* note 14, at 862–863. See also Krenc, 'La décision Senator Lines ou l'ajournement d'une Question Délicate', 61 *Revue Trimestrielle des Droits de l'homme* (2005) 121, at 124.

¹⁸ Callewaert, *supra* note 4, at 778, citing Case C–60/00, *Carpenter* [2002] ECR I–6279; Case C–206/91, *Koua Poirrez v. Caisse d'allocations familiales de la Seine-Saint-Denis* [1992] ECR I–6685; Case C–456/02, *Trojani v. Centre Public d'Aide Sociale de Bruxelles* [2004] ECR I–7573; Case C–127/08, *Metock v. Minister for Justice, Equality and Law Reform* [2008] ECR I–6241.

¹⁹ Callewaert, *supra* note 4, citing for the relevant criteria: App.No. 54273/00, *Boultif v. Switzerland*, ECHR (2001) 33 EHRR 50; App. No. 46410/99, *Üner v. Netherlands*, ECHR (2006) 45 EHRR 14; App. No. 1638/03, *Maslov v. Austria*, ECHR (2008) 47 EHRR 20.

²⁰ L. Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (2008), at 2 ff.

Scholars debate the different theoretical positions taken with regard to the rights of aliens who are present on a state's territory. Bosniak shows how the granting of rights may be based on nationality (thus excluding aliens) or on territoriality (thus including them).²¹ A similar distinction can be made with regard to the rights of TCNs in the EU, and both the ECJ and the ECtHR will be faced with the question whether having a foreign nationality is a relevant ground for withholding rights from TCNs. In this respect, despite applying different provisions, a coherent approach would require that both Courts take the same position. Callewaert has argued that there is no formal hierarchy between ECHR and EU law and they both claim the right to set standards applicable to a substantial part – if not all – of the continent. In his opinion, this will not change with the accession which is simply designed to prevent EU law and institutions from breaching the Convention.²² Although the accession is necessary to integrate the EU into the pan-European system of human rights protection, there is anxiety on how certain issues will be addressed. One of the main concerns is whether the EU is ready for accession and whether the ECJ is up to the standard required by the ECHR.²³

This article compares the jurisprudence of the two Courts to understand the complexity of the new EU dimension. The process of comparison starts with an analysis of the 'divergences' of the European Courts' decisions to gain an understanding of the 'commonalities' which will shape their relationship. Three stages of analysis are employed. The first stage aims at reflecting on the discrepancies between the divergent approaches and conclusions adopted by the two European Courts. The second angle concentrates upon possible convergences between the two sets of decisions of the two Courts. Finally, the third stage examines the interplay between these two angles, taking into account the impact of these 'commonalities' on the European fundamental rights dimension emerging after the Lisbon Treaty.

The aim is to determine whether there is any coherence or common approach between the two institutions, even in such a divergent area of law, and predict the direction the judiciaries of Europe will pursue in the light of the new developments introduced by the Lisbon Treaty. Finally, some preliminary conclusions will be attempted.

2 A Case Study: Confronting and Contrasting the ECJ's and ECtHR's Approaches to the Protection of Third Country Nationals against Expulsion

Dissimilar approaches have been followed by the two European Courts due to the distinct legislations on the protection of foreigners against expulsion. At EU law level there are two separate sets of laws, which are concurrent and mutually exclusive: the free movement of people/EU citizenship and the EU Immigration and Asylum

²¹ *Ibid.*, at 18 ff.

²² Callewaert, *supra* note 4, at 783.

²³ Morano-Foadi and Andreadakis, *supra* note 3.

provisions. By contrast, the ECHR rules focus more on the residence/integration criteria of the individual concerned.

A *EU Citizenship and Migration Law*

Under EU law, a person seeking protection from expulsion is subject to different treatment according to his/her nationality/citizenship status, and this creates a stratification of rights between different people living within the EU. There is a hierarchy of legal residents within the EU, with the Union citizens at the apex and TCNs with no connection with EU citizens at the bottom of the ladder. Some further sub-classifications within each category according to the migrant's economic attractiveness or the length of the residence status within the EU are also evident, in particular if the individual is a non-EU citizen.²⁴

Then, EU citizens and family members, including TCNs, have privileged status as they are protected by EU citizenship/free movement of people legislation and thus are very rarely subject to expulsion. Despite the broad scope of the right of free movement, there are some exceptions to the principle of free movement. These are laid out in Article 45(3) TFEU, which states that free movement can be restricted on the grounds of public policy, public security, and public health.

Directive 2004/38²⁵ sets out certain circumstances in which EU citizens can be expelled from or refused entry to another Member State. Article 27(1) refers to grounds of public policy, public security, or public health, but these grounds shall not be invoked to serve economic ends. Then, paragraph (2) affirms that any measures shall comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned.

There are further limitations for those Union citizens or their family members who have acquired the right of permanent residence (five years), as they may not be expelled 'except on serious grounds of public policy and public security' (Article 28(2) and (3)). An expulsion decision needs to be based on 'imperative grounds of public security' once the citizen has resided in the Member State for the last 10 years.

