

## EU LEGISLATION ON CRIMINAL JUSTICE FROM A STRASBOURG PERSPECTIVE

Gentjana Dedja

**ABSTRACT:** *Even though the European Convention on Human Rights is being applied in EU law, inter alia on the basis of Article 6 § 2 TEU, the Strasbourg Court has no jurisdiction in respect of the European Community or the European Union as such, neither of them being a Contracting Party to the European Convention on Human Rights<sup>2</sup>. As regards the Court's jurisdiction in respect of the EU Member States, a distinction is to be made between the acts of the EU institutions and the acts by which Member States give effect to EU law in their own legal system. With regard to the former, i.e. on the responsibility of the Member States - either individually or collectively - for acts of EU institutions, no answer has been provided yet by the Strasbourg Court and the question is likely to remain unanswered for a long while still, following the inadmissibility decision in the case of Senator Lines'. On the responsibility of the Member States for their own implementation of EU law, however, the case-law is gradually expanding into covering an ever greater number of pieces of the puzzle. As regards the mere "reception" of EU primary law by the domestic legal system of the Member States, reference should be made to the Matthews judgment in which the Strasbourg Court held the United Kingdom responsible for a breach of Article 3 of Protocol no. 1 to the Convention on account of the fact that by virtue of a piece of primary EU law - an Annex to the Act concerning the elections to the European Parliament - a resident of Gibraltar had been excluded from those elections. One consideration which appears to have played a certain role in the Court's thinking is the fact that primary law is not open to review by the European Court of Justice (ECJ)*

**KEY WORDS:** European Convention on Human Rights, EU Legislation on Criminal Justice,

### THE EU MEMBER STATES' RESPONSIBILITY UNDER THE CONVENTION

Even though the European Convention on Human Rights is being applied in EU law, *inter alia* on the basis of Article 6 § 2 TEU, the Strasbourg Court has no jurisdiction in respect of the European Community or the European Union as such, neither of them being a Contracting Party to the European Convention on Human Rights<sup>2</sup>.

As regards the Court's jurisdiction in respect of the EU Member States, a distinction is to be made between the acts of the EU institutions and the acts by which Member States give effect to EU law in their own legal system. With regard to the former, i.e. on the responsibility of the Member States - either individually or collectively - for acts of EU institutions, no answer has been provided yet by the Strasbourg Court and the question is likely to remain unanswered for a long while still, following the inadmissibility decision in the case of Senator Lines'.

On the responsibility of the Member States for their own implementation of EU law, however, the case-law is gradually expanding into covering an ever greater number of pieces of the puzzle. As regards the mere "reception" of EU primary law by the domestic legal

system of the Member States, reference should be made to the Matthews judgment in which the Strasbourg Court held the United Kingdom responsible for a breach of Article 3 of Protocol no. 1 to the Convention on account of the fact that by virtue of a piece of primary EU law - an Annex to the Act concerning the elections to the European Parliament - a resident of Gibraltar had been excluded from those elections. One consideration which appears to have played a certain role in the Court's thinking is the fact that primary law is not open to review by the European Court of Justice (ECJ)<sup>4</sup>.

As far as secondary EU law is concerned, the situation has been much clarified - at least in theory - by the recent judgment in the case of *Bosphorus*, which concerned the impounding by the Irish authorities of an aircraft which had been leased by the applicant company from a Yugoslavian airline. The Irish authorities had acted in pursuance of EC Council Regulation 990/93 which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia<sup>5</sup>.

In this judgment the Strasbourg Court acknowledged the responsibility *ratione personae* of the Member States when implementing EU law. As to their responsibility *ratione materiae*, it established the presumption that under Community law fundamental rights were protected in a way which could be considered "equivalent" to that for which the Convention provided, with the consequence that if a Member State did no more than execute legal obligations flowing from its EU membership, it had not departed from the requirements of the Convention. However, any such presumption could be rebutted if, in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient. Furthermore, a State would remain fully responsible under the Convention for all acts falling outside its strict international legal obligations, including those by which the Member States use the amount of discretion left to him in complying with its Community law obligations. To come to that conclusion, the Court relied also here quite a lot on the extent of the jurisdiction of the ECJ under Community law.

