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Comparison of procedures of States vs. States before the CJEU and the ECtHR

EUROPEAN JUDICIAL PROTECTION

URBAN BRATINA

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Introduction

The European Union prides itself for being based on the rule of law. Indeed, the success and longevity of the EU as an integration project can be partly explained by, on the one hand, the willingness of Member States to abide by the obligations that stem from the Treaties and, on the other, the resilience of the EU itself in the face of non-compliance by Member States. Aberrant behaviour does not stop it from functioning.

When a Member State fails to fulfil its obligations, it is normally the Commission that initiates the infringement procedure of Article 258 TFEU. Between 2002 and 2018, the Court of Justice ruled in 1418 cases of infringement brought by the Commission and found against Member States in 1285 cases. In other words, the success rate of the Commission is a staggering 91%. This raises the intriguing question which many papers in the literature have tried to answer but as, yet no one has provided a convincing explanation: Why do Member States persist all the way to the Court if statistically the odds are overwhelmingly against them (Nicolaides Phedon, 2019)?

A very recent judgment has highlighted another intriguing aspect of the enforcement of EU law. It is extremely rare for a Member State to take action against another Member State. Perhaps Member States do not do it because they can rely on the Commission to do it on their behalf. But the Commission is not obliged to launch the infringement procedure. This is another issue discussed in the literature without arriving at a satisfactory answer: What determines the decision of the Commission to start infringement proceedings?

The Treaty does empower Member States to seek redress before the Court of Justice. Article 259 TFEU specifically provides that a "Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union."

Yet, so far there have been only eight cases in the history of the EU involving action by one Member State against another. Of these eight cases, five have been adjudicated by the Court of Justice, one is pending while the remaining two were withdrawn (Nicolaides Phedon, 2019).

The five judgments were delivered in the following cases:

- France v United Kingdom, C-141/78, October 1979: Fisheries dispute.
- Belgium v Spain, C-388/95, May 2000: Designation of origin of wine.
- Spain v UK, C-145/04, September 2006: Eligibility to vote in EP elections in Gibraltar.
- Hungary v Slovakia, C-364/10, October 2012: Refusal to allow entry to President of Hungary.
- Austria v Germany, C-591/17, June 2019: Passenger car vignette.

One of the recent cases concerned action brought by Austria against Germany, objecting to the intention of Germany to require all cars operating on German roads to pay an annual vignette [or road use tax] of about EUR 130. Although Member States are free to decide whether to levy such taxes, the Court of Justice found on 18 June 2019, contrary to the opinion of the Advocate-General, that the measure would have discriminated against drivers from other Member States because Germany also intended to relieve owners of cars registered in Germany of an equivalent amount that would have been deducted from the motor vehicle tax.

Article 259 TFEU: MS v. MS

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court (Weingerl, 2021).

Action is taken in two stages:

1. Bringing the matter before the Commission:
   - Both MS submit their opinions
   - EC: reasoned opinion in 3 months

2. Action before the CJEU:
   - Regardless of the content of the EC opinion/even if there is no opinion

The interstate procedure is rarely used mean. Before submitting the action, states usually use Diplomatic means, EC action, preliminary ruling … Strong legal integration through EU institutions and the political means of resolving disputes are the main reasons for the low number of interstate cases. Interstate cases would "go against the very nature and custom of an integration project like the EU" (Weingerl, 2021).

By now, there have been only 8 cases of interstate cases before the CJEU:

- Ireland/France, 58/77 (withdrawal of the action);
- France/United Kingdom, 141/78 (fishery; France wins);
- Spain/United Kingdom, C-349/92 (withdrawal of the action);
- Belgium/Spain, C-388/95 (wine; Belgium loses);
- Spain/United Kingdom, C-145/04 (election to the EU in Gibraltar, no infringement);
- Hungary/Slovakia, C-364/10 (EU citizenship, Hungary loses);
- Austria/Germany, C-591/17 (vignettes, Austria wins);
- Slovenia/Croatia, C-457/18 (arbitration agreement, CJEU lacks jurisdiction).

Poland example

On December 1st, 2020, the Dutch House of Representatives (the Tweede Kamer) adopted a resolution compelling the government to bring Poland before the CJEU. In light of the Commission's failure to enforce the Courts' previous judgement, the Tweede Kamer noted, and of the 'serious' threats faced by the Polish judiciary, the Dutch government should take the lead, and ensure the protection of rule of law across the Union.

