Explaining divergence and convergence between Strasbourg and Luxembourg: a theory of strategic judicial dialogue between International Courts.

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International Courts today interact with each other, especially by referring to each others' rulings; the output of this phenomenon has so far been considered by the literature to be a progressive and stable convergence of their respective jurisprudence. The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), with their overlapping jurisdictions, are engaged in such interactions. However, their jurisprudence displays examples of convergence (such as the ECJ acknowledging the rights of businesses to privacy, following the ECtHR), but also of divergence (for example, on the possible exceptions to EU asylum laws).

This research will show that both Courts use convergence with each other as a legitimacy-enhancing mechanism, in reaction to threat from relevant actors: domestic courts, Governments, but also the other European Court. Relying on a case study, it explores this dynamic on the matter of exceptions to the principle of mutual trust grounded in fundamental rights for the execution of European Arrest Warrants It will explain this variation, so far overlooked, by proving that the ECJ and the ECtHR engage strategically with each other to safeguard their authority as policymakers within the European judicial and institutional system.

Note : Data collection for this article still partially in progress

1. Introduction: European Courts and the elusive "judicial dialogue"

How do International Courts (ICs) with overlapping sphere of competences, *rationae materiae* and *rationae territoriae*, co-exist in a common legal space? Are ICs vectors of harmony and coherence in international (human rights) law, or on the contrary, do they contribute to its fragmentation? This article explores and provides support for a theory explaining why this coherence or fragmentation can be the result of strategic decision-making by ICs. These ICs respond to threat to their authority by using convergence with another IC as a costly, but effective self-legitimization tool. This theory is tested through a case-study on the case-law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), used to assess some implications of this theory. In particular, it focuses on how threats and challenges coming from another IC and from domestic Courts forced the two European into convergence over the years, regarding the question of exceptions to the execution of European Arrest Warrants.

The ECJ and the ECtHR are indeed an interesting set of ICs to probe this theory. Despite some attempts to formalize their relationship by having the EU become party to the ECHR, they are still to this day two entirely separate and non-hierarchical Courts. They remain functionally independent from each other, which is one of the scope conditions of the framework presented here. This is not to say that they have ignored each other, or each other's jurisprudence, as this article will show; but rather that their ties have not been formalized, leaving their judges at liberty to handle the situation as they see fit[1]. This has led to multiple

[1] Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders' (2015) 22 Maastricht Journal of European and Comparative Law 812; *Åklagaren v Hans Åkerberg Fransson* (C-617/10), 26 February 2013.

jurisprudential sagas whereby the two Courts converged and diverged with each other when presented with similar questions.[2]

There is no rule organizing this sort of overlap *rationae materiae* (human rights) and *rationae personae* (EU Member States, who are all parties to the ECHR as well), and no unified trend across issue-areas regarding which Court leads and which Court follows. Empirically exploring the situation of the ECJ and ECtHR will yield important insight for the socio-legal scholarship. The multiplication of ICs and the judicialization of international relations has been accompanied by a multiplication of situations of overlap between the competences of different ICs worldwide[3]. The ECJ and the ECtHR being among the oldest and most influential Courts still active today, their constant convergences and divergences is simply more salient.

The legal scholarship has for decades held a strong interest in studying the overlap between the EU and the ECtHR and its consequences. To evaluate the consequences of this overlap and the new opportunities it opens for the ECJ and the ECtHR specifically, the concept of "judicial dialogue" has been developed. Judicial dialogue, or "*the exchange of arguments, interpretations and judicial solutions between magistrates, especially in decision-making, through the jurisprudence or relying on cooperation between jurisdictions*"[4], is a broad socio-legal phenomenon covering all forms of practices linking national and international judges alike, from formal and informal meetings to conferences to cross-citations [5]. While this does

[2] For a recent analysis of the phenomenon, see Sébastien Platon, 'CJUE et Cour EDH : la dialectique du maître et de l'esclave?' [2020] Revue québécoise de droit international (RQDI).

[3] N Lavranos, 'Regulating Competing Jurisdictions among International Courts and Tribunals' (2008) 68 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht; Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction - Problems and Possible Solutions' (2001) 5 Max Planck Yearbook of United Nations Law Online 67; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (3 edition, Oxford University Press 2003).

[4] Original in French: *« l'échange d'arguments, d'interprétations et de solutions juridiques entre magistrats, notamment dans le délibéré, à travers la jurisprudence ou par le biais de la coopération entre les juridictions* » Julie Allard and Antoine Garapon, *Les juges dans la mondialisation, La nouvelle révolution du droit* (Seuil 2005) 77.

[5] Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 100.

seem to capture something of a dynamic push-and-pull between the ICs, the broadness and vagueness of the concept makes it prone to yielding contradictory results: Law and Chang find it virtually absent as a systematic practice[6] whereas Claes and Visser consider it to be an important aspect of international justice [7]. Krommendijk found no specific methodology used to explain when the ECJ does or does not refer to the ECtHR[8] , an assessment De Búrca agrees with [9] . Many of these contradictory results could be due to challenges in definitions, operationalisation, and conceptualisation [10]. For example, where Law and Chang rely on the existence of absence of cross-citation-allowing rigorous data collection and transparent analysis-, Claes and Visser approach it as multifaceted, accounting for all sort of interactions and networking between the judiciary – more difficult to falsify, yet closer to reality.