The ECJ confirms that the expulsion of Union citizens or their family members exercising their mobility is not allowed unless justified, and it places EU citizens on a strong basis of equality with the state's own nationals. Public policy and public security shall comply with the principle of proportionality. These derogations relate only to the personal conduct of the individual concerned.²⁶ Previous criminal convictions are not in themselves grounds for expulsion. Article 27(2), incorporating *R v. Bouchereau*,²⁷ provides that personal conduct of the individual must represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society.

²⁴ A useful discussion of the typology of European inclusion and exclusion can be found in E. Guild, *Security and Migration in the 21st Century* (2009), at 188 ff.

²⁵ OJ (2004) L158/77.

²⁶ Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337.

²⁷ Case 30/77, *Régina v. Pierre Bouchereau* [1977] ECR 1999.

In *Adoui and Cornuaille*²⁸ the ECJ ruled that Member States may not expel a national of another Member State from their territory or refuse entry by reason of conduct (in this case, suspected prostitution) which, when attributable to their own nationals, does not give rise to genuine and effective or repressive measures intended to combat such conduct. Later on, the ECJ case law introduced further safeguards as regards deportation.²⁹ In *Oulane*, the ECJ stated that 'detention and deportation based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement'.³⁰

The recent *Tsakouridis* judgment,³¹ in line with the *Orfanopoulos* case law,³² clarifies the scope of 'imperative grounds of public security'. In emphasizing the importance of Article 7 of the Charter, the judgment attempts to balance the public security threat based on the personal conduct of the Union citizen with the risk of compromising its social rehabilitation in the state where he has become integrated.

The basis of the ECJ reasoning in all these judgments is the principle of non-discrimination on the basis of nationality, which is the core of free movement legislation and requires that similar situations are not treated differently between EU citizens and nationals, unless justified.

In paragraph 32 of the *Rutili* judgment, the ECJ explains that the grounds of public policy, public security, and public health are 'a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 . . . [ECHR] ratified by all the Member States, and in Article 2 of Protocol No 4 of the same convention, . . . which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests 'in a democratic society'.³³

According to Guild, the ECJ has relied 'on the legitimacy of the ECHR in a legal framework which is the inverse of the Convention'.³⁴ She explains that the right to free movement is an individual right enforceable against the state in a way that no right of the ECHR, with the exception of Article 3 (or perhaps Article 2 ECHR), applies.³⁵

²⁸ Joined Cases 115 and 116/81, *Adoui and Cornuaille v. Belgium* [1982] ECR 1665.

²⁹ Case 175/94, *R v. Secretary of State for Home Affairs, ex parte Gallagher* [1995] ECR I-4253, Joined Cases 65/95 and 111/95, *R v. Secretary of State for Home Affairs, ex parte Shingara and Radiom* [1997] ECR I-3343.

³⁰ Case 215/03, *Salah Oulane v. Minister voor Vreemdelingenzaken en Integratie* [2005], ECR I-01215, at para. 40; see also Case 157/79, *Pieck* [1980] ECR I-2171, at paras 18 and 19; Case 265/88, *Messner* [1989] ECR 4209, at para. 14; Case C-459/99, *Mouvement Contre le Racisme, l'antisémitisme et la Xénophobie ASBL (MRAX) v. Belgian State* [2005] ECR I-6591, at para. 78.

³¹ Case C-145/09 *Land Baden-Württemberg v. Tsakouridis* [2010] All ER (D) 247, not yet reported in the ECR.

³² Joined Cases C-428 and 493/01, *Orfanopoulos and Oliveri* [2004] ECR I-5257.

³³ *Rutili*, *supra* note 7.

³⁴ Guild, 'Security of Residence and Expulsion of Foreigners', in E. Guild and P. Minderhoud (eds), *Security of Residence and Expulsion: Protection of Aliens in Europe* (2001), at 65.

³⁵ *Ibid.*

In relation to family members of EU citizens, the ECJ has applied Article 8 ECHR in a number of judgments³⁶ to emphasize the obligation on national authorities to take into account the right to family life and respect of proportionality.