How do the Treaties envisage this possibility? The answer lies in the oft-neglected Article 259 of the Treaty on the Functioning of the European Union (TFEU), which provides that a Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union (Iniguez, 2020).

Article 259 infringement proceedings are rarer than the 'traditional' procedure under Article 258: the prospect of one government suing another is feared, and it is preferred that action against a Member State be taken by the European Commission. Yet as Dimitry Kochenov notes in Gazeta Prawna, such proceedings are more common than a first glance at the CJEU's law reports might suggest (Iniguez, 2020). In its second limb, Article 259 further notes that before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. Many of the claims brought by Member States are halted at this stage and taken up by the Commission instead – thus reaching the Court as 'traditional' Article 258 proceedings, rather than as disputes between two Member States.

This explains the residual nature of cases actually brought under Art 259 itself. Such disputes, Kochenov adds, are ones with a 'purely political dimension', which the Commission has refused to get involved in, and which are thus viewed as rather risible conflicts by the European legal community. Prominent examples include Spain v United Kingdom (C-145/04), which concerned a dispute over voting rights in Gibraltar; Hungary v Slovak Republic (C-364/10), which concerned freedom of movement and a diplomatic conflict between the two; or the case of France v United Kingdom (Case 141/78), which dealt with a fisheries disputes .

A turning point

This non-aggression pact between Member States, however, may have changed. Faced with the joint Hungary/Poland veto over the EU Recovery Fund, and in light of the increasing public awareness of the existential rule of law crisis the Union faces, Article 259 appears to be on the cards – and as the past week has shown, a Dutch claim against the Polish government could be plausibly backed by several other governments.

On December 1st 2020, and against the backdrop of the Polish persecution of Judge Igor Tuleya, the Court of Justice heard the case of Commission v Poland (C-791/19), concerning the introduced disciplinary regime for Polish courts (*Advocate General Pikamäe*, 2022). According to the Commission, said regime establishes 'political control' over the judiciary, allowing the government to sanction judges based on the political content of their rulings. In doing so, the Commission concludes, Poland has failed to fulfil its obligations under Art 19(1) TFEU (the right to effective legal protection), read in conjunction with Art 47 of the Charter of Fundamental Rights (the right to an effective remedy and to a fair trial) (Meijers Committee, 2019).

What was most striking about the hearing, however, was not the Polish government's violation of the judiciary's independence, which has become a commonplace phenomenon. It was, rather, the presence of five Member States (Belgium, Denmark, the Netherlands, Finland and Sweden), which intervened to support the Commission – coordinating their submissions, as the Belgian government explicitly recognised, and engaging 'in considerable detail with the situation in Poland in an unprecedented public way' (Iniguez, 2020).

An intergovernmental push to break the impasse

The recent manoeuvres by the Dutch parliament have been met with fierce resistance by the Polish government, which has threatened to bring an Article 7 TEU claim against the Netherlands: in its recent report, titled 'Violation of the rule of law by the Netherlands – Tax fraud in the EU', the Polish government warns of the Netherlands' 'aggressive tax planning', labels it a tax haven, and stresses that its fiscal framework risks violating the Union's financial interests.

Faced with the democratic backsliding in Central and Eastern Europe, the European institutions have systematically failed to act, engaging in never-ending 'dialogues' with authoritarian governments, and demanding new legal instruments whilst proving reluctant to use existing ones (such as Article 7 TEU proceedings, Article 260(2) TFEU sanctions, or the Common Provisions Regulation governing the European Structural and Investment Funds)(Kochenov, 2015). They have shown, in other words, the extent to which an 'authoritarian equilibrium', which is rendering the Treaties highly inefficient, is entrenched in the Union's very functioning (Meijers Committee, 2019).

The threat of an international agreement, signed by the remaining 25 Member States and taking the Recovery Fund outside the Treaties' framework, has played a vital role in seemingly overcoming the Orbán-Morawiecki veto. Similarly, faced with the Commission's blind eye towards the rule of law backsliding, Member States can rely on Art 259 TFEU to bring infringement proceedings against Poland and Hungary.

Overcoming the Treaties' rigidity, in other words, also means overcoming the institutions' lack of political will – to protect the Union's founding values (Art 2 TEU), uphold the principle of mutual trust (Art 4(3) TEU), and safeguard the principle of effective legal protection (Art 19 TEU). Without such assertiveness by the Member States, the EU's constitutional architecture will prove increasingly fragile (Iniguez, 2020).

