The Dorobantu case and the applicability of the ECHR in the EU legal order

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The applicability of the European Convention on Human Rights in the EU legal order has been a subject of scientific analysis and doctrinal debate ever since the relevance of fundamental rights in the EU legal order was made explicit by the Court of Justice of the European Union (CJEU). The EU not (or at least not yet) being a party to the Convention, the effects of the ECHR in EU law are indirect in nature, serving as a source of inspiration for the general principles of EU law and undoubtedly overlapping with the EU Charter of Fundamental Rights in numerous instances. In a recent judgment relating to the European Arrest Warrant, the CJEU however seemed to introduce a new way of application for ECHR law, one which in the author's view goes beyond the Court's hitherto applied method.

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1. Introduction

The EU legal order is generally seen as a *sui generis* supranational legal order, distinct and separate from both international law and national law.[1] Within this legal order, the protection of fundamental rights takes a prominent place. Based on Article 6 TEU, the EU's fundamental rights architecture rests on three pillars: the Charter of Fundamental Rights of the European Union; the EU's accession to the European Convection on Human Rights (ECHR); and the general principles of EU law based on the ECHR and on the common constitutional traditions of the Member States. As is widely known, Opinion 2/13 of the Court of Justice of the European Union deemed the draft agreement on the accession of the EU to the ECHR incompatible with EU primary law.[2] This of course did not affect the role of the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR) as "sources of inspiration" of the general principles of EU law in the case law of the CJEU.[3] In Case C-128/18 Dorobantu however, the CJEU seems to introduce a new way of application for ECHR law, one which arguably goes beyond the Court's hitherto applied method.[4]

[1] This has been stated and upheld by the Court of Justice constantly since the landmark Van Gend en Loos [EU:C:1963:1] and Costa v ENEL [EU:C:1964:66] judgments.

[2] EU:C:2014:2454. For analysis see for example Á. Mohay, *Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case Note*. Pécs Journal of International and European Law, Vol. 2, No. 1, 2015, pp. 28-36. It is worth noting that the Council of the EU reaffirmed on 8 October 2019 the commitment of the Union to accede to the ECHR where and adopted supplementary negotiating directives which should enable the European Commission to „resume negotiations with the Council of Europe in the near future." https://www.consilium.europa.eu/en/meetings/jha/2019/10/07-08/ (20 January 2020).

[3] See originally Case 4/73 Nold v Commission [EU:C:1975:114] and Case 44/79 Hauer v Rheinland-Pfalz [EU:C:1979:290].

[4] Case C-128/18 Dumitru-Tudor Dorobantu [EU:C:2019:857].

2. Background and the main proceedings

In substantive terms, the *Dorobantu* case revolves around the grounds for refusal of the execution of a European arrest warrant (EAW).[5] In this regard it falls into the line of cases delivered by the CJEU in recent years regarding limits on the execution of EAWs due to fundamental rights and rule of law related concerns. Whereas that aspect undoubtedly deserves attention and analysis as well, this paper focuses not on that facet of the case, but on the CJEU's reliance on and application of the ECHR and ECtHR case law in the EU legal order.

The Dorobantu case concerned the execution of an EAW by a German court (Higher Regional Court, Hamburg). The EAW was issued by a Romanian court in respect of a Romanian citizen, Mr Dorobantu. Dorobantu was being sought by the Romanian authorities for the purposes of conducting a criminal procedure against him. The German court executing the EAW, having regard to the CJEU's *Aranyosi and Căldăraru*[6] judgment, proceeded to assess whether „as regards the detention conditions, there are in the issuing Member State deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, and, second, check whether there are substantial grounds for believing that the person concerned will be exposed to a real risk of inhuman or degrading treatment because of the conditions in which it is intended that that person will be detained in that State."[7]

The German court was of the opinion (based *inter alia* on relevant judgments of the ECtHR) that systemic and generalised deficiencies in detention conditions were indeed discernible in Romania, however, the German court also took into account the information communicated by the issuing Romanian court and the Romanian justice ministry and finally concluded that the surrender of Mr Dorobantu was legal, since detention conditions had been improving in the issuing state, and since some measures had been implemented in order to compensate detainees for the lack of personal space. The court also considered that should the execution of the EAW be refused, the offences committed by Mr Dorobantu would remain unpunished, which would run counter to the efficacy of judicial cooperation in criminal matters.

