

**Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks.**

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**ABSTRACT**

The European courts' increasingly nested linkage has given rise to new forms of supranational judicial diplomacy between judicial actors of the European Court of Justice, the European Court of Human Rights that goes beyond traditional understandings of adjudication and has had a deep impact on law- as well as policymaking. The paper mainly aims to put judicial discourses and lawmaking in their political context. It explores how supranational lawyers endeavour to establish transnational epistemic communities that serve as a vehicle for supranational integration and how they engage into strategic interaction with national and supranational adjudicators. This evolving relationship, which is simultaneously underpinned by hierarchical conflicts, competitive and cooperative logics, appears to have become one of the foremost ways to harmonise the rather fragmented European normative space and to empower each of the two European courts. Our hypothesis is that supranational courts have brought up a common supranational “jurisprudential screen” as they relate to each other in order to prevail over national and private actors. Whereas the European courts relationship is often analysed in competitive terms by lawyers and has been neglected by political scientists, the paper addresses the nature of the cooperative jurisprudential and face-to-face dialogue of supranational judges in the changing European political landscape after the failure of the EU Constitution of 2004.

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## *Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks.*

### *Introduction*

After the EU enlargement to 10 new Member States on the first of May 2004 the European Union (EU) is about to embark upon another accession process, which has passed largely unnoticed. For the first time in the history of international organization an international institution is about to seek formal accession to another international body. More precisely, the EU is getting ready to adhere to the European Convention on Human Rights (ECHR) - the Council of Europe's (CoE) main human rights protection instrument. Indeed, the Constitutional Treaty that had been elaborated by the Convention for the Future of Europe in 2004 stated that "the Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (...)" (Title 2, art. 7, § 2). Whereas this accession had been put into question by the failure of the European constitution, it now appears that the principle of an EU accession to the ECHR has been maintained by the EU member states.<sup>1</sup> At a first glance, the political incentive did actually not come from the Conventionals but appears to emanate from the EU member states. The Laeken Declaration on the Future of the European Union gave the mandate to the Convention for the Future of the EU: "Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights" (European Council, 2000). The Convention for the Future of Europe went a step further though. It suggests not only a "first pillar" - or EC - accession to the ECHR but recommends that the whole EU - i.e. all three pillars - should adhere to this international human rights convention.<sup>2</sup>

Why does the EU engage itself into such an accession procedure? Why would such an accession be useful since the EU recently created its own human rights protection instrument, the European Charter on Fundamental Rights, which is to be integrated into the future constitutional treaty? How does it come that an international body seeks accession to another one while important branches of international relations theory assume that international institutions at the most provide for increasing cooperation and interdependence between contracting parties, i.e. States, but do not consider international institutions as *actors* of international relations and more precisely of the configuration of European (supranational) governance? In other words, why is the ECHR - a

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<sup>1</sup> See the Presidency conclusions of the European Council of Brussels, 21-22 June 2007, article 19 (s) and 21.

<sup>2</sup> Of course, as only the EC has a legal personality so far, the attribution of a legal personality to the EU, as proposed by the Convention for the Future of Europe would be a necessary step for such an EU accession.

convention to which only states have been contracting parties so far – about to be joined by a rather unexpected contracting party?

This paper argues that in the absence of EU member state agreement, the latter have been pushed to proceed to such an accession to the ECHR as a result of the rather turbulent interaction between supranational courts. Put differently, we argue that supranational actors are able to influence norms, have interests and seek for power and that they do all the more so when member states resist to the process of European integration they are willing to uphold. More specifically, we view the planned EU accession to the ECHR as a mainly unintended effect of the European Court of Justice's (ECJ's) and European Court of Human Rights' (ECourtHR) simultaneously competitive, conflictual and cooperative position in the general institutional and organisational configuration of the process of European integration. The initially jurisprudential interaction between both courts has led to the progressive emergence of a relation of interdependence, which in turn led to the emergence of a configuration of multiple hierarchies in which supranational institutions interfere into formerly separate legal orders. Over time, some judges and advocate generals in the European courts have started to transform their unintended jurisprudential entanglement into a strategic interdependence by setting up a highly diplomatic relationship.

As they started to meet directly on a regular basis, officially merely comparing their case law, they actually managed to deal with inter-institutional conflict and strengthened their courts' institutional power with regard to member states and private parties by relating to each other – the important point being that the courts did not at all create a “collusive coalition” against member states, neither did they come into fusion, but, quite to the contrary, their political, diplomatic and jurisprudential convergence through supranational judicial networks (which can be traced back empirically) tends to empower each of these otherwise very different courts with regard to those actors which plead in these judicial institutions and which mostly seek for very different objectives (conflict between the two courts actually arises whenever the interests of these actors overlap, i.e. when the same parties manage to bring the same cases to both courts simultaneously, sometimes strategically in order to maximise their interests).

Inter-institutional and cross-organisational interaction at the level of European supranational governance is a mostly neglected but particularly significant variable of the European process of regional integration. The ECJ's fundamental role in the process of European integration has been studied extensively (Dehousse, 1997, Stone Sweet, 2004, Vauchez, 2007). The ECourtHR's role in this regard has not been investigated to the same extent. Yet, the dynamics of competition and

convergence between supranational judicial actors have had a number of - mostly unintended or at least unforeseeable - consequences such as the planned EU accession to the European Convention on Human Rights. There are now two courts at a supranational level that protect human rights and they both play a major role in the process of European integration. Their interaction has progressively lead to a dynamic of convergence that has transformed two separate legal orders into one single, but highly fragmented supranational constitutional space of multiple hierarchies.

All accounts of a liberal self-regulating competition between courts, which - moreover - are not taking into account the complex political context in which supranational courts evolve and which depict courts as monolithic institutions, fall short to explain why and how the European courts interact and why they produce systemic effects on EU politics. The “legal doctrine” has mostly emphasised the competition and conflict between the European courts. This old myth of a competition between the Luxembourg and Strasbourg courts and the aim to explain their relationship by emphasising the mere competition between courts has recently appeared in political science as well (Schimmelfennig 2006). The aim of this contribution is to show that this relationship also has a cooperative facet, which can be seen in the European judges discourse and both courts’ jurisprudence and which appears to be the most prominent feature of the European courts interaction.<sup>3</sup> Of course, this does not mean that the European courts evolved from competition to convergence and cooperation in a linear way. In fact, this relationship cannot be understood without taking into account the not so paradoxical *concomitance* of competition, conflict and cooperation. It is only by taking into account these three distinct variables that the ECJ-ECourtHR relationship can be fully puzzled out, while a contextual political analysis helps to explain why the courts cooperate and why the discourse of cooperation has become so important for the judges themselves.