Enforcing the Rule of Law with use of Article 259 TFEU

Direct actions under Article 259 TFEU can play an important role in enforcing compliance with the EU's values and core principles in defiant Member States. This is particularly the case if systemic infringement actions are brought. The benefits of deploying Article 259 TFEU as opposed to other Treaty provisions are clear: the Article requires national as opposed to the EU-level institutional action, which solves the issue of the high thresholds for using the other mechanisms and also respects the federal sensitivities, by limiting the possibility of supranational power-grabs under the pretext of values enforcement. The provision is deployable immediately and can develop into the key element of biting intergovernmentalism, where the Member States themselves – even when confronted by reluctance or indecision in the Union institutions – can call upon the Court to enforce the values on which the Union is founded (Kochenov, 2015).

This brief contribution makes the case for exploring the potential of Article 259 TFEU, allowing for direct actions brought by the Member States of the European Union, in the context of the enforcement of the Rule of Law in the Member States deviating from the principles of Article 2 TEU. While plentiful possible ways to enforce the Rule of Law have been proposed so far – some more likely to be effective than others – all the proposals overwhelmingly focus on institutional action, either within the context of the Union – including the actions by the existing institutions: Council, the European Commission, the Fundamental Rights Agency of the EU (FRA) and actions by institutions yet to be created, such as the Copenhagen Commission – or outside the EU context, such as the involvement of the Venice Commission. Reliance on the Member States' courts, and a potential fine-tuning of the EU's powers through a broad interpretation of the Charter of Fundamental Rights of the EU (CFR) by the Court of Justice of the European Union (ECJ) has also been advocated.

In all the diversity of the proposed approaches, the scholars and institutions proposing them tend to underplay the potential role that the Member States of the European Union can and should play through direct actions before the ECJ, bringing before the Court those their peers that depart from the fundamental principles of Article 2 TEU – an argument potentially bringing the largely ignored Article 259 TFEU, which contains the following rule: 'A Member State which considers that another Member

State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union' to the fore.

There are three fundamental starting points. Firstly, the potential for direct actions under Article 259 TFEU has been unjustly overlooked by the commentators so far, while offering a much less cumbersome way to attempt to enforce the acquis and values, allowing one (or more) Member State to act directly in a context where all other instruments depend on meeting relatively high institutional thresholds, often implying the need to achieve difficult political agreements, potentially putting the enforcement of the law (and values) in jeopardy. The 'letters of foreign ministers' are a clear sign that some Member States tend to be more upset than others with the state of affairs in values enforcement in the EU – the contrary can also be true: some Member States, even while holding the Presidency of the EU, would not be disturbed by disruptions in values protection. While the EU is based, inter alia, on the principle of subsidiarity and also requires blocking ultra vires action, Article 259 TFEU provides for obvious respect for both such considerations, as the Member States are empowered by the Treaty to seize the Court in a situation where the institutions are silent and the violation of the law is ongoing (Kochenov, 2015).

Secondly, the idea of such direct actions is as appealing as it is usable in practice, notwithstanding a most restricted history of use of the relevant Treaty provision. This is due to the intricate connection, which emerged between Article 259 TFEU and the Commission-initiated Article 258 TFEU: the Member State initiating the action approaches the Commission first, which then takes over the action, should it agree with the arguments presented. This says nothing about the potential effectiveness of Article 259 TFEU taken alone in the context of values' enforcement. Moreover, parallels with the use of direct state-versus-state actions in the context of other legal systems in Europe testify to the appeal of the idea. The Council of Europe experience is particularly valuable in this respect: direct state actions should not be dismissed outright, especially not in the difficult circumstances.

Thirdly, this contribution demonstrates that the triggering of Article 259 TFEU should not be excessively difficult, legally speaking, in the context of growing interdependence and mutual reliance in the EU, where not only acquis violations sensu stricto but also violations of the fundamental values as expressed in Article 2 TEU have clear potential to result in negative externalities for all the EU Member States. In this sense the argument relies on the idea that bringing systemic infringement actions in the area of values based on Article 2 TEU in cumulation with other instruments, such the duty of loyalty, should broaden the room for manœuvre enjoyed by the Union – and its Member States, of course – and supply a sound method of grounding infringement actions in the Treaties.