It is on purpose that the reference here is to "Community law" rather than to "Union law", since the Strasbourg Court explicitly limited the scope of its findings in the *Bosphorus* case to Community law *stricto sensu*, i.e. to the so-called "first pillar"<sup>6</sup>. This raises the question of the extent of the Strasbourg Court's jurisdiction in respect of the two other pillars, and especially the third one.

Some information on this can be found in the Court's decision declaring inadmissible the case of *Segi and Others v. the EU Member States*. The application had been filed by two associations which complained that in breach of *inter alia* their rights to freedom of expression and association as well as their property rights, they had been put on a list of associations in respect of which the Member States were called on by an EU Common.

Position<sup>8</sup> to apply some "specific measures to combat terrorism". In their opinion they had thus been described as terrorist organisations by the EU Member States.

The Court denied the applicants the quality of victim required for an application to be admissible under the Convention for the reason that they were not directly affected by the Common Position at issue. Stressing the "strongly intergovernmental character" of the Union's actions under the 2<sup>nd</sup> and 3<sup>d</sup> pillars, the Court noted in respect of common positions that they were not directly applicable, as such, in the Member States and that their implementation required the adoption by each Member State of concrete domestic provisions

in the appropriate legal form. Since the applicants had not adduced any evidence to show that any such particular measures had been taken against them pursuant to the Common Position at issue, their application was declared inadmissible.

Interestingly, the Court added that if such concrete measures had been or would be adopted, they "would be subject to the form of judicial review established in each legal order concerned, whether international or national". This raises again the question of the responsibility of Member States under the Convention for the implementation of EU law, but this time in the area of police and judicial cooperation in criminal matters. While there is no other Strasbourg case-law yet on this issue, it can be assumed in the light of the Bosphorus-jurisprudence that given the fair amount of discretion left to the Member States in this area<sup>9</sup>, in addition to the limited jurisdiction of the ECJ<sup>10</sup>, Member States would remain responsible to a large extent under the Convention when giving effect to 3<sup>rd</sup> pillar-legislation.

### **The Relationship between the Convention and EU Legislation in the Field of Criminal Justice**

For the sake of convenience and by way of example, the relationship between the Convention and EU legislation in the field of criminal justice will be considered in the light of two of the most prominent texts adopted so far - or about to be adopted - in this area: the Framework Decision on the European Arrest warrant (EAW)" and the Draft Framework Decision on certain procedural rights in criminal proceedings (DFD)<sup>12</sup>.

#### **a) Compatibility with The Convention**

As regards the relationship of both texts with the Convention, the intention of the drafters clearly appears to have been to ensure entire compatibility. The Convention is being increasingly used as binding reference under EU law, on the basis of 6 § 2 TEU or even the Charter of fundamental rights, whose actual impact in the EU legal system cannot be denied. It would thus be something of a huge paradox if newly adopted EU legal instruments turned out to fall short of the Convention standards, even more so since these standards represent not a uniform but only a minimum level of protection, in respect of which Member States - and consequently the EU - also enjoy a certain discretion, in accordance with the principle of subsidiarity, as to the way in which they choose to uphold them.

The intention to remain in line with the Convention is also clearly indicated in the very text of the Decisions under consideration here. Both the Preamble and Article 1 of the EAW contain clear statements to the effect that the fundamental rights laid down in Article 6 TUE and in the EU-Charter - which both refer to the Convention - are to be complied with. Moreover, in many respects the EAW has to be executed in accordance with domestic procedures which remain themselves the subject of review under the Convention<sup>13</sup>.

The same intentions towards compliance with the Convention are perceptible in the DFD. In the Explanatory Memorandum, for instance, it is stated that "the intention is not to duplicate what is in the ECHR, but rather to promote compliance at a consistent standard." For its part, the Preamble to the Draft Framework-Decision states in its last recital: "This Framework Decision aims to strengthen the fundamental rights and principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union and in particular its Articles 47 to 50. It cannot lead to divergent judicial interpretations of the relevant provisions of the Convention since the reference to

fundamental rights in Article 6 TEU is necessarily contingent on their interpretation in the European Court of Human Rights case-law."

<sup>3</sup> "In the issuing and execution of European arrest warrants, the national courts will of course remain subject to the general norms relating to protection of fundamental rights, and particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union." (COM(2001) 522 final/2, p. 5)

While this analysis can only be approved of, the question is whether it will suffice to ensure a sufficient amount of legal certainty in the area concerned.