In this vein, the paper traces back the strategic interactions of the judges of the ECJ and the European Court of Human Rights aiming at fostering a common discursive and jurisprudential “thread”, allowing each of the two European institutions to increase their domination of those public and private actors who march into “judicial arenas” (Vauchez, 2005). Entirely made of fundamental rights, this transnational normative “net” tends to encompass European politics and to change the direction of integration itself. By studying the combined effects of the case law politics and the dynamics of cross-fertilization of the European courts, the overall aim of the paper is to dwell into the relationship between European integration and the evolution of supranational adjudication, transnational norms and their impact on national politics. This evolution is neither

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<sup>3</sup> Also see Scheeck, 2005.

linear nor are the European courts monolithic institutions. It is the result of a rather controversial mobilisations and considerable tensions within both courts which we will try to analyse.

In a first part we will explain why the judges of both European courts have started to meet on a regular basis. The paper then deals with two particular aspects of the supranationalisation of European law. In a second part, we try to show how the European courts' jurisprudential interactions increase the European courts margin of manoeuvre with regard to the basic dispositions of the European treaties and European law, how, by relying on each other's human rights sources and especially on the other court's case-law, the European judges manage to depart from "intergovernmental" or "political" law and even from their own jurisprudence, if their institutional interests evolve as political contexts change. This second part underlines how the relationship between European courts has empowered European law and European fundamental rights with regard to national actors (governments, administrations, (constitutional) courts). While the path-dependence of European law forces judges and their successors to find ways to deal with the historicity of their case law, more than with initial (inter)governmental choice, the supranationalisation of European judicial politics also tends to have a deep impact on governance at national levels as the courts have found ways to burst open spheres of national competences leading the way for transnational change (part 3).

From a methodological point of view, this research is mostly based on more than 80 interviews conducted with judges, law clerks, civil servants, trial lawyers, NGO representatives, law professors in Strasbourg, Luxembourg, Paris and Brussels from April 2002 to June 2007 at the ECJ, the Court of First Instance (CFI), the ECourtHR, the European Commission, the Permanent Representation of the Council of Europe to the EU, several Permanent Representations to the EU (France, Germany, Luxembourg, Sweden), the Secretariat and Committee of Ministers of the Council of Europe.

The evolution of the jurisprudence of the European courts has been traced back through a qualitative and quantitative case law analysis. Whereas case law is usually seen as highly pathdependent (this perspective has allowed to explain why the ECJ has managed to influence European integration maybe more than any other European institution – see Stone Sweet, 1999, 2004), we'd rather analyse jurisprudence as an evolving process in a socio-historic perspective. This allows us to highlight the always changing politics of the European courts. In this vein, we understand case law as a cluster of multiple distinctive actions and jurisprudence as "actions on actions" in the Foucauldian sense (or maybe "decisions on decisions", if we draw on Luhmann). Legal change is seen as a process of normative empowerment and autonomisation, by which courts

tend to initially build up case law based on (inter)governmentally designed conventions and law, the latter becoming increasingly insignificant as judges interpret them and infuse their interpretation into their judgements, hence producing ever more autonomous supranational law.

### *1. Entangled courts*

Since 1998, the judges and court officials of the ECJ and the ECtHR have been meeting on a regular, but not formally institutionalised basis. After having “talked” to each other for many years through their respective case law (Scheeck, 2005, 2005b), their direct encounters take many different forms: the judges have been holding regular bilateral meetings since the ECtHR became permanent in 1998,<sup>4</sup> they invite each other to make speeches at the other court, overemphasising their cooperation and dismissing their (still very present) conflicts and competition (Iglesias, 2002). The European judges’ dialogue finds a broader audience when they meet at conferences on European issues<sup>5</sup> or even at colloquia<sup>6</sup> on their own relationship.<sup>7</sup> In the same vein, they jointly give interviews on their courts’ relationship<sup>8</sup> and they contribute to the rather impressive body of literature on the relationship between the two organisations and their courts.<sup>9</sup>

This cooperation has emerged for two reasons. On the one hand, each court has hung a Damocles sword over the other court. On the other hand, they uphold their respective work and increasingly depend on each other. For instance, in Strasbourg, EU-related applications which have allowed the ECtHR to intrude into EU politics and to annex the latter via its case law politics, are quite often related to previous ECJ decisions.<sup>10</sup> For example, on 30 June 2005, in the case *Bosphorus Airways v. Ireland*, the ECtHR made its latest move forward with regard to its incremental annexation of the EU. In this case the applicant maintained that the manner in which Ireland implemented the sanctions regime against the FRY, which was based on an EC regulation, had

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<sup>4</sup> Interview at the ECJ (June 2004). Statement confirmed in Strasbourg (February 2005).

<sup>5</sup> Workshop with J.-P. Costa (ECtHR judge) and Ph. Léger (advocate general at the ECJ), *Constitution européenne, démocratie et droits de l’homme* colloquium at the Sorbonne, 13-14 March 2003 (Cohen-Jonathan and Dutheil de la Rochère, 2003, p. 270-277).

<sup>6</sup> E.g. the Luxembourg symposium on the relationship between the Council of Europe Human Rights and the Convention and EU Fundamental Rights Charter, Schengen, 16 September 2002; the “Globalization and the Judiciary” conference organised by the Texas International Law Journal and the University of Texas School of Law, 4 and 5 September 2003.

<sup>7</sup> With the notable exception of French judges, the European judges are often themselves academics. This is of course another reason why so much has been written on the two courts’ relationship.

<sup>8</sup> Puissechot [the French judge at the ECJ] and Costa [the French judge at the ECtHR], (2001).

<sup>9</sup> For example: Costa (Vice President of the ECHR), 2004, Lenaerts (ECJ judge) and De Smijter, 2001, Lenaerts, 2002, Jacobs (advocate general at the ECJ), 2001, Pescatore 2003 (former ECJ judge), Tulkens (ECtHR judge) and Callewaert, 2002, Rosas (ECJ judge), 2003, 2005, Wildhaber (president of the ECtHR) and Callewaert (legal and executive assistant to the president of the ECtHR), 2003, Spielmann (a recently elected ECtHR judge) 2001 and 2004.