Procedurally speaking Article 259 TFEU does not set a high threshold at all. 'Externalities' per se are not even required. Closely following the initial proposal concerning the deployment of systemic infringement actions made by Kim Lane Scheppele, this contribution borrows the cumulation idea and methodology and applies it to the direct action context, where one Member State challenges another. The idea of itself is not entirely new, as the Court of Justice has applied cumulation before, but only within the realm of the acquis sensu stricto – never in relation to the breaches of the values (and, previously, principles) of Article 2 TEU (Butler, 2017).

The novelty of the proposal is thus precisely in moving the cumulation technique to the sphere of the enforcement of Article 2 TEU coupled with other provisions, such as the duty of loyalty of Article 4(3) TEU, for instance. In terms of the steps to come following a declaration of breach by the ECJ, Scheppele's approach is applicable in full, as Article 260 TFEU works equally in the context of any failure to implement a judgment of the ECJ, be it a declaration of breach on the basis of Article 258 TFEU, 259 TFEU, or a judgment rooted procedurally in any other provision.

The paper idea progresses along the lines of the three points made above: arguing that direct actions by the Member States are particularly useful in the context of the current discussions in the area of values' enforcement; that Article 259 TFEU is easy to deploy and that it is also perfectly possible in practice; and drawing inspiration from proposal for systemic infringement actions made in the context of the utilisation of Article 258 TFEU and, as a natural follow-up, of Article 260 TFEU (Kochenov, 2015).

ECJ and ECtHR: Relationship between the courts (Bosphorus)

In recent years, the legal relationship between different international courts has attracted more and more scholarly attention. The so-called proliferation of international courts and tribunals has led to a debate about potential jurisdictional overlaps or even conflicts between these courts.

Presently, the European Community is not a party to the ECHR and therefore not directly bound by it. According to the well-established case law of the ECJ, which is reflected in Article 6 (2) EU, the ECHR constitutes the minimum standard for human rights in the EU because all EU Member States are also bound by the ECHR. However, this does not imply that the EC itself is bound by the ECHR. As long as the EC itself is not a member to the Convention, the Convention rights have only got an indirect influence on the scope of fundamental rights in the European Community so that the Community itself cannot be held responsible for possible infringements of these rights. The Member States, however, are bound by both: Community law and the ECHR. This means that when implementing Community law, the Member States must generally comply with the ECHR (Lock, 2009).

On various occasions both the European Commission of Human Rights (ECommHR) and the ECtHR had to decide cases directed against Member States of the EC, concerning actions by Member States that had been determined by Community law. The two most important decisions for the relationship between Community law and the ECHR are the cases of Matthews and Bosphorus. According to the ECtHR's decision in Matthews, Member States are responsible if EC primary law (in that case the EC Act on Direct Elections of 1976) violates the Convention. The main reasons for this are that although the Member States are not excluded from transferring competences on an international organization, they remain responsible for infringements of the ECHR after such a transfer. Moreover, the respondent United Kingdom had freely agreed to be bound by the act in question and EC primary law cannot be challenged before the ECJ.

In the more recent Bosphorus decision, the ECtHR was faced with the question of whether an EU Member State, in this case Ireland, could be held responsible under the Convention for the mere execution of an EC Regulation. The ECtHR had to reconcile two basic principles: On the one hand, parties to the Convention are not prevented from transferring powers to an international organization. On the other hand, a party cannot fully escape its responsibilities under the Convention by such a transfer. According to the ECtHR, a Member State remains responsible under Article 1 ECHR for all acts and omissions of its organs regardless of whether they are rooted in domestic law only or are a consequence of the State's membership in the EC. An action taken in compliance with obligations arising from the membership in an international organization, however, can be justified as long as that organization protects human rights at least in a manner equivalent to that of the Convention, if the Member State has no discretion in implementing these obligations (Emmert & Carney, 2017). Equivalent, according to the ECtHR, means comparable and not identical. If such equivalent protection is found to exist, there will be a presumption that a State has not departed from the requirements of the Convention when it does no more than implement the obligations flowing from its membership in the organization. The presumption, however, is rebutted when the protection offered was 'manifestly deficient', which would have to be examined on a case-by-case basis. The ECtHR went on to conclude that the European Community did in fact afford such a level of protection and that the presumption in

that case was not rebutted. Therefore, the complaint was held to be unfounded. The ECtHR also made it clear that the presumption in Bosphorus only operates where the Community law at issue could be challenged before the ECJ. Therefore it does not apply where, as was the case in Matthews, the compliance of primary law with the ECHR is at issue (Lock, 2009).