#### **b) A Challenge to Legal Certainty**

A lot could be said on this score but for the sake of brevity, observations will focus on a few essential points. In the Memorandum to the DFD it is stated that, against the background of the difficulties encountered by the Strasbourg system in coping with the growing number of applications and ensuring compliance with the Convention, the DFD aims at ensuring "*higher visibility of safeguards*, [which] would improve knowledge of rights on part of all actors in the criminal justice systems and hence facilitate compliance." While it is certainly true that higher visibility is needed in order to ensure better compliance with fundamental rights, it is not quite sure whether in its present form the DFD is not more likely to raise confusion than visibility.

If compared with the Convention, the DFD contains roughly two types of provisions. The first group is made up of provisions which clearly lay down some new, additional rights, like the right to the so-called "Letter of Rights" or to consular assistance. They are to be welcomed as a further contribution to the steady rise in fundamental rights standards which we have been seeing ever since the entry into force of the Convention. As such, they will no doubt also have an impact on the way the Convention will be interpreted in the future, including by the Strasbourg Court.

However, there is also another set of provisions whose relationship with the Convention rights is much less clear yet, because it cannot be said for sure whether they are meant to depart from them or to extend their scope and, if so, to what extent. They include for instance the right to "*legal advice*" laid down in Article 2. If only because of its own wording, this right will raise the question whether it is identical to the right to "legal r" laid down in Article 6 of the Convention. According to the Preamble to the DFD, "the provisions of this Framework Decision do not impose obligations on Member States that go further than the Convention, but merely set out common ways of complying with Article 6 of the Convention." The same is stated about the right to free and accurate linguistic assistance for foreigners laid down in Articles 6 to 8, which includes the right to interpretation *and* to translation. Actually, and by way of example, it seems doubtful whether in this area Article 6 of the Convention requires in all circumstances the same amount of safeguards.

So if the intention of the Framework-Decision is to refer to Convention rights, it is probably not helpful to depart from the Convention terminology, as different wordings in legal texts are normally intended to mean different things. Otherwise, the result might be a blurred picture and a good deal of confusion rather than enhanced visibility. A couple of years ago, roughly the same problem arose with the Charter of fundamental rights which borrowed a fair

amount of Convention rights but used another terminology to identify them. Fortunately, a solution could be found through the so-called horizontal provisions at the end of the Charter, especially Article 52 § 3, which provides in substance that without prejudice to higher standards being fixed by EU law, the rights borrowed by the Charter from the Convention have the same "meaning and scope". It would help a lot if the DFD contained a similar provision.

However that may be, whether or not such partial legislative initiatives as the DFD at the end of the day will really raise the visibility of fundamental rights, they for sure will all raise the level of complexity of the legislation dealing with fundamental rights, since they in effect add another legislative layer of - partly different - fundamental rights to those which already exist at domestic and Convention level in the area concerned. Not to mention the need to harmonise them with the Charter, should the latter ever enter into force. The result is an inflation of legal instruments confronting domestic courts with an ever greater legal complexity and thus with an increasing difficulty in handling them in a consistent way. If not kept under close control in order to prevent confusion and relativism, developments of that kind might fairly soon turn out to be detrimental to the very rights which they are meant to promote.

## REFERENCES

- [1] Dr. iur. Johan Callewaert, Legal and Executive Assistant to the President of the European Court of Human Rights, Strasbourg; Lecturer at the German Postgraduate School for Administrative Studies, Speyer. Any views expressed are personal.
- [2] ECHR, *Matthews v. UK* [GC], no. 24833, 18.2.1999, § 32.
- [3] ECHR, *Senator Lines GmbH v. the 15 EU Member States* [GC], no. 56672100, dec. 10.3.2004.
- [4] See §33.
- [5] ECHR, *Bosphorus Hava Yallari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, 30.6.2005.
- [6] See §72.
- [7] Nos. 6422/02 and 9916/02, 16123.5.2002
- [8] Common Position 2001/931/CFSP on the application of specific measures to combat terrorism. <sup>9</sup> See ECJ 16.6.2005, C-105/03, *Pupino*.
- [9] See 35 TUE.
- [10] Council Framework Decision of 13 June 2002 on the European arrest warrant.
- [11] Commission Proposal for a Framework Decision on certain procedural rights in proceedings (COM(2004) 328 final) criminal