On the basis of the German court's orders, the surrender of Mr Dorobantu was authorised – the surrender was to take effect once he had served his custodial sentence imposed on him in Germany for other offences committed. When he was released however, Mr Dorobantu lodged a constitutional complaint against the order of the German court at the Federal Constitutional Court of Germany *(Bundesverfassungsgericht).* The Federal Constitutional Court set aside the orders of the Hamburg Regional Court for three reasons: 1) Mr Dorobantu's right to be heard by a court or tribunal established in accordance with the law as enshrined in the German Basic Law had been infringed; 2) the criteria applied by the Hamburg court in its assessment of detention conditions in Romania have not been expressly accepted by the ECtHR as factors capable of compensating for a reduction of the personal space available to detainees; 3) neither the CJEU nor the ECtHR had previously ruled on the relevance of criteria relating to criminal justice cooperation in the EU and to the need to avoid impunity for offenders as factors relevant for deciding on the execution of an EAW. For these reasons the Federal Constitutional Court remitted the case to the Hamburg court.

It was this court that requested a preliminary ruling by the CJEU in order to ascertain the requirements that arise under Article 4 of the EU Charter with respect to detention conditions in the issuing

[5] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190).
[6] Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru [EU:C:2016:198].
[7] Case C-128/18 Dorobantu, para 21.

Member State and the criteria to be used in assessing whether those requirements have been met, especially in accordance with *Aranyosi and Căldăraru*.

3. The Court's judgment

In its preliminary ruling request, the German court was enquiring about the minimum standards for custodial conditions required under the EU Charter, and about the interpretation of the concept of "real risk" as used by the CJEU in *Aranyosi and Căldăraru*. The Court began by a usual overview and reaffirmation of the EU's fundamental rights system. It underlined further the significance of mutual trust and mutual recognitions in EU justice and home affairs law, and added that exceptional circumstances may require limitations to be placed on these principles, especially in light of *Aranyosi and Căldăraru*, *Minister for Justice and Equality (Deficiencies in the system of justice)*[8], and *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*[9], but only based on precise information. At this point, however, the CJEU encountered a difficulty. The Hamburg court was looking for guidance on how to assess conditions of detention as regards the personal space available to each detainee – but EU law contains no rules on this issue.

Thus the CJEU – in line with what was suggested by the Advocate-General[10] – decided to apply the ECHR to fill this *lacuna*: "On that basis, it must be noted that the Court has relied — having regard the considerations referred to in paragraph 58 of the present judgment, and in the absence, currently, of minimum standards in that respect under EU law — on the case-law of the European Court of Human Rights in relation to Article 3 of the ECHR and, more specifically, on the judgment of 20 October 2016, Muršić v. Croatia."[11] To support this, the CJEU recalled as a preliminary point that "in accordance with the first sentence of Article 52(3) of the Charter, in so far as the right set out in Article 4 of the Charter corresponds to the right guaranteed by Article 3 of the ECHR, its meaning and scope are to be the same as those laid down by the ECHR. In addition, the explanations relating to the Charter make clear, with respect to Article 52(3), that the meaning and the scope of the rights guaranteed by the ECHR are determined not only by the text of the ECHR, but also by the case-law of the European Court of Human Rights and by that of the Court of Justice of the European Union."[12]

In the following, the CJEU conducted an analysis of the necessary minimum space based on *Muršić v. Croatia*[13], supported partly by its own judgment in *Generalstaatsanwaltschaft*, and concluded that Mr Dorobantu should, once surrendered, be detained in a prison regime that would enable him to enjoy significant freedom of movement and also to work, which would limit the time spent in a multi-occupancy cell, and left it to the referring court to verify that information and to assess any other relevant circumstances for the purposes of the analysis it is required to make. As regards the other questions of the referring court, the CJEU held that a real risk of inhuman or degrading treatment cannot be ruled out merely because the person concerned has, in the issuing Member State, access to a legal remedy; it furthermore found that the real risk of inhuman or degrading cannot be weighed "against considerations relating to the efficacy of judicial cooperation in criminal matters

[8] C216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [EU:C:2018:586].
[9] C220/18 PPU Generalstaatsanwaltschaft (Conditions of detention in Hungary [EU:C:2018:589].
[10] See Case C-128/18 Dumitru-Tudor Dorobantu. Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 April 2019, para 114 [EU:C:2019:334]: „In the absence of standards defined by EU law, that factor is determined by reference to the minimum requirement defined by the European Court of Human Rights, which is not an absolute minimum."
[11] Case C-128/18 Dorobantu, para 71.
[12] Case C-128/18 Dorobantu, para 58.
[13] Muršić v. Croatia (App. no. 7334/13.) ECtHR (2016)

and to the principles of mutual trust and recognition."