<sup>10</sup> See SCHEECK, L. (2005) for a detailed historical analysis of the ECtHR’s incursion into EU politics.

violated its rights as guaranteed under the Convention. Although the court unanimously decided to a non-violation of the ECHR, it seized the occasion to refine its *M & Co* and *Matthews* jurisprudence. Even if the judges never comment on pending cases, the debates preceding their decision appear to have been characterised by a disagreement on whether or not the *M & Co* jurisprudence should be overturned or whether or not the *Matthews* jurisprudence is extendable to all other EU-related cases.<sup>11</sup> The final judgement appears to be a compromise between these two approaches. In point 155 of its judgement, the court decided to maintain its “presumption of equivalent protection” as elaborated in *M & Co*, but that “any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights’ protection”. In point 156, the court states that it presumes that an EU member state will not depart from the Convention when it implements EU acts and that “any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient”. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a “constitutional instrument of European public order” in the field of human rights (*Loizidou v. Turkey*.)” Put differently, the ECtHR is willing to wait until the EU has formally adhered to the ECHR before treating it in the same way as the Convention’s contracting parties, but it has also declared that it could sanction member states for EU-related acts if they violate the ECHR.

Until now, the ECtHR has never sanctioned an ECJ decision as such, but if it did, it would suddenly expose Luxembourg as a transgressor of human rights and put into question the supremacy of EU law – a principle which only holds against the pressure of constitutional courts as long as fundamental rights are respected. And the more the ECJ aligns itself on Strasbourg, the more it reduces the risk of being disavowed by the ECtHR, which could have a delegitimizing effect on its overall institutional position within the EU, especially since its authority with regard to national courts and institutions continues to be questioned by some national actors. Moreover, if Strasbourg had held responsible the 15 (now 27) EU member states for supranational acts, Strasbourg could also have shattered the Commission’s supranational role: from the Commission’s perspective applications against the 15 are highly problematic since national agents (who usually defend their governments at the ECJ, often against the Commission) are forced to intervene at and to speak for the EC level – a level at which they are not allowed to act according to the EC treaty.

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<sup>11</sup> Interviews at the ECtHR (February 2005).

Thus, affairs like the *Senator Lines* case in Strasbourg<sup>12</sup> incidentally called for a scenario which “supranationalists” fear most: the “intergovernmentalisation” of supranational institutions.

Conversely, the less the ECourtHR puts Luxembourg under pressure, the more it reduces the risk of being sidelined by the ECJ. Just as the ECJ’s supranational authority is not carved in stone, the ECourtHR has also been increasingly put under pressure by national courts and institutions in recent times. If this is in the nature of things, since Strasbourg spends its time assessing whether or not national institutions might have violated human rights, the ECJ could deal a hard blow to the ECourtHR if its judges (intentionally or unintentionally) supported these national institutions by “vampirising” Strasbourg.

If, however, Strasbourg started to sanction EU acts before the EU’s formal accession to the Convention, it would run the risk of reprisals from the ECJ judges though. As the EU grows larger, the ECJ could rapidly sideline the ECHR and its court, especially as some governments would be satisfied to see a less prominent human rights court in the era of the fight against terrorism. The ECJ could, for example, stop aligning its case law or exclusively rely on the Charter of Fundamental Rights, which provides a higher level of protection than the ECHR for EU citizens - whether or not the constitutional treaty is ratified.

In Strasbourg and in Luxembourg, judges and court officials regularly insist that there is no need to worry about the Charter, since it only applies to EU law and national law deriving from EU law, but not to national law. However, in Strasbourg an unspoken concern about the EU remains and in Luxembourg some officials like to speculate on what will happen if the Charter enters into force, whereas in Luxembourg everyone fears that one day Strasbourg could declare void an ECJ decision.

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<sup>12</sup> *Senator Lines* (10.03. 2004) was directed against all EU member states taken collectively so that the 15 governments had to defend themselves before the ECourtHR. The court declared the request inadmissible *ratione materiae*, without however going into the question of whether or not it was actually allowed to deal with EU-related questions. In this case, the ECourtHR had to deal with a fine inflicted by the European Commission and to verify if there was a violation of the articles 6 and 13 of the ECHR. The shipping company Senator Lines alleged a violation of article 6 of the ECHR (access to court), since it had to pay a fine before a decision was taken in the substantive proceedings before the Court of First Instance in Luxembourg. It claimed that this would have resulted in the insolvency and liquidation of the company before the issues were determined by Luxembourg. The “long awaited” (Calonne, 2003, also see Burgorgue-Larsen, 2004) ruling of the Strasbourg court on *Senator-Lines* ended in a rather unexpected way. Before even being able to rule on its admissibility, the ECourtHR was forced to cancel the hearing (Council of Europe, 2003b), because on 30 September 2003, three weeks before the ECourtHR’s planned decision, which was due to take place on 22 October 2003, the European Court of First Instance in Luxembourg decided to set aside the fine of 273 million euros imposed on Senator-Lines (and 15 other companies) by the European Commission (*Atlantic Container Line and Others v. Commission*, joined cases T-191/98 and T-212/98 to T-214/98). A couple of months later, on 10 March 2004, Strasbourg came back to the *Senator Lines* case. It then decided that the application was inadmissible by declaring that the applicant company could not claim to be a victim of a violation of the ECHR as there was now clearly no violation left, after the annulment of the fine and because of the CFI decision of 30 September 2003, it rejected the arguments of the applicant “whatever the merits of the other arguments in the case”.



As they say in Luxembourg, both courts remain “non subordinated”,<sup>13</sup> whereas in Strasbourg it is considered that nothing is equal with an external control of EU acts. For sure, the protection of human rights would be better off if Strasbourg had not to take into account very complex inter-institutional concerns. Consequently, the equilibrium between the two courts remains very fragile.

Although the European judges don't always trust each other, the European courts also have a common supranational specificity, as well as comparable objectives, such as their aim to uphold their increasingly overlapping supranational legal orders. The ostentatious references to Strasbourg's case law in Luxembourg and Strasbourg's occasional support of the supremacy of EU law are on everyone's lips in both places and clearly have an appeasing effect on each court's potential to subordinate the other court.<sup>14</sup> Generally, our interviews lead to the conclusion that, in both places, there is a lingering uncertainty about the future behaviour of the other court. Thus, the improvement of the relationship between the two courts, which surely has an epistemic underpinning, cannot lead to the conclusion of a supranational conspiracy of judges. On the contrary, the enthusiasm about the European courts' good relationship, exhibited in both places, largely corresponds to a change of discourse motivated by self-interest.