The same rules do not apply to TCNs not related to any EU citizens. In the area of immigration and asylum, the Treaty of Amsterdam conferred jurisdiction on the ECJ, and the Treaty of Lisbon extended it to criminal matters and police cooperation issues, with the exclusion of the review of the validity of operations carried out by the police or other law-enforcement services of a Member State for the safeguarding of internal security. TCNs enjoy EU rights through a variety of instruments based on Article 79 TFEU (ex Article 63(3) TEC, as amended), which include amongst others³⁷ the Directive on Third Country Nationals who are Long-Term Residents.³⁸ This Directive provides for a secure residence right and free movement for economic and other purposes across the EU for (most) TCNs, who have completed five years' lawful residence in a Member State. It is the closest immigration and asylum measure to the Citizenship Directive 2004/38. Article 12(1) of the Directive states that Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security. The decision to expel a long-term resident 'shall not be founded on economic considerations' and a number of factors (such as the duration of the residence of the long-term resident in the Member State; her/his age; the consequences of the exclusion order on the long-term resident and his/her family; the links that he/she has with the country of residence or the absence of those links) should be taken into account before adopting such a decision. All these criteria are also present in Directive 2004/38. However, while for Directive 2003/109 the list is exhaustive, that is not the case for Directive 2004/38. Then, Directive 2004/38 also stresses the need to consider the EU citizens' health in case of expulsion, and there is extra protection for those who have the right of permanent residence after five years, those who have resided for the previous 10 years, and minors. Such cases can be expelled on 'imperative grounds of public security' only. The personal conduct of the individual concerned must represent a genuine and sufficiently serious threat affecting one of the fundamental interests of society, as interpreted by the ECJ.³⁹ This requirement is not present in Directive 2003/109. The Court said that present convictions for EU citizens and family members cannot automatically warrant an expulsion order;⁴⁰ this requirement is also not present in Directive 2003/109.

In addition to long-term residents, other TCNs have been assimilated to EU citizens. Their right to equal treatment can be derived from bilateral or multilateral agreements

³⁶ *Carpenter*, *supra* note 18; Case C-109/01, *Akrich* [2003] ECR I-9607; *Orfanopoulos*, *supra* note 32; *Metock*, *supra* note 18.

³⁷ Such as the Family Reunification Dir (Dir 2003/86, OJ (2003) L251/12); the Students and Researchers Dirs (Dir 2004/114, OJ (2004) L375/12 and Dir 2005/71, OJ (2005) L289/15); the Returns Dir (Dir 2008/115, OJ (2008) L348/98).

³⁸ Council Dir 2003/109, OJ (2004) L16/44.

³⁹ Case 67/74, *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 297 and Case 30/77, *Régina v. Pierre Bouchereau* [1977] ECR 1999.

⁴⁰ Case C-348/96, *Criminal Proceedings against Donatella Calfa* [1999] ECR I-11.

between the EU and non-EU countries. Such agreements introduce equal treatment clauses to be applied to the nationals of some European states which are not currently in the EU (e.g. Turkey, FYROM), several North African states (Algeria, Morocco, Tunisia), and more than 70 African, Caribbean and Pacific states which are parties to the Cotonou Agreement.⁴¹ So, for example, in the case law on the EU/Turkish agreement, the ECJ has emphasized the length of residence of Turkish migrant workers in the host state as a decisive element to consider in expulsion cases.⁴² In particular, the EEC/Turkey Association Agreement and Decision No. 1/80 confer on Turkish migrant workers the same protection in access to employment and conditions of employment as are accorded to EU nationals.⁴³ In *Hava Genc v. Land Berlin*, the Court mentions that the only two kinds of restrictions on the rights conferred on Turkish nationals who fulfil the conditions laid down in Decision No. 1/80 are 'a restriction based on the fact that the presence of the Turkish migrant in the host Member State constitutes, by reason of his own personal conduct, a genuine and serious threat to public policy, public security or public health, within the terms of Article 14(1) of that decision [. . . and] a restriction based on the fact that the person concerned has left the territory of that State for a significant length of time without legitimate reason'.⁴⁴ The ECJ in *Murat Polat* affirms that Article 14(1) needs to be interpreted 'as not precluding the taking of an expulsion measure against a Turkish national who has been the subject of several criminal convictions, provided that his behaviour constitutes a genuine and sufficiently serious threat to a fundamental interest of society. It is for the national court to determine whether that is the case in the main proceedings'.⁴⁵

It remains to be assessed whether the expulsion of a Turkish national is permitted only on 'imperative grounds of public security', provided the individual has resided in the host country for 10 years, equalizing in such a way Turkish citizens to EU citizens. New pending preliminary proceedings⁴⁶ will provide a clear answer to this question.

The recent case of *García and Cabrera* dealing with the Convention implementing the Schengen Agreement expands the protection accorded to TCNs, stating that 'where a TCN is unlawfully present on the territory of a Member State because he or she does

⁴¹ See Ryan, 'The EU and Labour Migration: Regulating Admission or Treatment?', in A. Baldaccini, E. Guild, and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (2007), at 489, 511–513.

⁴² For a complete analysis see Guild *supra* note 34, at 63; Acosta, 'Protection Against Expulsion: Article 12', in D. Acosta, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An analysis of Directive 2003/109* (2011), at 121.

⁴³ See Dec 1/80 of the Association Council, OJ (2008) C064/10; Case C–294/06, *The Queen, on the application of Ezgi Payir, Burhan Akyüz and Birol Öztürk v. Secretary of State for the Home Department* [2008] ECR I–203; and Case C–1/97, *Mehmet Birden v. Stadtgemeinde Bremen* [1998] ECR I–7747.