4. Direct applicability of the ECHR in EU law?

The ECHR – to which all EU Member States are parties to – has long played an important role in the fundamental rights architecture of the EU: since *Stauder v Ulm*, it has been referenced by the CJEU as an important source of inspiration for the general principles of EU law, and given the fact that the EU Charter only received legal binding force in 2009 via the Treaty of Lisbon, its significance cannot be overestimated: the CJEU has been relying on the ECHR and the case law of the ECtHR (alongside the common constitutional traditions of the Member States) for decades as guidelines for developing its own jurisprudence on fundamental rights as unwritten principles of EU law, a concept which was recognized and supported by a joint declaration of the European Parliament, the Council and the Commission already in 1977.[14] Thus reliance on the ECHR, the "benchmark" in European human rights protection is of course nothing new, and even though the Lisbon Treaty endowed the Charter of Fundamental Rights of the EU with legal binding force, the continuing parallel existence of the general principles in the post-Lisbon era is expressly recognized by Article 6(3) TEU.

What can however be considered new in *Dorobantu* is the method by which the CJEU introduced a direct application of Article 3 ECHR as interpreted by *Muršić v. Croatia*. Interestingly, the judgment makes no mention whatsoever of the general principles of EU law and does not reference its own jurisprudence regarding how the ECHR may have an indirect relevance in EU law. In *Dorobantu*, the EU court saw no reason to reference the general principles of EU law as the intermediary through which the ECHR can have an effect in the EU legal order. A simple gap in EU law was a sufficient reason to turn to the ECHR and the related ECtHR jurisprudence.[15]

It is of course true that the CJEU references the ECHR for other purposes as well in its case law, most notably to support elements of its argumentation, but again in a way which cannot be regarded as direct application. To make some comparisons: In the landmark joint cases *N. S. and M. E.*[16], the CJEU referenced the ECtHR's M. S. S. judgment[17], but did so in order to partly pinpoint notable similarities and – more importantly – to argue that national courts in the EU did not lack the means to assess fundamental rights compliance of other Member States in the context of Dublin procedures; it further cited the case to compare the scope of relevant rights under the Charter and the ECHR. (It is true of course that rules on the Dublin procedure were definitely not lacking in EU law, so the situation was not entirely the same.) Similarly in the aforementioned *Aranyosi and Căldăraru* case, the CJEU referenced the ECHR and ECtHR jurisprudence to argue that the right enshrined in Article 4 of the EU Charter was absolute, as it corresponded to Article 3 ECHR from which no derogation is possible under Article 15(2) ECHR. In the context of the current analysis

[14] Joint Declaration by the European Parliament, the Council and the Commission (OJ 1977 C 103) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31977Y0427(01)&from=EN

[15] The Advocate-General further suggested in his opinion that the CJEU „does not, at present, have the necessary expertise in that regard, unlike the European Court of Human Rights and the other bodies of the Council of Europe, which have gained special expertise in the field of prison systems and a practical knowledge of the conditions of detention in the States by means of the disputes brought before the former and the reports and on-site inspections for which the latter is responsible" [para 72]. Though undoubtedly prison conditions in a human rights context are more of an issue for the ECtHR then the CJEU, still it is somewhat surprising to read an explicit reference to a perceived lack of expertise at the CJEU in an AG opinion.

[16] Joined Cases C-411/10 and C-493/10 N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (EU:C:2011:865)

[17] M.S.S. v. Belgium and Greece (Application no. 30696/09). ECtHR (2011)

it is also worth noting that the referencing German court was prompted to initiate a preliminary ruling procedure partly by the earlier ECtHR pilot judgment in *Varga and others v. Hungary*[18], a case unrelated to EU law but concerning prison overcrowding and prison conditions in Hungary.

Furthermore, since *Kamberaj* it is known that the ECHR does not "enjoy the benefits" of direct effect and primacy of application over national law by virtue of Article 6 (3) TEU, as the TEU does not govern the relationship between the ECHR and the Member States' legal systems, and thus it cannot have the effect of transforming the ECHR into a directly applicable quasi-EU law norm with primacy over national law.[19] Based on *Kamberaj* it can thus be ruled out that the ECHR was applied in *Dorobantu* via the principles of direct effect and primacy.