Looking more broadly at theories on interactions between ICs in general, some scholars have attempted to causally explain why courts "borrow" from each other. The first explanation could be based on Slaughter's liberal theory of judges in international law and judicial dialogue[11]. Slaughter identified different goals that Courts may seek to accomplish when interacting with other courts. First is constitutional cross-fertilization**,** where a Court seek to improve democracy and rule of law in their constituency by borrowing from another Court with a higher reputation in these fields – as a comparative legal scholars of sorts, seeking inspiration in other legal systems. Second, and closely related is the existence of a "Global community of courts

[6] David Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 Washington Law Review 523, 523.
[7] Claes and Visser (n 5).
[8] Krommendijk (n 1).
[9] Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168..
[10] see also Hege Elisabeth Kjos, *Judicial Dialogue and Human Rights* (Amrei Müller ed, Cambridge University Press 2017) 5–9.
[11] Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 International Organization 457; Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99; Anne-Marie Slaughter, 'Court to Court' (1998) 92 The American Journal of International Law 708; Anne-Marie Slaughter, *A New World Order* (New Ed, Princeton University Press 2005).

and law", specifically in human rights [12]. Slaughter, in particular, has highlighted how much domestic courts borrow from the ECtHR, for example citing Courts from non-member States where the ECtHR has no formal authority. According to her, the spontaneous reliance on ECtHR decisions is due to "*respect for their legitimacy, care and quality by judges worldwide engaged in a common entreprise of protecting human rights*" [13]. However, both in 1994 and 2004, when she revisited the idea of Courts as actors of international relations [14], transjudicial dialogue seems to be mainly among domestic courts, or vertically between domestic courts and ICs, rather than horizontally between ICs. Dothan reaches a fairly similar conclusion when assessing this dialogue at the level of ICs only, considering that ICs make strategic use of another Court's persuasive authority by referring to its rulings[15]. However, as exemplified by Voeten[16] and Sandholtz[17] later on, this scholarship uses the presence or absence of cross-citation between ICs, which is easier to conceptualize and measure, but captures only a fraction of the judicial dialogue, and none of its consequences on the international legal order.

Having taken stock of the existing socio-legal literature, this article will first provide a *causal* theory of convergence and divergence between ICs, compared to the legal literature which has tended to stay descriptive. This will help to understand whether, or rather *when*, ICs contribute to the fragmentation, of international law, and under what conditions they can instead contribute to its coherence; in doing so, it will explain why the literature on fragmentation has also had mixed findings on whether fragmentation is inevitable or not. Dupuy and Viñuales' noted that "*although there is no rule of precedent in international law,*

[12] Slaughter, *A New World Order* (n 11) 79–82.
[13] Slaughter, *A New World Order* (n 11) 81.
[14] Slaughter, *A New World Order* (n 11) ch 2.
[15] Shai Dothan, 'How International Courts Enhance Their Legitimacy' (2013) 14 Theoretical Inquiries in Law 455, 471.
[16] Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 The Journal of Legal Studies 547.
[17] Wayne Sandholtz, 'Human Rights Courts and Global Constitutionalism: Coordination through Judicial Dialogue' (2020) Global Constitutionalism 1.

some consideration for the decisions of other tribunals could help avoid conflicting decisions" yet "*what seems to be more challenging is the determination of the conditions under which such deference is […] given*"[18]; this article will shed light on these "conditions", but also explore why the outcome is not a true "*deference*", but a compromise.

Second, by reconceptualizing judicial dialogue as a multifaceted process leading to convergence and divergence between ICs, it will go beyond partial accounts based on the mere presence or absence of cross citations. It will avoid false negatives (whereby there are no explicit reference to a Court, but an influence is clearly present) and false positives (whereby a reference to another Court is made but does not bear substantial convergence for the ICs' jurisprudence). It will offer a more multi-dimensional account of the interactions between ICs, anchored in the reality of inter-ICs relationships. Having a more thorough understanding of these interactions is fundamental, in a world where ICs are growing in number and in influence[19].

Third, this research adds to the current state of knowledge on strategic decision making of Courts at international level. The existing scholarship established well that domestic judges are strategic actors, with policy goals and interests to maximize in the face of various constraints[20]. ICs have developed strategies to attempt to secure compliance with their ruling even in the presence of high constraints or adverse situations. This includes adapting the outcome of a case

[18] Pierre-Marie Dupuy and Jorge E Viñuales, 'The Challenge of "Proliferation": An Anatomy of the Debate' [2013] The Oxford Handbook of International Adjudication 146.
[19] Karen J Alter, *The New Terrain of International Law – Courts, Politics, Rights* (Princeton University Press 2014); Karen J Alter, 'The Multiplication of International Courts and Tribunals After the End of the Cold War' (2013) The Oxford Handbook of International Adjudication; Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction - Problems and Possible Solutions' (2001) 5 Max Planck Yearbook of United Nations Law Online 67; Dupuy and Viñuales (n 19); Cesare PR Romano, Karen J Alter and Yuval Shany, 'Mapping International Adjudicative Bodies, the Issues, and Players' (2013) The Oxford Handbook of International Adjudication.
[20] Lee Epstein, William M Landes and Richard A Posner, *The Behavior of Federal Judges – A Theoretical and Empirical Study of Rational Choice* (Harvard University Press 2013); Lee J Epstein and Jack Knight, *The Choices Justices Make* (1st edition, CQ Press 1997).

in light of the preferences of States[21]; signalling impartiality in the ruling itself[22]; or relying more on its own precedent as a persuasive tool to convince an adverse audience[23]. However, not much is known on ways international judges can resist constraints by interacting *with* another actor; as stated above, there are even contradictory results when it comes to assessing the scale, impact and goals of cross-referencing between ICs.

Lastly, and more urgently, it will offer more insight into the relationship between the ECJ and the ECtHR, particularly relevant as negotiations on the EU accession to the ECHR have started again this year. Is such accession necessary for the coherence of European Human Rights, or can the current set-up offer sufficient protection against its fragmentation?

2. A new theory: judicial dialogue as a strategic legitimizing tool

ICs are strategic actors, in that they attempt to maximize their goals in the face of various constraints[24]. ICs need to strike a careful balance between different goals, which can lead them to make compromises when these goals are contradictory [25]. Such can be the case with the *authority*, *legitimacy*, and *specific policy goals* of an IC.