⁴⁴ Case C–14/09, *Hava Genc v. Land Berlin*, not yet reported; See also Case C–453/07, *Land Baden-Württemberg v. Metin Bozkurt* [2008] ECR I–7299, at para. 30.

⁴⁵ Case C–349/06, *Murat Polat v. Stadt Rüsselsheim* [2007] ECR I–8167.

⁴⁶ See the reference for a preliminary ruling in Case C–371/08, *Nural Örneek v. Land Baden-Württemberg* [2008] OJ C 285/24.

not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person'.⁴⁷

Moreover, extensive protection granted by the ECJ to TCNs can be found in *Chakroun*⁴⁸ on the interpretation of the Family Reunification Directive. The Court referred to case law⁴⁹ applicable to EU citizens when interpreting the meaning of certain provisions applicable to TCNs. This decision was taken by the ECJ after the entry into force of the Lisbon Treaty; thus it can be a sign of a move by the Court towards a more universal approach to human rights.

Provided that the Court follows its previous line of reasoning applied to cases with regard to Turkish citizens and the Schengen Agreement, as well as its rationale in *Chakroun*, it can be argued that the security of residence of status-holders has certainly been improved.⁵⁰ Arguably, it has reached a level comparable to that of European citizens as envisaged by the Tampere Conclusions,⁵¹ the Stockholm Programme,⁵² the Communication from the Commission entitled 'Europe 2020 strategy', and the June 2010 Council Conclusions.⁵³

B Immigration Cases within the ECHR

In the context of the Council of Europe, applying the ECHR to immigration cases has always been a difficult balancing exercise between the effective protection of human rights and the Contracting States' autonomy to regulate migration flows. Every country has introduced specific legislative measures dealing with immigration and, more specifically, with the maintenance of effective immigration control. The Strasbourg Court maintains the principle that the Contracting States enjoy the right 'as a matter of well-established international law and subject to their treaty obligations to control the entry, residence and expulsion of aliens'.⁵⁴

There can be several reasons why a person is deported or removed from a country. A large number of applicants have relied on Article 8's insistence on respect for family life as the basis for contesting a decision to refuse entry to or deport aliens, when the excluded person has family connections in the relevant country.⁵⁵ Despite the duty of

⁴⁷ Joined Cases 261 and 348/08, *María Julia Zurita García and Aurelio Choque Cabrera v. Delegación del Gobierno en Murcia* [2009] ECR I–10143.

⁴⁸ *Chakroun*, *supra* note 13.

⁴⁹ Case C–291/05, *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind* [2007] ECR I–10719 and *Metock*, *supra* note 18.

⁵⁰ See Acosta, *supra* note 42.

⁵¹ Presidency Conclusions, Tampere European Council, 15 and 16 Oct. 1999, Bull. EU 10/99.

⁵² Council of the European Union, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizen', Doc 17024/09, Brussels, 2 Dec. 2009.

⁵³ 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010)2020; European Council Conclusions, 17 June 2010, EUCO 13/10.

⁵⁴ App. No. 12313/86, *Moustaquim v. Belgium*, ECHR (1991), at 43.

⁵⁵ Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?', 57 *Int'l & Com LQ* (2008) 88. See also App. No. 15576/89, *Cruz-Varas v. Sweden*, ECHR (1991), which extended the logic of the *Soering* case on extradition to expulsion and deportation.

the state not to interfere with private and family life, expulsion is a rather broad concept, and it would be wrong to consider it confined within the limits of Article 8 only. There is a considerable body of case law on expulsion using Article 8 together with Article 3 ECHR, Article 3 only, or Article 2. Article 3 constitutes an absolute minimum standard entailing the obligation for a state not to extradite or expel a person to a country where there is a risk of exposure to torture or inhuman or degrading treatment or punishment.⁵⁶ Article 2 prohibits deportation in the case of a real risk that the deporting alien will be the victim of arbitrary killing in the receiving country.

Cases of expulsion ordered for the protection of society against serious crime cannot be judged by the same criteria used for those of ordinary removal. Each situation is unique, but also the standards cannot in principle be the same just because the applicants use considerations of family life and/or private life. Accordingly, the factors taken into account for the assessment of an expulsion order are different if criminal offences are committed.

Under the Convention, protection is provided for all people irrespective of nationality or citizenship. For the ECtHR it makes no difference whether it is a European or a foreign case when assessing whether protection from expulsion should be granted under Article 8 ECHR. The Strasbourg Court examines whether there is a violation of the rights protected by the Convention *per se* and just focuses on the context in which the possibility of a person's forced removal to another jurisdiction arises.⁵⁷ In other words, for the application of Article 8 the decisive question is whether the state's refusal of leave to enter or remain in the country, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, deprives the applicant of the opportunity to benefit from his right and thus constitutes a sufficiently serious breach. The answer is given, taking into full consideration all factors in favour of the refusal and following an attempt to strike a fair balance between the rights of the individual and the interests of the community.