The Bosphorus decision further clarifies that the presumption only applies where the Member State had no discretion in implementing Community law. Where the Member State had some degree of discretion, its responsibility will be the same as if a purely domestic act had been at issue. One of the questions left open by the ECtHR is whether the presumption also applies in cases where there has been no national act executing Community law. Such a case could for instance arise where an applicant directly challenges a decision rendered by the Commission and confirmed by the ECJ before the ECtHR. Bosphorus is based on the presumption that the protection of human rights in Community law is equivalent to that under the Convention. Therefore, the ECtHR presumes that in cases where the Community's Member States had no discretion when implementing secondary Community legislation that the Member States complied with the requirements of the Convention. Therefore, Bosphorus privileges secondary Community law as such. Thus the presumption formulated by the ECtHR in Bosphorus must also be applicable in cases where there was no implementing action by Member States.

As mentioned, the present relationship between the ECJ and the ECtHR is characterized by a mutual exercise of comity in that both courts respect the work of the other. In Bosphorus, the ECtHR showed a great degree of deference towards the ECJ, in that it is presumed that the human rights protection under Community law is equivalent to that required by the ECHR. However, it is doubtful whether that presumption will still be justifiable after an accession. An accession of the EU to the ECHR will provide a solid legal basis for a review of alleged human rights violations committed by the organs of the EU. That review will also include decisions of the ECJ. As previously mentioned, the Bosphorus presumption should be applied in cases where only the Community acted. It would hardly be justifiable if that presumption were to be retained in such cases because it would deprive the ECtHR of a great deal of cases arising within the EU. It would moreover lead to an unequal treatment of the different parties to the ECHR, in that the presumption would privilege the EU.

Considering that the ECtHR does not grant such a privilege to any of the highest national courts of the parties to the ECHR, such a privilege for the ECJ is hardly justifiable. This argument is reinforced by the fact that such a privilege is even denied to those national courts that provide for a more effective protection of human rights than the ECJ, e.g., by granting easier access. In addition, after an accession to the ECHR, the need for the ECtHR to exercise comity will have ended. The justification for the exercise of comity was that the relationship between the two European courts is presently not fully clear. After an accession that will no longer be the case. Therefore, it is to be expected that the ECtHR will give up its Bosphorus jurisprudence after an accession (Lock, 2009).

The relationship between the two European courts is likely to undergo significant changes in the future. Presently, the ECtHR puts the ECJ in a privileged position as the ECtHR will generally presume that the ECHR was not violated in cases where there was a possibility of judicial review by the ECJ and where the Member State held responsible for an alleged violation of the ECHR did not have discretion in implementing Community law. Th is approach is justified by the fact that the ECJ usually follows the ECtHR's interpretation of the ECHR and thereby helps to maintain a relatively high human standard in the European Community. This situation will not significantly change once the EU Charter of Fundamental Rights has entered into force. The ECHR will remain the minimum human

rights standard in the EU. The ECJ will be bound to interpret the ECHR but will not be bound to follow the ECtHR's case law. It can, however, be expected that the cooperation between the two European courts will increase somewhat further. After the EU's accession to the ECHR, the present coexistence of the two European courts will change. The ECJ's decisions will become directly reviewable by the ECtHR. In addition, the reason for the Bosphorus jurisprudence, which puts the ECJ in a privileged position relative to national courts, will disappear and that jurisprudence will probably be given up. Moreover, the ECJ will be bound to follow the ECtHR's decisions, where the EU was a party to previous proceedings in the same matter.

CJEU as an inter-state court

Articles 259 and 273 TFEU allow for the jurisdiction for the Court of Justice of the European Union (CJEU) to adjudicate on inter-state disputes between EU Member States, subject to the fulfilment of certain conditions set down in the treaties. Article 259 TFEU relates to inter-state enforcement of European Union (EU) law obligations, whereas Article 273 TFEU concerns asking the CJEU to be an adjudicator for inter-state disputes stemming from a bilateral or multilateral arrangement that relates to the subject matters of the treaties. Use of both instruments for inter-state litigation has historically been limited, demonstrating the strong self-contained regime of law that the EU has built and developed.