The authority of an IC will here be understood narrowly[26], as an ability to have the rulings implemented at domestic level. This is a deliberately restrictive understanding of

[21] Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 American Political Science Review 435.
[22] Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28 European Journal of International Law 357.
[23] Olof Larsson and others, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2017) 50 Comparative Political Studies 879.
[24] Alec Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 140.
[25] Yuval Shany, 'Assessing the Effectiveness of International Courts : A Goal-Based Approach' (2012) 106 The American Journal of International Law 225, 262.
[26] Other conceptions of authority can be broader, to encompass all the indirect and diffuse influence an (International) Court may have on the actors in (and out) of its jurisdiction see for example : Karen J Alter,

authority, very similar to goal-based approach of IC's effectiveness[27]. Compliance requires implementation by the actors who have to undertake a positive step to enforce the ruling, or could otherwise effectively prevent the implementation; these actors are typically state authorities, government branches, or domestic courts. Such limited understanding of authority was chosen here as non-implantation – or threat of non-implementation- is the clearest and most serious challenge an IC can be presented with. This allows a clear assessment of what is, and is not, an attack on a Court's authority; a broader understanding of "authority" would be more difficult to empirically assess in a single contribution.

Legitimacy**,** on the other hand is one of the core challenges of ICs. It is defined as the "*belief[…] within a given constituency […] that a political institution's exercise of authority is appropriate*" [28], which ensures acceptance of the decision by the constitution of this institution, rendering force unnecessary for compliance, regardless of the actual content of the decision[29]. A Court's legitimacy, in particular is associated with its impartiality and neutrality, a "*neutral servant[…] of the law*"[30]. Consequently, legitimacy is improved when a judge can present its reasoning as being objective, reaching an uncontestably truth about what the law should be and indeed, *is*, rather than reflecting policy preferences or any other subjective value. What can provide support for this appearance of neutrality is what enhances the legitimacy of a court.

Laurence R Helfer and Mikael Rask Madsen (eds), *International Court Authority* (Oxford University Press 2018).

[27] Yuval Shany, *Assessing the Effectiveness of International Courts* (Reprint edition, Oxford University Press 2016).

[28] Jonas Tallberg and Michael Zürn, 'The Legitimacy and Legitimation of International Organizations: Introduction and Framework' (2019) 14 The Review of International Organizations 581, 585.

[29] Archibald Cox, *The Role of the Supreme Court in American Government* (Oxford University Press 1977) 102; Dothan (n 15).

[30] Martin Shapiro and Alec Stone-Sweet, *On Law, Politics, and Judicialization* (OUP Oxford 2002) 3; see also Stone-Sweet (n 24) ch 1.

Legitimacy precedes authority: "*before the Court can make authoritative policy that other institutions, the states, and the public will view as binding on them, it must have some level of respect*"[31]. Therefore, one way for an IC to enhance its authority is therefore to enhance its legitimacy[32]. That is not to say that this is the only way for an IC to improve its authority; other strategies include delaying sensitive rulings, anticipating domestic public's preferences, choosing low-cost remedies[33] or anticipation of backslash by exercising judicial restraint[34]. Even when it comes to legitimization strategies specifically, an IC can also cite its own precent even when not bound by them[35], or cooperate with national courts[36]. Converging with another IC is one of these strategies, which has so far been overlooked. The legitimization relies on both the inherent legitimacy of legal reasoning and the persuasive authority that a jurisdiction's case law can have when used by another Court[37]. When it converges with another IC, a Court strengthens its own legal reasoning, gives it external validity, and co-opts the legitimacy of this Court in turn. Of course, this means that this second IC must have a sufficiently high legitimacy capital. This convergence can take different forms: citing the other Court's rulings, using the same legal standards, and/or adopting the same outcomes. This adds another scope condition to the theory: for an IC to adopt this strategic approach, the other Court it converges with need to have sufficient legitimacy to co-opt.

[31] Epstein and Knight (n 20) 12–13.
[32] Dothan (n 15) 459.
[33] Dothan (n 15) 475.
[34] Øyvind Stiansen, 'Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments' [2019] British Journal of Political Science 1.
[35] Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 British Journal of Political Science 413.
[36] Famously for the ECJ : Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003); Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41.
[37] Erik Voeten, 'Why Cite External Legal Sources? Theory and Evidence from the European Court of Human Rights' in Clara Giorgetti and Mark A Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition among International Courts* (Cambridge University Press 2022).

However, this strategy is costly**:** by converging with another IC, a Court may gain in legitimacy, but it limits its ability to pursue its own policy preferences. Indeed, relying on the precedent of another Court while keeping the coherence of legal reasoning intact means reaching an outcome at least partly closer to the preference of this second Court. Courts must preserve the appearance of a coherent legal reasoning to maintain the mask of law and neutrality[38]; in the words of Schimmelfennig, "*Courts cannot escape the logic of legal arguments*"[39] . This is important, since the ECJ and the ECtHR, for example, have different preferences and goals. The ECJ holds the autonomy and supremacy of EU Law, EU integration and the upholding of EU policies -many of them primarily economic-, as its main policy preferences[40]. The ECtHR, as a purely human rights Court, has the protection of fundamental rights and the rule of law as its preferences. When one converges with the other, it will have to accept a trade-off between its enhanced legitimacy and its ability to fully pursue its preferences in a given issue-area.

Therefore, convergence with another IC is a strategy a Court will engage with only when the threat to its authority is perceived as sufficiently credible and serious. Formally, the theory poses the threat to the authority of the IC as the independent variable (IV), and the reaction of an IC, in the form of convergence or divergence with another IC, as the dependent variable (DV) (Figure 1).