The protection of TCNs' long-term residence status does not create a new and separate category of protection based on the length of their stay in the receiving country and the personal bond with that country, although there were judges suggesting an autonomous protection independent of the existence of family life.⁵⁸ Expulsion or deportation is commonly recognized as a form of 'interference with the applicant's right to respect for his private and family life',⁵⁹ as judges were reluctant to take such a bold step and give up the link to family life.

⁵⁶ Koprolin, 'Introduction', in Guild and Minderhoud (eds), *supra* note 34, at 4.

⁵⁷ Du Bois-Pedain, 'The Right to Family Life in Extradition Cases: More Defendant-Friendly than Strasbourg Requires', Case Comment, 69 *Cambridge LJ* (2010) 223.

⁵⁸ *Beldjoudi v. France*, ECHR (1992), Series A, No. 234-A. See also the opinions of judges Wildhaber, Morenilla, and de Meyer in *Nasri v. France*, ECHR (1995), Series A, No. 320-B.

⁵⁹ App. No. 25404/94, *El Boujlifa v. France*, ECHR (1997), at 36; similarly, App. No. 47160/99, *Ezzouhdi v. France*, ECHR (2001), at 26; and App. No. 26102/95, *Dalia v. France*, ECHR (1998), at 45. See also van Dijk, 'Protection of "Integrated" Aliens against Expulsion under the European Convention on Human Rights', 1 *European J Migration and L* (1999) 298.

A wide interpretation of family life and a flexible approach have been adopted by the ECtHR. This has confirmed the role of that Court as a safeguard of human rights and protector of individuals who can be found in a disadvantageous position. However, the pressing need for consistency in the Court's approach, due to the extremely serious and sensitive nature of Article 8 cases, has prompted the ECtHR to develop a set of standards to avoid a 'judicial lottery'⁶⁰ and maintain coherency and fair judgments. This was considered to be the most appropriate response to the repeated criticism that the Court's case law lacked a coherent approach, thus increasing legal certainty and efficient protection.⁶¹

Although not written in stone, the tests used by the Court in the relevant case law were related to the degree of integration in the host country and the social ties with the local community. If the foreigner was able to demonstrate the existence of sufficiently strong links with the host country, this was highly valued by the Court in its assessment of the personal situation of an applicant and his family members. In this way, the Court wished to leave the door open for reassessment and periodic review in the light of any changing circumstances.

However, *Boutlif*⁶² represents a turning point in the ECtHR's approach towards family life in general and family reunification of long-term immigrants in particular. In this case, the Court provided a list of criteria to be taken into account for the assessment of whether an expulsion measure by a Contracting State is justified as proportionate to the legitimate aim pursued as well as necessary in a democratic society. They are wide-ranging factors, covering several different aspects of the life of the immigrant, the offence committed, and the threatened expulsion measure. The rationale behind the introduction of a list is the measurement of the effect that an expulsion order will have upon the applicant and his/her family. The Court elaborated the relevant criteria to be used for assessing whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued.

The eight *Boutlif* criteria, as reproduced in paragraph 50 of the judgment, include the nature and seriousness of the criminal offence, the length of the stay in the host country, the time elapsed since the offence was committed and the conduct during that period, the nationalities of the various people concerned, the applicant's family situation, whether the spouse knew about the offence when they entered into the relationship, the age of children, and the seriousness of the difficulties which the spouse is likely to encounter in the country of origin.⁶³ The judges considered these criteria as a really useful tool and have gone on to use them in similar cases since 2001.

Given the fact that the *Boutlif* criteria were open to further development and improvement, the Court in *Benhebbba v. France*⁶⁴ showed the intention effectively to extend

⁶⁰ Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals in Strasbourg', 21 *Netherlands Q Human Rights* (2003) 66.

⁶¹ Harvey, 'Promoting Insecurity: Public Order, Expulsion and the European Convention on Human Rights', in Guild and Minderhoud (eds), *supra* note 34, at 41 ff.

⁶² *Boutlif v. Switzerland*, *supra* note 19.

⁶³ *Ibid.*, at paras 48–50.

⁶⁴ App. No. 53441/99, *Benhebbba v. France*, ECHR (2003), at 33.

the degree of protection granted to foreigners who were born in the host country or moved there in their young childhood. More specifically, when a foreigner was born in the host country or moved there in his young childhood, the Court limits its assessment to the three first *Boutlif* criteria, thereby effectively extending the degree of protection granted to the person concerned.⁶⁵

The next case that re-affirmed the importance and practicality of the *Boutlif* criteria is *Üner*.⁶⁶ The Court applied the *Boutlif* criteria, making clear that they are applicable and should be used in all similar cases. The innovation was that there is a differentiation regarding the best interests and the wellbeing of the children as well as the solidity of the family ties as two additional sub-criteria.⁶⁷ The first one was already reflected in the case law,⁶⁸ while the second one derived from the Court's recognition that 'the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be'.⁶⁹ Overall, despite the addition of two further criteria, the judgment in *Üner* does not represent a conceptually new approach to the problem of expulsion of long-term immigrants. However, the Court did take more detailed account of the impact of such a measure on an immigrant's private and family life, since the judgment accepted that the totality of ties between settled migrants and their host country forms part of the concept of private life within the meaning of Article 8.⁷⁰

The consistent application of these standards in the later cases,⁷¹ even after the ratification and the entry into force of the Lisbon Treaty,⁷² is another step in the right direction. This illustrates the willingness of the Court to build a coherent case law which facilitates the autonomous application of Article 8 ECHR by domestic courts.