Inter-state disputes and judicial remedies

Inter-state mechanisms for resolving disputes are a common feature of the international legal system. They have the ability to find resolutions to disputes by peaceful means and can often be the best manner in which to settle an international dilemma. Inter-state disputes before international courts of a regional nature in Europe in different venues are possible: at the European Court of Human Rights (ECtHR), the CJEU, and the Court of Justice of the European Free Trade Association States (EFTA Court). Inter-state disputes through adjudication mechanisms are common in other international for a too, such as the WTO. Yet what is intriguing about inter-state disputes in a European Union context is the lack of inter-state disputes that ever reach a stage when a judicial arbiter is needed.

Inter-state litigation and subsequent adjudication before an international court are highly privileged cases, where locus standi is narrow, and the fact that inter-state disputes cannot be resolved bilaterally put such scenarios when they do arise, on their face value, as being highly contentious. In the context of the European Union therefore, with Member States that have become increasingly integrated through a supranational legal order, the potential for inter-state disputes before a court of law is thus minimized from the outset. The fact that Member States for many years were given more access to the CJEU in its early years than other (private) actors, perhaps even 'old fashioned' was such a construal even at that time, has meant other means to access the CJEU increased over time, but the basis for inter-state litigation has remained relatively static (Butler, 2017).

The EU's legal order was proclaimed by the CJEU and has subsequently been extensively developed in a constructed manner. As an international adjudicator, the CJEU has more extensive jurisdiction than other international courts and tribunals. Its reach goes beyond that of the typical features of the International Court of Justice (ICJ), and furthermore has successfully designed the EU as its own legal order, separate and distinct to that of the classical international legal order (Meeusen, 2019). Inter-state trade has been at the heart of the EU and its very foundations to build on a common market, and later an internal market. Yet, the judicial body to facilitate inter-state trade has not led to a large number of inter-state disputes before the CJEU. That is despite Member States not having completing free-reign as regards where they should settle disputes.

The function of the CJEU has primarily been to answer questions of EU law that arrive before it via a number of different mechanisms. Whether it is direct actions, infringement proceedings, providing opinions on future international agreements, or preliminary references, the EU's status as a self-contained regime is a noteworthy objective in itself, but more critically, the lack of inter-state disputes resolved by judicial means is also a noticeable abstention. This applies to disputes because of both EU Member States' obligations to follow EU law, but also to disputes arising from other aspects of bilateral or multilateral relations outside of EU law (Butler, 2017).

In most situations, there is no need to resort to litigation at a court for interstate disputes. Yet when it is needed, there are a number of procedures available to Member States. There are two provisions in the treaties that allow an inter-state dispute to arise before the CJEU—with one Member State pitched against another Member State. Firstly, through the inter-state enforcement of EU law through Article 259 Treaty on the Functioning of the European Union (TFEU); and secondly, an inter-state dispute touching upon EU law through Article 273 TFEU. In the former, inter-state adjudication in the EU legal order is principally motivated by ensuring compliance with obligations flowing from EU law, be it primary or secondary in nature. This is different from other interstate litigation in the latter, where a bilateral or multilateral arrangement between Member States that has elements of EU law is submitted to the CJEU to adjudicate on what is principally a bilateral or other multilateral arrangement.

The inter-state nature of adjudication before the CJEU should also be seen against the backdrop of inter-state adjudication under the European Convention on Human Rights (ECHR), within the jurisdiction of the ECtHR. Article 33 ECHR provides that 'any High Contracting Party may refer to the Court [ECtHR] any alleged breach of the provisions of the Convention and the Protocols there to by another High Contracting Party'. The very existence of an explicit inter-state reference in the ECHR has served as a 'striking innovation by the normal canons of international law'; given that states, inter alia, do not have to prove a specific legal interest. A minimal number of inter-state disputes before the ECtHR also matches the rarity of inter-state disputes before the CJEU. In the history of the ECtHR, just twenty-one inter-state cases from both EU and non-EU Member States have been filed, with just five judgments being delivered. Inter-state litigation has occurred between EU Member States before their accession to the EU, but to date, there has been minimal judgments with respect to inter-state litigation between EU Member States. In 2016, Slovenia v Croatia was lodged at the ECtHR, an inter-state case between two EU Member States (*JUDGMENT OF THE COURT (Grand Chamber). Case C-457/18*, 2020). Similarly in the outer-EU system, inter-state cases are possible in the European Economic Area (EEA), integrating the EU's internal market to peripheral European states that have made decisions to stay outside of the EU. Article 108(2)(c) of the EEA Agreement mirrors the EU's own Article 259 TFEU,14 and caters for the EFTA Court being competent to adjudicate on 'the settlement of disputes between two or more EFTA States'. Despite such provisions existing from the very beginning of the EEA system,15 no inter-state case has even arrived before the EFTA Court, even though a possibility for cases to do so does exist.