[38] Stone-Sweet (n 24); Burley and Mattli (n 36).
[39] Frank Schimmelfennig, 'Competition and Community: Constitutional Courts, Rhetorical Action, and the Institutionalization of Human Rights in the European Union' (2006) 13 Journal of European Public Policy 1247, 1250.
[40] Alter, *Establishing the Supremacy of European Law* (n 36) 53; R Daniel Kelemen and Susanne K Schmidt, 'Introduction – the European Court of Justice and Legal Integration: Perpetual Momentum?' (2012) 19 Journal of European Public Policy 1. ECJ President Skouris himself opened a speech in 2014 by noting that "*The Court of Justice is not a human rights court; it is the Supreme Court of the European Union*" 'The ECJ as the European "Supreme Court": Setting Aside Citizens' Rights for EU Law Supremacy' (*Verfassungsblog*) <https://verfassungsblog.de/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/> accessed 28 September 2021.

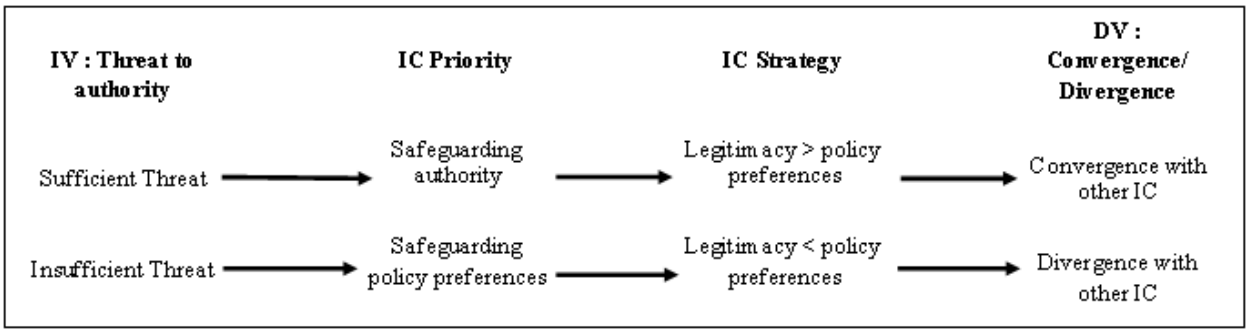

Figure 1: Causal chain hypothesized

ICs therefore react to "*threats to authority*" but threats *from who?* The constituency of an IC would include its Member States, Domestic Courts, but also the legal field, in a sociological sense[41]. Arguably, in the case of the ECJ, this constituency could even include other EU institutions. Moreover, the constraints and risks that an IC face are multiple; adding to the traditional solution of Voice and Exit[42] as ways for States to deal with unfavourable rulings, budget attacks and the creation of a new IC are also possibilities[43]. Nonetheless, the sources of challenges to authority can be narrowed down, as this theory focuses on threat specifically to non-implementation: non-compliance, overruling of the IC's decision, or exit by a part, are such sources of non-implementation.

As a result, Figure 2 indicates that for European Courts, actors in charge of implementing rulings (and therefore potentially overruling or using the Exit option) are Domestic Courts; Governments of their Member States (understood broadly as all state authorities); and the other European Court.

It must be noted that divergence by one European Court, in itself, is not necessarily a threat to the authority of the other Court. A threat would require a persistent divergence and a

[41] R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century The Variable Authority of International Courts' (2016) 79 Law and Contemporary Problems 117.
[42] Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).
[43] Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press 2014) ch 3.

targeting of the other Court: an explicit refusal to follow, a possibly systematic refusal of the other Court, or the negation of the other IC's autonomy, for example. In the same sense, any expression of disapproval by State authorities or domestic Court is not necessarily a threat : a degree of *saliency* of the issue is required, for a disagreement to be considered a threat by a European Court.

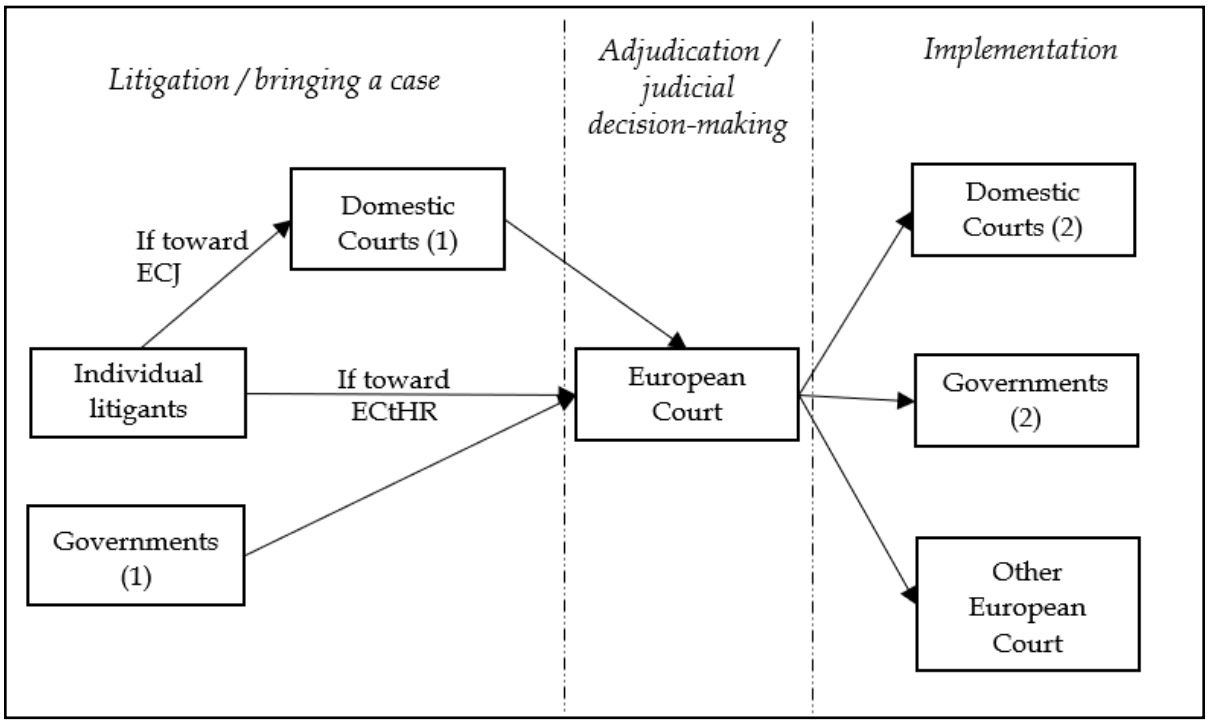

Figure 2: Procedure of adjudication before European Court

The sources of this challenge to an IC's authority can therefore be the following:

- *Domestic Courts of the Member States*: especially a coalition of high-reputation States, or a majority of States (not necessarily a unanimous threat from all Domestic Courts)
- *State authorities/governments of Member States*: although not necessarily a unanimous threat from all States
- *The other IC Court*: by refusing (explicitly or implicitly) to implement the ruling of the parallel European Court, one European Court is undermining the authority of the other.

These different sources of threat form INUS conditions: Insufficient, but Necessary part of an Unnecessary but Sufficient condition[44]. This means that various constellations of threat/non-threat from the different actors are expected to have *different* impacts on European Courts depending on how many actors express a threat at once. Conversely, a low level of threat can come from one actor, or from another, and have the *same* effect on European Courts. Table 1 sums up the different hypotheses drawn from this theoretical framework, for the case of the ECJ and the ECtHR overlapping.

Threat to authority (Domestic Courts, Member States, other European Court)	**ECJ**	**ECtHR**
No threat from any actor	H1: Divergence/status quo	
Threat from **one out of three**	H2a: Divergence/Status quo	H3a: Divergence/Status quo
Threat from **two out of three actors**	H2b: Weak to medium convergence	H3b: Divergence/Status quo H3b.bis: coalition of EU actors → weak convergence
Threat from **three out of three actors**	H2c: Strong convergence	H3c: Partial to strong convergence

Table 1: Overview of all possible hypotheses

[44] JL Mackie, *The Cement of the Universe: A Study of Causation* (Oxford University Press 1980); James Mahoney and Rachel Sweet Vanderpoel, 'Set Diagrams and Qualitative Research' (2015) 48 Comparative Political Studies 65.

3. Research Design

To test the theoretical framework presented, a case study will be conducted on a specific issue area which has seen rich judicial and jurisprudential interactions between both European Courts in the last decade. This area concerns fundamental rights-based exceptions to mutual trust in the execution of a European Arrest Warrant (EAW).

The European Arrest Warrant Framework Decision (EAWFD)[45] was enacted in 2003 and reformed in 2009 ; it organized a simplified system of extradition, heavily relying on the mutual confidence EU Member States have in each other regarding human rights standards and the implementation of European law :

> "*[The principle of mutual trust] requires, particularly with regard to the Area of Freedom, Security and Justice, each of the Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law* [46].

The procedure, which can either be pre-trial or post-trial, requires an issuing judicial authority to send the EAW, and the executing judicial authority to send back the person targeted. There are possible grounds for refusal of execution[47], but threats to Fundamental Rights were initially not one of them – on account of Member State actually trusting each other to uphold fundamental rights once the EAW had been executed.

There are multiple EU instrument based on mutual trust in the Area of Freedom, Security and Justice (AFSJ), and the most litigated have by far been the Dublin Regulation in

[45] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)
[46] ECJ, Opinion 2/13 *Opinion pursuant to Article 218(11)*, 18 December 2014, para 191.
[47] EAWFD, Articles 3-4.

the area of asylum[48] and the EAWFD. However, this case study focuses on the latter only. While the question of exception of mutual trust for Dublin cases has also been litigated before both Courts, and it will be relevant for this case study, this was done separately from EAW cases. Both lines of jurisprudence evolved in different time-frame, allowing a case-study specifically on one of them[49].

This case selection is a compromise between different imperatives: first, the research needed a sufficient number of rulings and back-and-forth between European Courts, where the position of each Court evolved sufficiently over time, to be able to truly identify instances where the one court either converged or diverged from the other. Second, the case selection process needed to yield variations across time in the level of threats toward the ECJ and the ECtHR, and who these threats came from, to test as many hypotheses as possible.

A trade-off of this in-depth qualitative and mechanism-oriented case-study is of course que question of the external validity of the findings; in other words, their generalizability[50]. This contribution recognizes this limit, as the goal is primarily to establish a credible, empirically documented and therefore stable causal mechanism for a theoretical framework which has not been explored so far. While the entire theory might not be proven generalizable simply if support is found for all hypotheses which this case study allows to test, it will still give evidence that the causal mechanism envisioned is credible and warrants further research.

[48] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person
[49] See : Ermioni Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust' (2018) 55 Common Market Law Review.
[50] James Mahoney and Gary Goertz, 'A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research' (2006) 14 Political Analysis 227, 237–238.

However, a single case-study does not offer all the possible constellations of independent variables which would allow to test all hypotheses. Therefore, this case-study is a first of a larger research project, and will only allow the testing of *Hypotheses H3a, H2a and H2b.*

The cases have been retrieved through the database of each European Court, through specific keywords (" *"European Arrest Warrant" AND "mutual trust"* ", in French and English), then individually read to remove those who did not deal specifically with the question of fundamental rights-based exceptions to mutual trust. Cases which were mentioned by the Courts within these rulings and seemed pertinent were also similarly read and either added to the final list of cases or discarded[51]. In order to ensure that all cases had been collected, any potentially relevant European ruling mentioned by legal commentators was also assessed and either added to the list or discarded. The goal of this process was to ensure that only rulings dealing with the very specific question at hand were kept, in order to ensure full comparability of the jurisprudence through time, while still making sure that no case was missed due to simply not having attracted much scholarly attention. The total number of cases in the end was twelve : three ECtHR cases and nine ECJ rulings (Table 2).