The re-conceptualization of private and family life within the meaning of Article 8 may lay the ground for the structural alignment of ECHR standards and EU legislative instruments. The Court's criteria for the protection of family life may serve as the human rights standard for the Family Reunification Directive, while its jurisprudence on the protection of the long-term residence status would become the parameter for the rights of long-term residents under Directive 2003/109.⁷³ More specifically, the eight '*Boutlif* criteria' may guide the interpretation of the public order provisions present in Article 17 of Directive 2003/86⁷⁴ and Article 12 of Directive 2003/109.

⁶⁵ *Ibid.*

⁶⁶ App. No. 46410/99, *Üner v. The Netherlands*, ECHR (2006).

⁶⁷ *Ibid.*, at 57–58.

⁶⁸ App. No. 31465/96, *Sen v. The Netherlands*, 36 EHRR (2003) 7, at 40; App. No. 60665/00, *Tuquabo-Tekle and Others v. The Netherlands*, ECHR (2005), at 47.

⁶⁹ *Üner*, *supra* note 66, at 58.

⁷⁰ Steinorth, '*Üner v. The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life*', 8 *Human Rts L Rev* (2008) 1, at 196.

⁷¹ *Maslov*, *supra* note 19.

⁷² App. No. 17486/06, *A.W. Khan v. United Kingdom*, ECHR (2010).

⁷³ See Case C-540/03, *Parliament v. Council* [2006] ECR I-5769 with the Opinion of Kokott AG of 8 Sept 2005, at paras 59–78. The Dir is that on the status of third country nationals who are long-term residents, OJ (2004)L16/44.

⁷⁴ On the right to family reunification, OJ (2003) L251/12.

These provisions on the protection of foreigners against expulsion can be interpreted in the light of the ECHR case law. In this way, the cooperation between the Courts can be transformed into something more tangible and concrete than the desire for mutual respect and support.

C Common Approaches between the Two Courts

Since the ECtHR and the ECJ have to combine their forces, the judges should create a common code of communication, a human rights legal language, which will enable them to avoid conflicts of interests and judicial overlaps. In this way, the level of protection afforded will be enhanced and both the ECHR and the Charter will be smoothly integrated into the EU legal order. From the foregoing discussion, there seem to be common approaches between the two Courts and these can be used as a basis for further development of the common human rights legal language.

At EU law level the flow and volume of migration is left to the autonomy and control of Member States, but once the migrants are within EU borders, EU law regulates residence and expulsion. Despite the differences of treatment in EU legislation between EU citizens and TCNs, the ECJ in *Chakroun* interpreted some provisions applicable to TCNs in line with the case law applicable to citizens as well as the ECtHR jurisprudence and the Charter of Fundamental Rights. The Charter can improve the dialogue between the two Courts during the transition period until the formal accession of the EU to the ECHR. Through the Charter, the ECtHR jurisprudence should be applicable to EU law even before the accession takes place. Almost all of the rights contained in the Charter apply not only to EU citizens but also to TCNs, because of the Charter's universal applicability. Since it refers to 'everyone', the way is open for the equalization of rights for everyone in the EU. Moreover, the universal applicability is not jeopardized by the fact that Poland, the UK, and the Czech Republic have opted out of specific chapters of the Charter, because the ECJ can make use of the general principles of law instead of individual provisions, as in *Küçükdeveci*.⁷⁵

At the same time, through the EU's secondary legislation on TCNs it is clear that they are already acquiring bundles of rights in Marshall's citizenship sense.⁷⁶ This is now further developed and extended by the Charter.⁷⁷ It has been argued that the assimilation of protection of residence for certain TCNs to the level enjoyed by Union citizens diminishes the differential in rights between the TCNs and EU citizens in a state. This simplifies the job of the administration and the courts in applying one test in respect of Union law, no matter whether it is based on the Treaties, secondary legislation, or other sources such as accession agreements or the Schengen Convention.⁷⁸

⁷⁵ Peers, 'Supremacy, Equality and Human Rights: Comment on *Küçükdeveci* (C-555/07)', 35 *EL Rev* (2010) 849, at 856.

⁷⁶ According to Marshall, citizenship describes a process of accumulation of bundles of rights claimed by people: see T.H. Marshall, *Class, Citizenship and Social Class* (1963).

⁷⁷ Guild, 'What Fundamental Rights for whose EU Citizens?', available at: http://ec.europa.eu/education/jean-monnet/doc/ecsa10/guild_en.pdf.

⁷⁸ Guild and Minderhoud (eds), *supra* note 34, at 79.