By fighting each other, the courts run the risk of reciprocally unravelling the painfully constructed authority of their respective supranational legal orders to the benefit of those actors that are generally suspicious of the rise of independent supranational institutions. By respecting and referring to each other's work, they uphold their own and the other court's position within their overlapping and enlarging organisations. The latter scenario is now clearly favoured in Strasbourg and in Luxembourg since this discreet solidarity between supranational judges increases their autonomy within their basic organisational units. Conversely, they would themselves be the first victims of a war of European judges. As a ECJ judge confirmed, there are constant pressures from the national level to play one court against the other, but so far all attempts to divide and rule have failed and the “very subtle idea [of some of the involved actors] to create a Charter in order to hurt Strasbourg has been a colossal blunder”.<sup>15</sup> The two supranational courts have indeed found a common interest with regard to their relationship with member states, which is more important than anything else. According to an ECJ judge “by quoting other courts we keep together the member states. If a member state does not comply with a certain interpretation, it is important that all

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<sup>13</sup> Interviews at the ECJ (June 2004).

<sup>14</sup> Interviews at the ECJ (June 2004) and at the ECourHR (February 2005).

<sup>15</sup> Interview at the ECJ (June 2005).

international courts have the same analysis”<sup>16</sup>. Hence, by joining their forces, the two courts can fulfil their respective objectives much better.

## ***2. Mutual judicial assistance between supranational courts***

Despite both the ECJ's and the European court of Human rights competitive position in the European human rights configuration, their relationship cannot be boiled down to unilateral attempts to protect human rights, institutional conflict and legal protectionism. Their relationship appears to have a more important dimension. The European courts' reciprocal actions on each other's legal order can also have a mutually supportive effect. The ECourtHR has also helped to strengthen the EU's supranational architecture. As for the ECJ, its increasing references to Strasbourg's case law have given new meaning to its approach to the ECHR - despite the Court's will for institutional autonomy. Strasbourg also increasingly refers to Luxembourg's case law. These dynamics of cross-fertilisation have not only led to a considerable enrichment of their respective means to protect human rights, but have also increased both courts' autonomy with regard to the EU and Council of Europe member states.

Intentionally or not, Strasbourg been promoting this principle invented by the ECJ as early as 1964, but which sometimes happens to be difficult to enforce on the national level. For instance, in 1993, the European Commission of Human Rights strongly encouraged national courts to make preliminary references to the ECJ in the *Soc. Divagsa v. Spain* (12.5.1993) and *Fritz and Nana S. v. France* (28.6.1993) cases - requests which were all declared inadmissible - when it ruled that a refusal by a national court to seek advice from the ECJ could lead to a violation of the ECHR and could be contrary to article 6 (right to a fair trial), especially when the national court's refusal is an act of an arbitrary nature. Additionally, Strasbourg supported the system of preliminary references to the ECJ by refusing to take into account the length of the questions addressed to the ECJ by national judges whenever it had to control whether or not the length of a trial was contrary to article 6 (Burgorgue-Larsen, 2004, p. 1060) - a condemnation would no doubt have had a discouraging effect on national judges to make preliminary references to the ECJ and would not have been appreciated in Luxembourg.

Furthermore, in 1997, the ECourtHR condemned Greece (*Hornsby v. Greece*, 19.3.1997) for not executing a Council of State ruling based on an ECJ preliminary decision (Spielmann, 2004, p. 1459-1462), thus strongly reminding the Greek administration of the supremacy of EU law.

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<sup>16</sup> Interview at the ECJ (June 2005).

Similarly, in *Dangeville* and *Cabinet Diot et SA Gras* cases against France (16.4.2002 and 22.07.2003), the ECourtHR condemned France for failing to bring French law into line with EU law. So, whereas Strasbourg has partly annexed the EU, it also feels responsible for controlling the EU member states' neglect to apply EU law - thus promoting the implementation and coherence of European law.

The ECourtHR judges also have made use of the EU treaties and they have increasingly been referring to Luxembourg's case law in order to fortify their decisions. Although they had already done so very discreetly in the early 1970's, the references have become much more explicit in recent times (Spielmann, 2004, p. 1463). Generally speaking, Strasbourg took over several advancements of the ECJ case law, for example, with regard to questions such as self-incrimination, the right of having a name or the right of keeping one's state of physical health secret (Simon, 2000, p. 44). The ECourtHR has also used references to EU law and the ECJ's case law to operate reversals of case law (Burgorgue-Larsen, 2004, p. 335-350). The first time it did so was in December 1999 in the *Pellegrin v. France* case (Burgorgue-Larsen, 2003, p. 168-169). A recent example is the *Goodwin v. United Kingdom* case (11.07.2002), where the ECourtHR strengthened its argument by referring to an ECJ decision and quoting the Charter (Spielmann, 2004, p. 1464, Burgorgue-Larsen, 2004, p. 349, Burgorgue-Larsen, 2003, p. 168-169).

The EU's Charter of Fundamental Rights has now become a "major parameter of reference" (Burgorgue-Larsen, 2004, p. 1052) in several ECourtHR judgements. For their part, the ECJ judges, waiting for the Charter to become an enforceable instrument, have not yet made use of it - unlike the Court of First Instance (CFI) judges (Menéndez, 2002, Burgorgue-Larsen, 2004b, p. 1055-1060). When the ECourtHR fortifies its decisions by using the Charter, it simultaneously demonstrates the usefulness of this text, which has not yet become legally enforceable in the EU. Even though the ECourtHR started to refer to the Charter before the ECJ, interviewed judges and court officials at the ECJ clearly welcome these references.<sup>17</sup>

Similarly, in Strasbourg the ECJ's alignment on Strasbourg's jurisprudence is equally appreciated. The ECJ's use of the ECHR took on new meaning since it started to increasingly refer to Strasbourg's case law. Whereas Luxembourg sometimes gave the impression of snatching the ECHR away from the ECourtHR (see opinion 2/94 or the *Senator Lines* case), its current use of the ECHR's case law looks more like a tribute to the ECourtHR's work, than a vampiric appropriation likely to cause Strasbourg's demise. Given its authority with regard to national courts, the ECJ's