A Codebook developed for the purpose of this research (Appendix 1) helped evaluate, with each new ruling, how similar or dissimilar the jurisprudence of the two Courts are. Each ruling of one Court is coded by comparing it to the other Court's most recent case, yielding a Similitude/Dissimilitude Score ("S/D Score") which evolves over time. This evaluation is multifaceted, in order to capture and account for the different ways two rulings can be considered similar or not. Indeed, was of the limits of the literature previously mentioned is a tendency to only account for cross-citation between Courts. But we could imagine a situation

[51] For example, certain cases do technically deal with the EAW and fundamental rights, but the ECJ sidestepped the question by reasoning on the validity of the original arrest warrant, making it impossible to validly compare them. See:.Steve Peers, 'EU Law Analysis: Human Rights and the European Arrest Warrant: Has the ECJ Turned from Poacher to Gamekeeper?' (*EU Law Analysis*, 12 November 2016) <http://eulawanalysis.blogspot.com/2016/11/human-rights-and-european-arrest.html> accessed 18 April 2022.

where a Court align itself with another IC, without explicitly citing that other IC. The codebook therefore includes different categories on which a score is associated:

- *Actual outcome on specific sub questions*: in this case, broken down in two sub-questions: Is there possibility for non execution, or postponement, of the EAW ? If yes, which fundamental rights are the acceptable legal grounds ?
- *Test/legal standards used*: assessment of the risk of violation of fundamental rights *in concreto*, *in concreto*, or both ?
- *Existence of a cross-references between the Courts :* with a distinction between a reference coherently included in the reasoning, and cherry picking or just name-dropping (which Krommendijk called "by the way" references[52]) without necessarily following the ruling referred to.

Each new ruling is a new observation allowing for a new measurement of this S/D Score every time. Point are attributed, for each of the item mentioned above, when the ruling of one Court shows *dissimilarity* to the most recent ruling of the other Court. The closer to 0, the higher the degree of similarity; a higher score means a higher degree of dissimilarity.The list of all cases and associated scores is present in Table 2, and Figure 3 shows the evolution of this score overtime.

[52] Krommendijk (n 1).

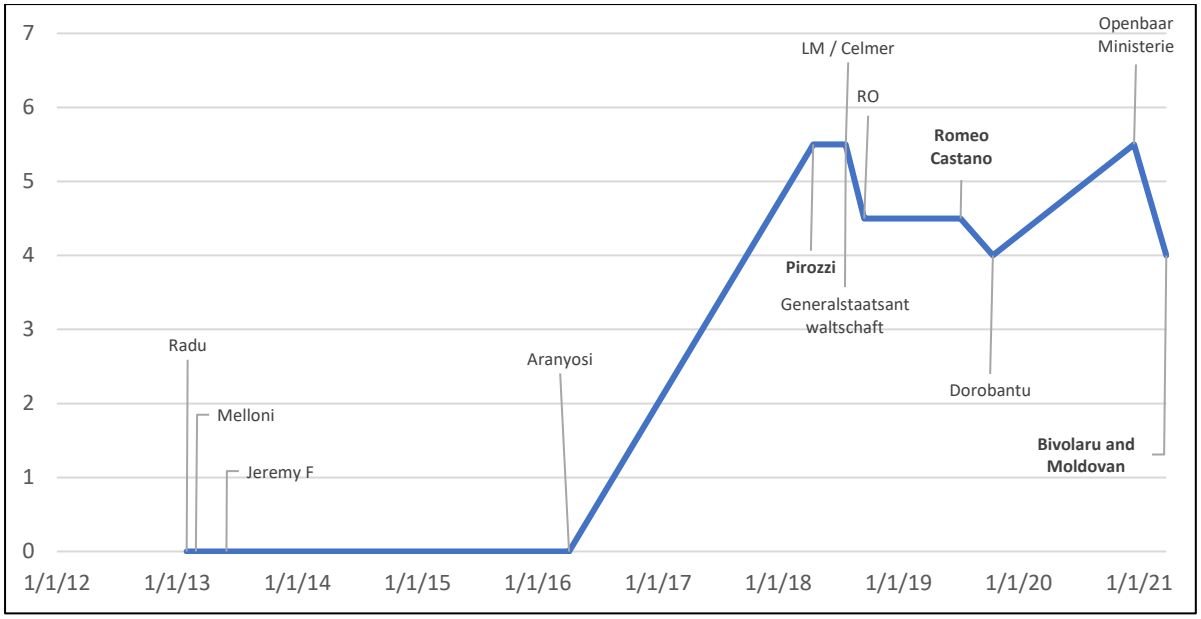

Figure 3 : Evolution of the S/D Score between the ECJ and ECtHR on fundamental rights-based exception to mutual in the execution of European Arrest Warrants[53]

The first section, until the *Aranyosi* case, is made up only of ECJ rulings, and therefore no S/D score can be attributed to these cases. Only a qualitative assessment, which will be carried out in the next section, will show why during this period, the ECJ was anticipating the ECtHR's jurisprudence and converging in advance. The second period, from the ECtHR's *Pirozzi* ruling, shows that the distance between both Courts remained overall high, between 4 and 5.5. This means that there were differences between both Courts which were somehow sustained to this day, without a clear resolution.