The other side of the coin is to claim that the enhanced protection accorded to some TCNs can create a new category of privileged non-European citizens, which could potentially reduce the distinction but not diminish the differential. Beyond doubt, whatever position is taken on this respect, the value of the Charter and its broad personal scope of application cannot be underestimated.

Moreover and more specifically, the cases of *Metock* and *Carpenter* can be used as examples of convergence between the two Courts, but once again, despite the reference to Article 8 ECHR, the cases involved EU citizens' family members.⁷⁹ For example, in *Metock*, the Court adopted a rather wide interpretation of Article 3(1) of Directive 2004/38 providing that 'the benefit of rights provided for in Article 10 of the Regulation on Freedom of Movement for Workers within the Community [Union] cannot depend on the prior lawful residence of a spouse in another Member State'. The assimilation of protection between TCNs and EU citizens will no doubt facilitate the integration of non-EU nationals.

The Strasbourg jurisprudence maintains the principle that the Contracting States enjoy the right 'to control the entry, residence and expulsion of aliens'.⁸⁰ It takes the form of a balancing exercise between the effective protection of human rights and the Contracting States' autonomy to regulate migration flows. The Court has classified the deportation of a foreigner as a potential violation of his right to family life under Article 8 ECHR and applied the prohibition of inhuman or degrading treatment in Article 3 ECHR to the expulsion of aliens.⁸¹

The Strasbourg Court considers it appropriate further to expand its protective scope beyond the realms of family life *stricto sensu* and put under its umbrella second-generation immigrants as well. In assessing individual rights to protection for family life, the ECtHR has considered the degree of family life, including considerations about the integration of the individual.⁸² As mentioned earlier, the degree of integration in the host country and the social ties with the local community are criteria that have already been used in the relevant case law.

What remains to be resolved is whether the ECtHR gives primary significance to the legitimate interests of states in securing public order or to the right of long-term immigrants to remain in their host country.⁸³

Finally, it is worth mentioning an interesting approach introduced by the joint dissenting opinion of judges Costa, Zupančič, and Türmen in *Üner*. The judges argued that texts, such as the UN Convention on the Rights of the Child together with Council of Europe's Recommendations or even the conclusions of the Tampere and Seville European Council of 1999 and 2002 respectively can be used for the correct

⁷⁹ It is to be noted that the majority of TCNs in the EU are family members of EU migrant nationals so their position must be subsumed to that of their EU national principal. See Guild, *supra* note 24, at 147.

⁸⁰ *Moustaquim*, *supra* note 54, at 43.

⁸¹ *Thym*, *supra* note 55, at 88. See also *Moustaquim*, *supra* note 54 and App. No. 15576/89, *Cruz-Varas v. Sweden*, ECHR (1991), which extended the logic of the Soering case on extradition to expulsion and deportation.

⁸² App. No. 25613/94, *El Boujaïdi v. France*, 30 EHRR (2000) 223.

⁸³ Steinorth, *supra* note 70, at 196.

interpretation of the ECHR and the proper construing of its provisions, i.e. Article 8.⁸⁴ Since there is no formal hierarchy that binds the judges, any alternative sources, EU or international law, can be used for the achievement of the best possible results. What the Strasbourg judges suggested in this case may be the way forward, and perhaps the Charter could be used as a commonly accepted and authoritative source, as long as it is interpreted consistently and in line with EU law.⁸⁵

3 Some Preliminary Conclusive Remarks

The new developments introduced by the Lisbon Treaty, i.e. the legally binding nature of the Charter and the EU's accession to the ECHR, will significantly re-adjust the relationship and the balance of powers between the two European Courts.

Until November 2009, human rights were being regulated by two distinct and independent regional regimes: the Luxembourg system and the Strasbourg order. Within the Luxembourg regime, fundamental rights first developed by the ECJ, as general principles of EU law, were then enshrined in the EU Treaties.⁸⁶ Within the Strasbourg system, human rights were based on the ECHR interpreted by the ECtHR and administered by the Council of Europe.⁸⁷ In general, the two regimes have co-existed in harmony for all these years with no major conflicts of authority or hierarchy issues, even though some problems and divergences of approaches existed in relation to specific areas.

The Lisbon Treaty added an additional layer of protection of fundamental rights to the existing EU legal order. Despite the divergent approaches, the two Courts managed to generate a strong relationship of cooperation by initiating a dialogue that has led to a remarkable convergence between their legal orders in some areas (i.e. the right to protection for property, the right to freedom of expression, the right to respect for private and family life, the right to a fair trial).⁸⁸ For instance, the ECJ has been using the Convention as a source of inspiration for the general principles of law, underlining its 'special significance',⁸⁹ and has also followed the ECtHR's jurisprudence and then re-considered its own previous case law in the light of more recent Strasbourg judgments.⁹⁰ In parallel, the Strasbourg Court has adopted the same approach to

⁸⁴ See Joint Dissenting Opinion of Costa, Zupančič, and Türmen in *Üner*, *supra* note 66, at 6–8.