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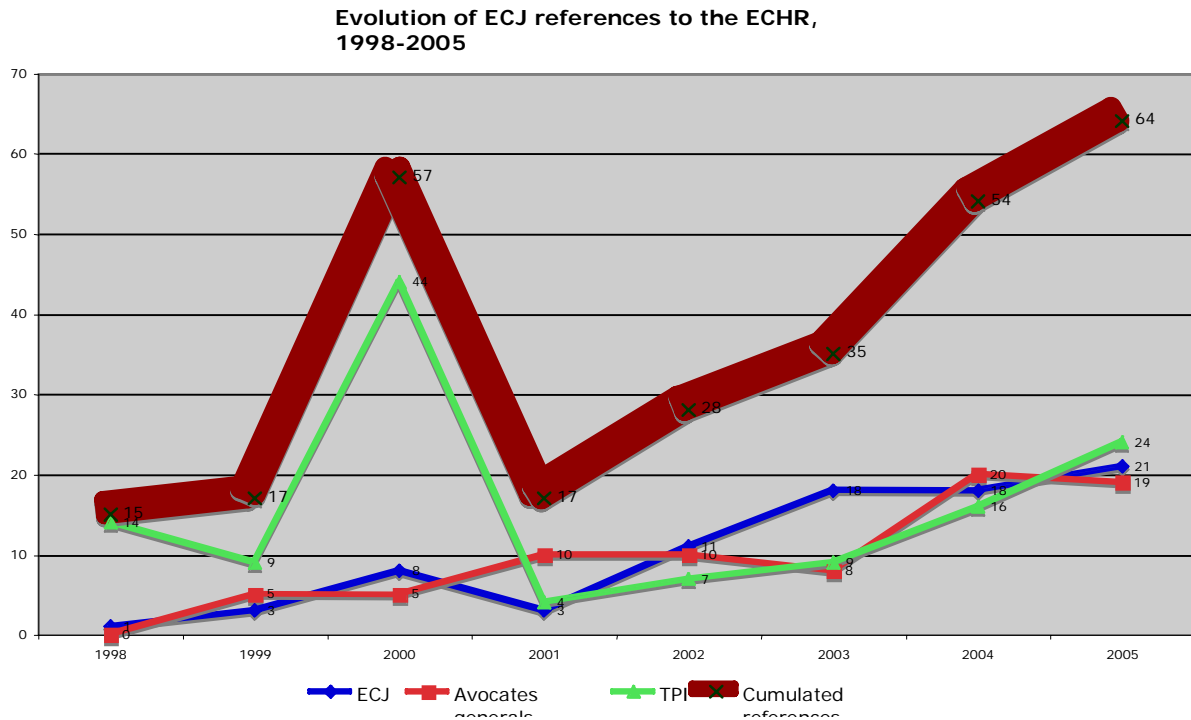
<sup>17</sup> Interviews at the ECJ (June 2004).

recent approach has a legitimizing effect on Strasbourg's activities with regard to the protection of fundamental rights. Although the ECJ does not, or cannot, go so far as to feel bound by the ECHR, references to this instrument have been increasing dramatically over the last ten years.

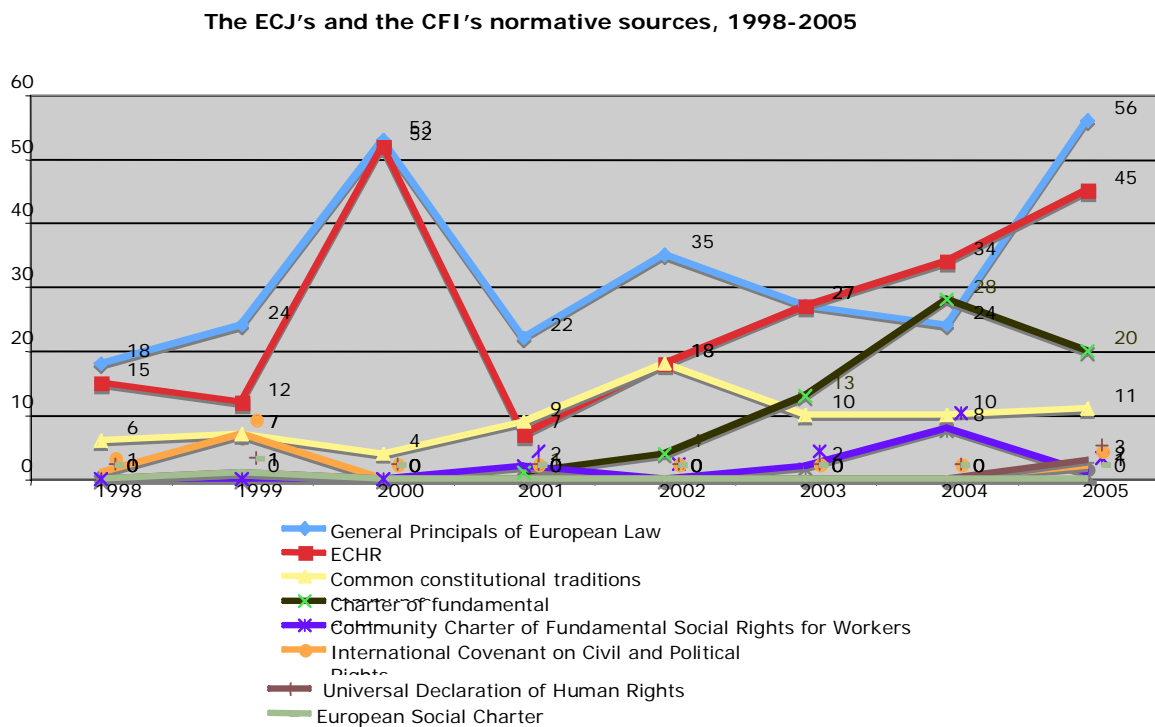
References to ECHR articles and case law are now quite commonplace in Luxembourg and the judges are much less cautious than they were a couple of years ago.<sup>18</sup> For the 1974-1998 period, Elspeth Guild and Guillaume Lesieur referenced more than 70 ECJ judgements and opinions in which the ECHR appears (Guild and Lesieur, 1998). Meanwhile, the ECHR's status has continued to evolve considerably in the EU's legal order. As shown by Graph 1, the references to the ECHR by ECJ and CFI judges and avocate generals have been increasing constantly since 1998. Graph 2 shows that the use of the ECHR has not only been increasing, but that the ECHR has become the main rights instrument in Luxembourg. From 1998 to 2005, the ECHR is indeed referred to 7,5 times more often than all the other human rights instruments the ECJ occasionally relies on, including the Charter of fundamental rights, *taken together*.