However, this does not say much regarding the dynamic of both Courts. In the second period in particular, the stable dissimilitude can be caused by one court constantly diverging and the other constantly converging just as much ; or by both Courts standing their ground, which is a very different dynamic. To complete this first score, each ruling is assigned a second score, a Convergence/Divergence Score ("C/D Score"). It is obtained by subtracting the S/D

[53] In bold : ECtHR ruling ; others : ECJ rulings

Score of the most recent ruling to the S/D score obtained by this new ruling. A positive Convergence/Divergence Score will mean that the IC *moved toward* the other IC, with *more similarity* than before (Convergence); whereas a negative score will mean that the IC *moved away*, with *less similarity* than before (Divergence). In other words, while the S/D score captures the state of relation between the two Courts at a given time, the C/D score captures the action of a Court in a given ruling: converging or diverging with the other. This more detailed overview of the dependent variable is presented in Table 2. This Convergence/Divergence will be the other aspect of the phenomenon explored in this article, the one impacted by the theoretical mechanism tested.

Court	Case Name	Date	D/S Score	C/D Score
ECJ	*Radu*	29/1/13		
ECJ	*Melloni*	26/2/13		
ECJ	*Jeremy F*	30/5/13		
ECJ	*Aranyosi and Caldararu*	5/4/16		
ECtHR	*Pirozzi v. Belgium*	17/4/18	5.50	
ECJ	*Generalstaatsantwaltschaft*	25/7/18	5.50	
ECJ	*LM / Celmer*	25/7/18	5.50	
ECJ	*RO*	19/9/18	4.50	0.50
ECtHR	*Romeo Castano v. Belgium*	9/7/19	4.50	0.00
ECJ	*Dorobantu*	15/10/19	4.00	0.50
ECJ	*Openbaar Ministerie*	17/12/20	5.50	-1.50
ECtHR	*Bivolaru and Moldovan v. France*	25/3/21	4.00	-1.50

Table 2 : List of all cases and associated S/D and C/D score

By focusing on the C/D score, we can see that the stable differences between both Court is caused by each Court neither converging nor diverging with each other, and instead largely keeping the status quo. The ECJ seems to be the one slightly converging with the ECtHR in the *RO*[54] and *Dorobantu*[55] cases, but *Openbaar Ministrie*[56] marks a move away

[54] ECJ, Case C-327/18 PPU, *Minister for Just. & Equality v. RO* (19 Sept 2019).
[55] ECJ, Case C-128/18, *Dorobantu*, (15 October 2019),
[56] ECJ, Case C-354/20 PPU and (C-412/20 PPU, *Openbaar Ministerie / L and P* (19 Dec 2020)

from the Strasbourg Court. The ECtHR, for its part, either fully stands its ground or diverge from the ECJ as in the very last case of this series, *Bivolaru and Moldovan v. France*.

Independent Variables, for their parts, will be considered binary (existence/absence of threat to the authority of the Court), based on different potential observations, as listed in Annex 3. Threats to the authority of the Court could be particularly explicit (a press release of a Government criticizing the outcome of a case) or implicit (a ruling in which a Domestic Court substitute its own standards to the one set by the European Court) ; it can be specific, limited to the outcome of a specific ruling or a specific policy area, or systemic, by questioning the authority of the ECtHR as a whole or of EU law over domestic law. Especially between the two European Court, this sort of threat can exist when one is asked a question tantamount to conducting judicial review of a decision of the other.

Process tracing[57] will be used to establish both correlation and causation. Process Tracing is defined as "*the analysis of evidence on processes, sequences, and conjunctures of events within a case for the purposes of either developing or testing hypotheses about causal mechanisms that might causally explain the case."*[58], and is a methodological tool which required the collection of "Causal Process Observations" (CPOs), that is, empirical evidence, which match and support the mechanism theorizes. Process Tracing provides leverage to data to establish robust causation[59], and is particularly adapted to research relying on within-case analysis. It has the added value of providing insight into the actual mechanism at work, making it particularly appropriate for this project. Process tracing will ensure that the convergence or

[57] Andrew Bennett and Jeffrey T Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool* (Cambridge University Press 2014); James Mahoney, 'The Logic of Process Tracing Tests in the Social Sciences' (2012) 41 Sociological Methods & Research 570.
[58] Bennett and Checkel (n 57) 7.
[59] Henry E Brady and David Collier, *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Rowman & Littlefield 2004); Mahoney and Goertz (n 50).

divergence by one Court is indeed due to a threat to its authority and an attempt to improve its legitimacy, by looking at the temporality of the threat, its reception by the Court and the reaction to this threat, and reconstructing the legal reasoning invoked to justify a given decision.

In order to give support to the specific causal mechanism hypothesized, different observable implications associated with the specific mechanism purported to take place have been identified.[60] These observable implications are drawn from the different steps of the causal mechanism.

Mechanism step	Observable implication for convergence	Observable implication for divergence
Sufficient threat to authority of European Court ?	- European Court is aware of challenge - European Court recognizes the challenge as actually being a threat to authority	- Court is not aware of challenge - OR Court does not conceptualize challenge as threat
Change of priorities?	- Awareness of trade-off between authority and policy preferences - Court focuses on authority, importance of implementation - Less focus on policy preferences	- Court focuses on policy goals exclusively
Court seeks self-legitimization ?	- Use of other Court's jurisprudence argumentatively - Court downplays any persisting dissimilarities with the other Court - Framing of the other Court as an ally/agreeing	- No argumentation relying on other Court - Court ignores or engages critically with other European Court and its dissimilarities.

Table 3 : Causal Process Observations possible for the theory tested

As appropriate for a qualitative study collecting both dataset observations and CPOs, a diverse range of sources will be used. Primary sources will include: case-law (European and domestic), Amicus Curiae submitted to Courts (one of the traditional ways for judges to know

[60] Frank Schimmelfennig, 'Efficient Process Tracing: Analyzing the Causal Mechanisms of European Integration' [2015] Process Tracing: From Metaphor to Analytic Tool 98.

of other actor's preferences), national legislation, press-release and official statements, speeches, writings and publications from judges. Secondary sources will include legal commentary published in specialized academic journals, and reports from domestic and European institutions or civil society.