⁸⁵ See Morano-Foadi and Andreadakis, *supra* note 3.

⁸⁶ See Johnston, 'Indefinite Immigration Detention: Can it Be Justified', 23 *J Immigration Asylum and Nationality L* (2009) 351.

⁸⁷ Harpaz, 'The European Court of Justice and its Relations with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy', 46 *CML Rev* (2009) 105.

⁸⁸ Krisch, 'The Open Architecture of European Human Rights Law', 71 *MLR* (2008) 183, at 198; see also Scheeck, *supra* note 14, at 837; Callewaert, *supra* note 4, at 769–770.

⁸⁹ See Case 260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforisis and Sotirios Kouvelas* [1991] ECR I-2925, at para. 41; *Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759, at para. 33; Case C-299/95, *Kremzow v. Austria* [1997] ECR I-2629, at para. 14.

⁹⁰ See Case C-441/05, *SA Roquette Frères v. Council of the European Communities* [2007] ECR I-1993, in which the ECJ appeared to reconsider its *Heechst* case law in the light of Strasbourg's judgment in *Chapell* and later *Casey* concerning the search of business premises under Art. 8 ECHR.

reassess its judgments in the light of the most recent ECJ case law.⁹¹ Consequently, even though neither the Convention nor the ECtHR judgments were legally binding on the EU and thus not creating direct obligations for that entity,⁹² arguably the result was reasonably the same as if the Union was bound by the Convention.⁹³ This is also confirmed by the fact that recently there has been a remarkable development in the ECJ's citations of the Strasbourg case law in its judgments.⁹⁴ Another positive indication is that, despite their differences, the cases in which the ECJ and the ECtHR have reached opposing conclusions have so far been very few.⁹⁵

However, the fact that there has been no friction between the two Courts so far should not create an illusion of unity. It should not be ignored that the ECJ has set different objectives from the ECtHR. The ECJ speaks the language of freedom and it is committed to offering a sound interpretation of the Treaties and facilitating the operation of the internal market. It is devoted to ensuring that EU citizens enjoy all the rights and freedoms provided and protected by the European legal order. On the other hand, the ECtHR is a specialized Court, focusing on human rights and the ECHR. Therefore, it is reasonable to come across differences in the approach, the interpretative methods, the justification of judgments, as well as the analysis of provisions and legal terms. Indicatively, we can mention the fact that the ECtHR has declared that it does not afford different treatment to people coming from different countries, as the distinction between nationalities is not crucial for the Court. Nevertheless, nationality is one of the *Boutif* criteria, as mentioned earlier, and this raises some questions on the discriminatory free approach used by the ECtHR.

Overall, although the identification of common approaches between the two Courts can be characterized as an indication of harmony between the Courts, full harmonization of the human rights standards is yet to be achieved. The recent ECJ case law shows that the gulf between the rights of citizens of the Union and TCNs has diminished, but several steps need to be taken, as there are still 'unharmonized' areas. Any differences should not become an obstacle in the Courts' way towards convergence and mutual understanding and cooperation, particularly in the

⁹¹ See App. No. 28957/95, *Goodwin v. UK*, 22 EHRR (1996) 123, where Strasbourg referred to the ECJ's *P v. S and Cornwall County Council* judgment [1996] ECR I-2143 regarding the rights of transsexuals to marry in their assigned gender. See also Jacobs, 'The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union Accession to the European Convention on Human Rights', available at: http://www.ecln.net/elements/conferences/book_berlin/jacobs.pdf, at 292.

⁹² Krisch, *supra* note 88.

⁹³ Ovey and White, 'Prospects: The Relationship with the European Union', in F.G. Jacobs and R.C. White, *The European Convention on Human Rights* (2006), at 516. See also Jacobs AG in *Bosphorus*, *supra* note 16, who argued that 'although the Convention may not be formally binding upon the Community, nevertheless for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in this Court and in national courts'.

⁹⁴ Morano-Foadi and Andreadakis, *supra* note 3.

⁹⁵ Joined Cases 46/87 and 227/88, *Hoechst v. Commission* [1989] ECR 2859 and Case 374/87, *Orkem v. Commission* [1989] ECR 3283; cf App. No. 13710/88, *Niemietz v. Germany*, 16 EHRR (1992) 97 and App. No. 10828/84, *Funke v. France*, 16 EHRR (1993) 297.

post-Lisbon era. The Lisbon Treaty not only changed the architecture of the Union, but gave it a totally different direction. The principle of the ‘rule of law’ embedded in the Member States should be articulated within the new transnational European dimension going beyond the territory of the nations.⁹⁶ Human rights protection constitutes a brand new challenge for the EU institutions and the two Courts have to live up the expectations of EU citizens and TCNs. The EU and the Council of Europe must learn how to interact, not just to co-exist. Until this happens, the EU Charter, which includes reference to the ECHR, appears to be the most suitable vehicle which could connect the two worlds.

⁹⁶ Guild, *supra* note 24, at 191.