Inter-state judicial bodies as a whole serve three functions: the promotion and protection of a coherent legal system, provision of opinions on constitutional issues, and provisions of measures of protection. Member States generally do not initiate inter-state litigation before the CJEU, despite the long-standing legal basis that enables them to do so. More run of the mill cases before the CJEU provide Member States the opportunity to intervene in cases. The lack of interstate disputes resolved by judicial means can partly be explained by the manner in which the EU legal order has developed from the outset. The CJEU's early case law stated that obligations flowing from treaties are still applicable to other Member States, even when one party fails in their obligations, given that withholding

performance as would be possible under international law, 'cannot be recognised under Community law' (Butler, 2017).

The lack of inter-state cases before the CJEU can indicate two strong dimensions of how the EU functions. First, with regard to the Article 259 TFEU procedure, it demonstrates the strong nature of the Commission subject to Article 258 TFEU, subject to political discretion, to take infringement actions on behalf of the EU as a whole to the CJEU. Secondly, the lack of inter-state adjudication through Article 273 TFEU demonstrates the strength of political cooperation within the EU to resolve inter-state disputes via non-judicial means, thus rendering the potential of the CJEU as an inter-state court rather limited. The EU has become a self-contained regime, whereby laws are respected without the need for Member States to litigate against one another before the CJEU, which is a remarkable achievement in its own right (Bux, 2021). What Article 259 TFEU and Article 273 TFEU both share is their affinity with EU law. The former is specifically an inter-state mechanism regarding potential violations of failing to fulfil obligations flowing from EU law, whereas the latter is likely, in the future, to be interpreted along the lines of EU law.

The lack of inter-state disputes before the CJEU can be further explained by two factors. First, there are other institutions and means beyond the judiciary that fulfil the function of resolving inter-state disputes that occur in other multilateral regimes of law. Secondly, inter-state disputes can be seen as 'hostile actions', and the rareness of inter-state disputes before the CJEU may be a blessing, given it may be 'rather unpleasant to have states suing each other in a Community supposedly based on peace and comity'. Additional considerations for why Member States might be reluctant to utilize Article 259 TFEU enforcement proceedings can also be explained by diplomatic considerations, as the cooperation of those states will have to continue within the remit of the Council. The fact remains that the EU—an integration project through law— avoids direct confrontation between Member States wherever possible, be it in the political or legal arena. The cordial nature in which the EU has been built is under a constant need to evolve, given its inability to stand still. Thus, while inter-state disputes being tried and tested before a court of law are undesirable, they nonetheless exist to ensure the Commission is not the only potential enforcer of infringements of EU law, and that some safety valve is present (Butler, 2017).

ECtHR as an inter-state court

In the last seven decades, States have referred 24 situations to the former Commission and to the European Court of Human Rights (ECtHR). Certainly, compared to some 750,000 individual applications, the number looks small. However, the inter-State applications have had an impact for a large number of individuals. Many of the cases also had important political ramifications and shaped the present supervisory architecture of the Convention.

The ECtHR full list of inter-State cases reveals a considerable rise of applications, with currently eight pending sets of proceedings: the 2008 armed conflict between Georgia and the Russian Federation is before the Court in Georgia v Russia II. The case has reached the merits stage, the admissibility decision was taken back in 2011 (Buckley et al., 2018). Georgia v Russia (IV) was lodged in 2018 and is pending at the admissibility stage. It relates to the alleged deterioration of the human rights situation along the boundary between Georgian-controlled territory and Abkhazia and South Ossetia. Ukraine has, since 2014, lodged a total of eight inter-State application against Russia before the ECHR, five of which are currently pending in Strasbourg. In those cases, no formal admissibility decision has been rendered yet. In the case of Ukraine v Russia (re Crimea) the Court had a hearing on the admissibility in September 2019. Slovenia brought a case against Croatia in 2016 that concerns the consequences of the breakup of Former Yugoslavia. In that case, the Court will render an admissibility decision after it held a hearing in June 2019, as anticipated on this blog by Igor Popović (Ulfstein & Risini, 2020).