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<sup>18</sup> Since the beginning of the 1970's, the ECJ has in particular borrowed the rights guaranteed in the framework of the ECHR in order to protect fundamental rights and (hence) assert its own role. By a "process of incremental valorisation" (Simon, 2001, p. 35), the Convention's status has become increasingly prominent at the EU level. After having declared that Community acts should be compatible with the fundamental rights "enshrined in the general principles of community law and protected by the court" (*Stauder*, 12.11.1969, point 7), it confirmed this approach in *Internationale Handelsgesellschaft* (17.12.1970), when it declared the supremacy of European law over national constitutions. The ECJ waited for France to sign the European Convention on Human Rights, on 3 May 1974, before mentioning the "various international treaties, including in particular the Convention for the protection of human rights and fundamental freedoms" eleven days later and that "international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law" (*Nold* decision, 14.05.1974, points 12 and 13). The *Nold* decision preceded the German *Bundesverfassungsgericht's* first *Solange* decision by two weeks. Since Karlsruhe did not take it into account, the ECJ judges had to push even further their guarantees for the protection of human rights. Individual articles of the ECHR have been mentioned explicitly from 1975 onwards (since the *Rutili* decision, 28.10.1975, point 32). The ECJ has confirmed this move, for example, in the *Johnston* case (16.05.1986) when it noted that the principle of effective judicial control "is laid down in articles 6 and 13" of the ECHR (point 2), as well as in its *Heylens* judgement (15.10.1987) when it also referred to the same articles. On 22 October 1986, the German Constitutional Court abandoned its role as guardian of fundamental rights when it ruled that the guaranteed protection of German citizens' fundamental rights could be withdrawn "as long as" (*solange* in German) the ECJ provides equivalent protection. Subsequently, the ECJ continued to emphasise the importance of fundamental rights. In 1989, the ECJ judges added that the European Convention on Human Rights has a "particular significance" (*Hoechst*, 21.09.1989). More recently, in the *P/S and Cornwall County Council* case (30/04/1996) the ECJ for the first time made a reference to the ECourtHR's case law (Spielmann, 2001, p. 803). In the *Baustahlgewebe GmbH* case (17.12.1998), the ECJ also referred to the ECourtHR's case law on the right to a fair trial enshrined in article 6 of the ECHR. According to Gérard Cohen-Jonathan, the *Baustahlgewebe* decision is one of the most prominent examples where the court "directly and expressly relies on" Strasbourg's jurisprudence and where the judges in Luxembourg "acted as genuine human rights judges" (Cohen-Jonathan, 2002, p. 184).



Graph 1. The evolution of ECHR references at the ECJ, the CFI and by advocate-generals.<sup>19</sup>



Graph 2. The normative sources of the ECJ and the CFI, 1998-2005.<sup>20</sup>

<sup>19</sup> Source : SCHEECK, L. (2006) *Les cours européennes et l'intégration par les droits de l'homme*, PhD dissertation, Sciences-Po, Paris. To be published in 2007 at in the « European series » of the Editions de l'Université de Bruxelles. The evolution of references increases continuously, while the year 2000 peak is due to one judgment in 41 joint cases (15 March 2000).

<sup>20</sup> Source : *Idem*.

ECJ references to Strasbourg's case law are a form of streamlining case law in the rather fragmented European normative space. The *Schmidberger* case is an example (*Schmidberger, Internationale Transporte und Planzüge* case (12.6.2003), see Alemanno, 2004) where Luxembourg "pre-empted Strasbourg" (Tridimas, 2004, p. 37), when it put human rights before fundamental freedoms. This case is a good example of Luxembourg's favouring of rights as protected by the ECHR - more specifically, freedom of expression - over economic rights – freedom of movement of goods - as granted by the EU treaties (Tridimas, 2004). In the recent *Omega Spielhallen- und Automatenaufstellungs-GmbH* case of 14 October 2004, the ECJ also had to seek an equilibrium between fundamental liberties and human rights and opted for the latter. Although, strictly speaking, the ECJ treats economic and fundamental rights as complementary, rather than establishing a hierarchy of rights,<sup>21</sup> there now exists a "de facto hierarchy" in favour of fundamental rights, according to an ECJ official.<sup>22</sup> Following the above-mentioned judgements, there are now internal debates at the ECJ as to whether or not Luxembourg should carry out a fundamental reversal of its case law, so that all national measures restricting fundamental liberties for the sake of guaranteeing fundamental rights would be presumably compatible with the treaties.<sup>23</sup> According to a judge in Luxembourg, this effect is not strategically sought after, but he acknowledged that the ECJ is very careful not to come into conflict with Strasbourg.<sup>24</sup>

Paradoxically, reciprocal references to the other European court's case law and instruments can thus have fortifying and protective internal effects, they can be challenging and supportive for the other court all at once. The streamlining of case law is general tendency of the relationship between the European courts and it appears that by now, the ECJ has eliminated any divergence with ECHR case law. Divergence of the two courts' case laws can notably lead to confusion at the national level (Bribosia, 2002). National courts must apply communitarian and conventional law and case law. As both legal orders are superior to national law, some authors consider divergent case law to be a serious legal problem since in that case national judges face two different interpretations on similar issues without knowing which one to apply.

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<sup>21</sup> In its decision, the Court argues that freedom of expression and freedom of movement are of equal constitutional ranking, but decided that the Austrian authorities could not be held responsible for a perturbation of international exchange of goods when it allowed an environmental association to organise a manifestation at the Brenner pass, which had the effect of blocking the circulation between Italy and Austria for 30 hours. The international transport company Schmidberger was among those who were blocked on the motorway linking Germany and Italy and sought damages from the Austrian authorities for their alleged failure to guarantee freedom of circulation.

<sup>22</sup> Interview at the ECJ (June 2005).

<sup>23</sup> Interview at the ECJ (June 2005).

<sup>24</sup> Interview at the ECJ (June 2005).

The above-mentioned *Hoechst* judgement is, for instance, a typical example of the risks inherent to Luxembourg's use of the ECHR. In its judgement, the ECJ gave an interpretation on individual dispositions of the European Convention on Human Rights before the European Court of Human Rights could make its opinion heard (Lawson, 1994, p. 234-235) and without, of course, consulting Strasbourg. Luxembourg also decided that respect for private life and home, as protected under Articles 8 and 9 of the ECHR, does not apply to business companies, whereas Strasbourg later ruled that it does (*Niemietz v. Germany*, 16.12.1992). Similarly, regarding article 6(1) of the Convention and the right to a fair trial, the European Commission of Human Rights held that this article includes a right to protection against self-incrimination (*Saunders v. United Kingdom*, 14.05.1994, § 30), whereas the ECJ, in the *Orkem v. Commission* case, had already ruled the other way in 1989, in the absence of existing case law from Strasbourg. Later, the ECtHR confirmed the European Commission of Human Rights' decision in *John Murray v. United Kingdom* (8 February 1996), in *Saunders v. United Kingdom* (17 December 1996) and in various other judgements.<sup>25</sup> On the whole, conflicting case law not only remains relatively rare (Spielmann, 2001; Tulkens and Callewaert, 2002), but divergences have also been drastically diminished in recent years as a result of Luxembourg's readjustments so that, for the time being, there are no diverging interpretations of the ECHR left between Strasbourg and Luxembourg.