Even though the method utilised by the Court of Justice in *Dorobantu* is new in the context of the ECHR, it does bring to mind a similar method the Court applied in *Poulsen and Diva Navigation.*[20] In the fisheries-related dispute, a national court was *inter alia* asking the CJEU in a preliminary ruling procedure whether EU law (more precisely Community law at the time) contained any provisions on the situation of distress. The Court of Justice found that it did not, and then proceeded to point the national court towards international law, by proclaiming that "[i]n those circumstances, it is for the national court to determine, in accordance with international law, the legal consequences which flow (…) from a situation of distress involving a vessel from a non-member country."[21] Thus in *Poulsen and Diva* the CJEU essentially encouraged the national court to fill a lacuna existing in EU law with customary international law.[22]

5. Concluding remarks

As research has shown, the CJEU tends to cite the ECHR and the case law of the ECtHR less frequently since the entry into force of the Lisbon Treaty.[23] Accession to the ECHR could have affected this new dynamic, were it not for the CJEU's – heavily autonomy-centric and much discussed – *Opinion 2/13*, as a result of which this process has stalled, at least until recently. It will be interesting to see whether the novel method of reference applied in Dorobantu (*nota bene*: by the Grand Chamber) will be utilized in other cases and whether the Court of Justice will tend to rely on it as a temporary substitute until formal ECHR accession eventually happens. In any case the *Dorobantu* judgment also underlines the relevance and significance of judicial dialogue between European courts.[24]

Finally*, Dorobantu* is also relevant more generally as regards the relationship between international law and EU law and the applicability of international law norms within the EU legal order. This recent judgment seems to fall into the line of cases (such as *Haegeman*[25], *Racke*[26], *ATAA*[27] or *Front*

[18] Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.
[19] Case C-571/10 Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others [EU:C:2012:233].
[20] Case C-286/90 Poulsen and Diva Navigation [EU:C:1992:453].
[21] Case C-286/90 Poulsen and Diva Navigation, para 38.
[22] L. Blutman, *Az Európai Unió joga a gyakorlatban (Második, átdolgozott kiadás).* HVG-Orac, Budapest 2013, p. 249.
[23] J. Krommendijk, *The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders*, Maastricht Journal of European and Comparative Law, Vol. 22, No. 6, 2015, pp. 812-835.
[24] In the context of the EU's ECHR accession, see e.g. P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, Fordham International Law Journal, Vol. 38, No. 4, 2015, pp. 955-992.
[25] Case 181/73 Haegeman v Belgium [EU:C:1974:41].
[26] Case C162/96 Racke v Hauptzollamt Mainz [EU:C:1998:293].
[27] Case C-366/10 Air Transport Association of America and others v Secretary of State for Energy and Climate Change

Polisaro[28]) that demonstrate a strong *Völkerrechtsfreundlichkeit* (or a monist approach, if you will) on behalf of the CJEU and seems at odds with judgments based on an more autonomy-centric (or dualist) approach (such as *Kadi*[29], *Achmea*[30] or indeed *Opinion 2/13*).

On a final note, one cannot but note the slight irony in the following. In *Opinion 2/13*, the CJEU found it problematic that the EU Member States could take each other to court in Strasbourg for the infringement of the ECHR, because EU law on the other hand required them to rely amongst themselves on the principle of mutual trust.[31] Now in yet another judgment regarding the EAW, the CJEU (similarly as it did in *Aranyosi and Căldăraru, Minister for Justice and Equality*, and *Generalstaatsanwaltschaft*[32]) has relied – one way or another – on the ECtHR jurisprudence to underline the existence of exceptional circumstances under which Member States are required to derogate from the principle of mutual trust.

[EU:C:2011:864].

[28] Case C-104/16 P Council v Front Polisario [EU:C:2016:973].

[29] Joined Cases C-402/05 P and C-415/05 Kadi and Al Barakaat International Foundation v Council [EU:C:2008:461].

[30] Case C-284/16 Slowakische Republik v Achmea BV [EU:C:2018:158].

[31] Opinion 2/13, paras 191-195.

[32] For analysis of the mutual trust question in the context of these judgments see V. Mitsilegas, *Resetting the Parameters of Mutual Trust: From Aranyosi to LM,* in V. Mitsilegas & A. di Martino & L. Mancano (Eds.), The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis. Hart, 2019, pp. 421-436.