Notably, two of the sets of cases involve Russia and human rights in situations of sovereignty disputes and armed conflict. Overall, the thrust of work in these inter-State proceedings still lies ahead of the Court.

State-to-State litigation based on human rights treaties is on the upswing also in the framework of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The Committee on the Elimination of Racial Discrimination is currently dealing with three inter-State communications. In the most recent December session, the Committee decided that it has jurisdiction regarding the inter-State communication submitted by the State of Palestine against Israel.

Further, the compromissory clauses of CERD and the Genocide Convention have given rise to a number of cases before the International Court of Justice (ICJ). One set concerns Ukraine v Russia. Ukraine has brought proceedings under the International Convention for the Suppression of the Financing of Terrorism in respect of the events in the eastern part of its territory. With regard to the events in Crimea, Ukraine's claim is based solely upon CERD. In 2017, after a finding of a prima facie dispute, the ICJ issued provisional measures based on CERD. The addressee of the measures is Russia, with reference to the territory of Crimea, in favor of those individuals affected by Russian policies. Subsequently, the ICJ rendered its judgment on the admissibility on 8 November 2019 (Kleinert et al., 2020). Further, the ICJ is dealing with the Case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) based on Article 22 CERD. The Court indicated provisional measures for the United Arab Emirates in 2018. In 2019, the United Arab Emirates addressed the parallel proceedings before the CERD Committee and sought an order by the ICJ against Qatar to immediately withdraw its communication before the treaty body, however, with no avail. Noteworthy is also the State-to-State litigation before the ICJ of the Gambia against Myanmar based on the Genocide Convention. It concerns "acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group".

The place of the inter-State applications on the ECtHR's agenda is reflected in the message for the 60thanniversary of the Court by its current president, Linos-Alexandre Sicilianos. Specifically, he underlined that by way of inter-State applications 'a number of State conflicts have been brought before the Court. He added that "in addition to these inter-State cases there are thousands of individual applications before the Court related to conflict situations". He thereby highlighted the difficult role for the Court: it must deal with disputes between Member States in conflict and, at the same time, is tasked with the protection of a large number of individuals and their human rights (Ulfstein & Risini, 2020).

Inter-state applications are also the subject of the reform process of the Court (the 'Interlaken process'). The 2018 Copenhagen Ministerial Declaration commissioned the Committee of Ministers, before the end of 2019, to finalize its analysis of 'obtaining a balanced case load', including by: 'exploring ways to handle more effectively cases related to inter-State disputes, as well as individual applications arising out of situations of inter-State conflict, without thereby limiting the jurisdiction of the Court, taking into consideration the specific features of these categories of cases inter alia regarding the establishment of facts.' (para. 54 c)

The Court has submitted proposals for a more efficient procedure in inter-State cases. However, the Steering Committee for Human Rights (CDDH) was in its meeting on 18-21 June 2019 not able to agree on a set of recommendations. In its meeting on 26-29 November 2019, the Committee decided to set up a Drafting Group on effective processing and resolution of cases relating to inter-State disputes

(DH-SYSC-IV) with a view to submitting proposals to the Committee of Ministers before 31 December 2021 (Garciandia, 2020).

Some of the inter-State proceedings under the ECHR addressed the general human rights situation in a country. Examples are Greece at the end of the 1960s and Turkey in the early 1980s. These examples of public interest litigation resound in today's action by the Gambia against Myanmar before the ICJ. However, many inter-State applications before the ECtHR has had an underlying conflict about the sovereign status of a territory. The context of such cases has put the Convention bodies in a difficult role.

The Court has already had occasion to deal with several of these issues, but many challenges remain. The Plenary of the Court has outlined its policy in its proposal of 5 June 2019, referred to above. However, the Steering Committee for Human Rights will continue work on recommendations in a special Drafting Group. A draft report will be submitted to a high-level expert conference in spring 2021, organized under the auspices of the German Chairmanship of the Committee of Ministers in cooperation with the PluriCourts Centre for the Legitimate Roles of the Judiciary, University of Oslo (Ulfstein & Risini, 2020).

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