For a couple of years, the ECJ has, however, shown motivation to avoid diverging case law with Strasbourg. In its "PVC II" judgement of 15 October 2002, the ECJ brought its case law into line with Strasbourg's jurisprudence on the right to protection against self-incrimination.<sup>26</sup> After a long development on the *Orkem* case, the ECJ notably stated that there "have been further developments in the case-law of the European Court of Human Rights which the Community judicature must take into account when interpreting the fundamental rights" (§ 274). Furthermore, in the *Roquette Frères* case (22.10.2002), the ECJ put an end to 13 years of diverging case law on the protection of the home with the ECtHR by explicitly referring to Strasbourg's jurisprudence.<sup>27</sup>

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<sup>25</sup> For example : *Servès I.J.L. and Others v. United Kingdom* (19 September 2000); *Heaney and McGuinness v. Ireland* (21 December 2000); *Quinn v. Ireland* (21 December 2000); *J.B. v. Switzerland* (3 May 2001,); *P.G. and J.H. v. United Kingdom* (25 September 2001); *Beckles v. United Kingdom* (8 October 2002); *Allan v. United Kingdom* (5 November 2002).

<sup>26</sup> Joined Cases C-238/00 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P. *Limburgse Vinyl Maatschappij (LVM) and Others v. Commission*.

<sup>27</sup> For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgement in *Hoechst*. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgement of 16 April 2002 in *Colas Est and Others v. France*, not yet published in the *Reports of Judgements and Decisions*, § 41) and, second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case (*Niemietz v. Germany*, cited above, § 31).

In this vein, the ECJ has helped considerably in putting an end to the debate on the clash between the “Europe of human rights” and the “Europe of trade” by relying on the ECHR and the ECtHR’s case law. It has shown that business does not trump fundamental rights and that these two supposedly separate “Europes” increasingly overlap, and can do so to the benefit of human rights.<sup>28</sup> By relying and referring to each other’s case law, the web of judicial law, as opposed to political law, which emerged from the interactions of both courts has a reinforcing effect on both European judicial institutions. Whereas the Strasbourg court has found an ally in protecting human rights in EU member states, the inclusion of the ECHR in ECJ case law also increases the legitimacy of its judgments and its normative impact in the same states. By relying on and respecting a set of compulsory fundamental norms which all EU member states have subscribed to, the ECJ indeed increases the impact of the entire European legal system on national politics and, sometimes, manages to extend its competences on national spheres. Put differently, human rights and the primacy of European law have become inextricably linked in the EU. This might appear paradoxical in the sense that human rights usually tend to diminish the power of public actors, whereas in the European case, human rights empower supranational public actors. Upholding rights is a means for the ECJ to protect the EC/EU’s constitutional architecture and to become more autonomous, the active protection of rights at the supranational level has even become a way to deepen integration and, if not to erode national sovereignty, at least to circumvent the resistance of national judicial systems to European politics and to anchor supranational norms at the national level.

### ***3. Producing and resisting to path-making and path-breaking effects through inter-institutional interaction.***

As they relate to each other in order to prevail over national and private actors supranational courts, the European courts have brought up a common supranational “jurisprudential screen” and produced transnational change. Besides the creation of this normative net through aligning case law and tactics of mutual reinforcing in order to enhance the impact of European and ECHR law on the national level, the ECJ also instrumentalises the European Convention and its case law to extend its own competences to areas where the EU treaties do not even allow it to interfere, whereas the ECtHR relies on the Charter to extend its normative playground. National courts have recently

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<sup>28</sup> If the ECJ’s eagerness to rely on the ECHR in order to improve the protection of fundamental rights sounds like good news, its application of the Convention has happened to be a source of some bewilderment in Strasbourg. Indeed, whereas the judges in Luxembourg are overzealous in their use of the ECHR they do not, however, feel bound by the Convention. Whereas the ECJ invented the protection of fundamental rights at the EU level by instrumentalising the ECHR in order to ensure the supremacy of EU law (and thus the pre-eminence of its own role), it did not go too far because this would have endangered its institutional autonomy.



developed new forms of resistance to European law by imposing various constitutional restrictions, especially in the framework of the EU's third pillar (Guild, 2006; Mitsilegas, 2006), at the very moment when the ECJ and the ECtHR had managed to entangle national courts into their own human rights jurisprudence. For instance, on 16 June 2005, the ECJ extensively used the ECtHR's case law in making its *Pupino* judgement, which introduced direct effect of EU decisions in criminal matters although the EU treaty explicitly excludes this possibility. Although initial drafts of the judgement extensively quoted Strasbourg's jurisprudence in a very precise manner,<sup>29</sup> the final judgement still relies heavily on the Convention and its court's work to justify its groundbreaking decision, which not only confirms the supremacy of EU law in Justice and Home Affairs, but also that the ECJ has an eye on the protection of fundamental rights in that area.<sup>30</sup>

Yet, on 18 July 2005 the German constitutional court, which in its 1993 decision on the Maastricht treaty insisted that it still had jurisdiction to challenge EU acts if they extend the EU's competence or violate fundamental rights, chose to ignore the *Pupino* judgement when it declared void the national transposition of the European Arrest Warrant in a case where a German national was facing an extradition request from Spain on al-Qaida terrorist charges.<sup>31</sup> Karlsruhe did so on the grounds that the protection of fundamental rights was not sufficiently guaranteed. The capsizing of the European Arrest Warrant in Germany is a reminder how much national constitutional courts can put the EU under pressure with regard to its ability to protect human rights, and explains why the ECJ has to apply the highest standards in this area.<sup>32</sup>

This example shows that the emergence of a European human rights regime is a very fragile and incomplete process. While national courts still resist to supranational adjudication and while some Member States still do so with regard to the institutionalisation of human rights at the EU level, the ever more interdependent European courts have decisively contributed to effectively setting up a

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<sup>29</sup> Interview at the ECJ (June 2005).

<sup>30</sup> The main issue was whether or not the Italian courts are obliged to interpret the national legislation on the procedure for taking testimonies from children who were victims of a crime in conformity with the EU's framework decision regarding the treatment of particularly vulnerable victims in criminal proceedings.

<sup>31</sup> According to the German Constitutional court, "the Act encroaches upon the freedom from extradition (Article 16.2 of the Basic Law (*Grundgesetz*) in a disproportionate manner because the legislature has not exhausted the margins afforded to it by the Framework Decision on the European arrest warrant in such a way that the implementation of the Framework Decision for incorporation into national law shows the highest possible consideration in respect of the fundamental right concerned. Moreover, the European Arrest Warrant Act infringes the guarantee of recourse to a court (Article 19.4 of the Basic Law) because there is no possibility of challenging the judicial decision that grants extradition. Hence, the extradition of a German citizen is not possible as long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law" (Bundesverfassungsgericht, 2005).

<sup>32</sup> The German judges were clearly aware of the *Pupino* judgement. See the dissident opinion of judge Gerhardt, [http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604).

new normative basis for further political integration. As the European Union has become ever more powerful in terms of political output, it has indeed turned out to be a potential source of human rights violations. While national governments have disagreed on setting up consequential control mechanisms for several decades until recently, the European Court of Justice and the European Court of Human Rights pre-empted intergovernmental choice as they extend their competences via inter-institutional interactions and created a political situation where EU member states suffer from all the advantages of an accession to the ECHR, but benefit from none of its advantages in terms of democratic legitimacy and reducing the EU's democratic deficit, which, if anywhere, clearly exists in the realm of the protection of human rights (increased political power at the EU level, yet still no comprehensive human rights instruments in place).

Above and beyond the traditional antagonism between supranationalists and sovereignists, the reciprocal actions of the European courts and national constitutional courts have also led to an unexpected policy outcome where the area of Justice, Liberty and Security is now entirely dependent on the future evolution of the European human rights regime. As "storm clouds" have gathered over human rights in recent times (Guild, 2004) and it is still to be seen if the human rights "umbrella" which has been opened up by the European courts and the German constitutional court, and many other Constitutional courts (Guild, 2006, Mitsilegas, 2006), will hold and prevent the EU and its member states from transgressing international commitments.

Meanwhile, it appears that the European judges are masters in the art of making a case within a case. The two supranational courts have been able to influence the process of European integration, watch over their common interests and add force to their own institutional strategies as they related to each other. Most of the courts' strategic actions are channelled through their case law. With time, the European courts have both elaborated specific positions with regard to each other by giving a strategic twist to their decisions. A new feature, which has appeared as a result of the European courts' interaction, is that courts can mutually support each other and legitimately induce change by referring to each other.

The European courts' credibility in governance relies on their ability to achieve their goals without outbraving the role they have been attributed by member states and without contradicting themselves by issuing opposing case law. Judges cannot make arbitrary rulings for wider political purposes without jeopardizing their legitimacy. To uphold their position in governance, judges have to give reasoned interpretations in order to be and remain legitimate actors in highly

institutionalised social systems. Whenever they adjudicate, they “give reasons” and construct complex “argumentation frameworks” (Stone Sweet) in order to justify their decisions.<sup>33</sup>

The European courts’ decisions often appear to be strategically linked to their institutional interests though. Just like any other social institution, courts seek to maximise their institutional power, the most important aspect of which is judicial independence. Judges are not politicians. Yet, courts are institutions of governance in rule of law-based societies (Stone Sweet, 2000, 2004) and lawmaking is an inherent function of judicial organs (Dehousse, 1998, p. 71-78). In this vein, adjudication inexorably produces political effects. The European judges remain “within the case” in order to “make a case” though. Their political influence depends on the relative indeterminacy of European and human rights norms and on the judges’ collective willingness to play on their elasticity. A court ruling can only be given a strategic twist in so far as it does not go against original intent and “constitutional” texts. The ECJ’s interpretation of the EU treaties is known to be teleological (Courty and Devin, 2005, p. 61, Von Bogdandy, 2000, p. 1325, Dehousse, 1998, p. 76) and to follow the principle “*in dubio pro integratione*” (Spielmann, 2001, p. 802). As Renaud Dehousse puts it, “judicial organs, by their very nature, necessarily carry out a creative task, particularly when they have to apply a text of a general nature” (Dehousse, 1998, p. 117).<sup>34</sup>

A new characteristic of the courts’ law and policy-making is the fact that they can generate new sources of law by relying on alien texts and case law. The European courts increasingly rely on the work of other supranational courts to fortify their arguments, especially when it comes to “history-making” decisions (see *Schmidberger* or *Pupino*). It is known that judges not only rely on written law, but also on “path-dependent” (Stone Sweet, 2004, p. 30-35) case law. Case law both carries the courts’ decisions through time and space. But judges are not necessarily captive of written law or their own jurisprudence, as the literature on path-dependency suggests. Inter-jurisdictional interaction is one way to circumvent lock-in effects. As the linkage between the European judges has become stronger, reversals of case law that imply any divergence from existing case law (or even written law) can be justified with references to another court’s case law. The court’s reciprocal

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<sup>33</sup> Sometimes, some segments of a ruling might not even be strictly indispensable to the resolution of the dispute at issue. They can, for instance, take the form of an *obiter dictum*, a general reasoning devoid of any *ratio decidendi*, i.e. a reasoning which has no obligatory impact on the disputing parties, which is not necessarily directly related to the dispute in question, but which clarifies the court’s position on a more general legal problem. Dissident and concurrent opinions can contain similarly important messages.

<sup>34</sup> In this vein, the ECHR and the EU treaties also inherently provide for change. In the introductory part of the ECHR the signatory states consider that “the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms”. Similarly, the signatories of the EC treaty state that they are “determined to lay the foundations of an ever closer union among the peoples of Europe”. Despite the European courts’ increasingly inductive approach to decision-making, all court rulings are consistent with written law, since the latter is so vague.

upholding is a form of inter-jurisdictional cooperation that is so indirect that the courts cannot be suspected of having violated their obligation of judicial independence. Consequently, the European courts' "case law politics" can be useful to protect a court's jurisdiction (i.e. its institutional autonomy), or, conversely, to influence and interfere with other legal orders. Case law politics, defined as a given court's action to pursue its institutional objectives by giving a strategic orientation to case law, can also be a means for setting up new forms of inter-organizational cooperation. By doing so, the European courts have provided for change on a transnational scale as they relate to each other.

### **Conclusion**

The European courts' increasingly nested linkage has given rise to new forms of supranational judicial diplomacy between judicial actors of the European Court of Justice and the European Court of Human Rights that goes beyond traditional understandings of adjudication and has had a deep impact on law- as well as policymaking. This paper mainly aimed to put judicial discourses and lawmaking in their political context. It explored how supranational lawyers endeavour to establish transnational epistemic communities that serve as a vehicle for supranational integration and how they engage into strategic interaction with national and supranational adjudicators. This evolving relationship, which is simultaneously underpinned by hierarchical conflicts and cooperative logics, appears to have become one of the foremost ways to harmonise the rather fragmented European normative space. As a result of their jurisprudential and face-to-face dialogue and their multifaceted investment in emerging transnational networks, Europe's supranational judges have produced path-making and path-breaking effects on the process of European integration.

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