The main challenge will be the data collection for the position of domestic courts and states. To remain tractable, the project will rely on the identification of broad trends and important shifts in the position of domestic courts and states, using multiple data sources to avoid biasing or missing an important observation. It must be noted that the theory tested does not assume European judges to have access to perfect information themselves, either: these sources (reports, legal commentary, press releases…) are also largely the ones Strasbourg and Luxembourg judges have access to before making a strategic decision themselves.

4. Results

Two different phases can be identified, with different trends in particular for the ECJ. Indeed, in a first series of cases, until 2016, the only case-law on the question at hand came from the ECJ. Still, the Luxembourg Court were able to anticipate the preferences of the ECtHR, and slowly converged with it, pressured by Domestic Court and without strong support from Member States (4.1). The second period, from 2016 onward, is very different : as the ECtHR enters the debate officially, both Courts arrive to a standstill. This is due to them balancing each other in terms of challenges to their mutual authority : the ECJ is challenged by Domestic Courts but supported by EU Member States ; the ECtHR challenges by Member States but finding support in domestic Courts ; and both European Courts exercise a similar level of challenge to each other's authority (4.2).

This explains not only why the ECJ initially made concession toward the ECtHR, and then stopped ; but also why the two Courts maintain a divergence to this day, contrary to

what has been observed in other issue areas where the challenges to their authority were different.

4.1. Phase 1 : From *Radu* to *Aranyosi* : uncovering an implicit convergence of the ECJ

The limit of this methodology used in this article is that without an ECtHR ruling on the exact same issue, no score can be attributed to ECJ rulings to establish if the Luxembourg Court was already trying to converge or divergence with the ECtHR. However, different elements still allow for the identification of a convergence of the ECJ toward the ECtHR, as it was anticipating the preferences of the Strasbourg Court (4.1.1.). An evaluation of the threats to its authority, in particular form the ECtHR itself and domestic Court, provide an explanation which matches the expectations of the theory presented above (4.1.2.), further supported by Causal Process Observations linking the threat and the ECJ's reaction (4.1.3)

4.1.1. Identification of the implicit convergence

The first phase covers only cases from the ECJ which all happened to have attracted much attention from the scholarship : *Radu*, *Melloni*, *Jeremy F* and *Aranyosi and Caldararu*.[61] At this period, there was no ruling from the ECtHR which would have been a direct foil, specifically on fundamental-rights based exceptions to the execution of a European Arrest Warrant.

However, the ECJ's jurisprudence on these aspects of the EAW do not exist in a bubble. Since the 2000s, a rich and much-commented back-and-forth was unfolding between the two

[61] ECJ, Case C-396/11, *Radu* (29 Jan 2013) ; ECJ, Case C-399/11, *Stefano Melloni vs Ministerio Fiscal* (26 Feb 2013) ; ECJ, C-Case C-168/13 PPU, *Jeremy F v. Premier Ministre* (30 May 2013) ; ECJ, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (5 Apr 2016)

Courts, on another EU tool based on mutual trust. The Dublin Regulation[62], an instrument from EU asylum law designating which Member State is responsible to handle a given asylum claim, shares multiple similarities with the EAW : it requires a member State to send back to another Member State an individual currently on its territory. States are supposed to trust each other regarding the protection of fundamental rights ; in particular the State "*sending back*" the asylum seeker must trust that the State in charge of processing their asylum claim will uphold the asylum seeker's fundamental rights. From 2009 onward, the ECtHR had expressed doubts against the use of mutual trust, in particular given the condition of detention of migrants, including asylum seekers, in some member States[63]. The ECJ had reacted to that by developing, for this instrument, a system of fundamental-rights based exceptions to the application of the Dublin Regulation[64].

The ECJ -and the doctrine- could therefore by 2013 identify what the preferences of the ECtHR would be regarding the execution of a mutual-trust-based instrument :

a. A refusal of a system based on "blind trust" where mutual trust means that Member States cannot even envision fundamental-rights based exceptions[65].
b. A preference for the non-execution, rather than just a suspension of execution in case of doubt[66]

[62] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person
[63] ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09 (21 Jan 2011)
[64] See Vassilis Pergantis, 'The "Sovereignty Clause" of the Dublin Regulations in the Case-Law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence?' in Giovanni Carlo Bruno, Fulvio Maria Palumbino and Adriana Di Stefano (eds), *Migration Issues before International Courts and Tribunals* (CNR Edizioni 2019).
[65] REF
[66] ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09 (21 Jan 2011) para 340.

c. A protection on the basis of Article 3 ECHR (protection against torture and inhumane and degrading treatments)[67], but also other fundamental rights such as the right to effective remedy[68] and the right to family[69]…
d. With am in-depth control *in concreto*, specific to the individual at hand, where proof of more generalized deficiencies can be used to support this assessment[70].

How has the ECJ's jurisprudence on the exceptions to the EAW evolved, in light of these predictable preferences of the ECtHR ?

There is a clear progression of the ECJ. The first two cases, *Radu* and *Melloni*, marked a refusal to have any exception to the execution of the EAW, neither for the protection of fundamental rights in general[71] or to uphold the constitutionally protected fundamental rights of the executing state[72]. This phase is typically characterised as the "*blind trust"* phase of the jurisprudence[73]. The first chip in this approach came from the *Jeremy F* case, whereby France, the executing State, asked for the EAW to be not immediately executed in order to offer a right to appeal the decision of execution, a right framed as constitutionally protected. Here, the ECJ backtracked, accepting that as long as this was a

[67] ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09 (21 Jan 2011) para 340, para 360
[68] ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09 (21 Jan 2011) para 397 ; ECtHR, Tarakhel v. Switzerland Application No.29217/12 (4 Nov 2014)
[69] Although it ended up not finding a violation for this case : ECtHR, *A.S. v. Switzerland*, Application No. 39350/13 (30 June 2015)
[70] Commenting on *MSS* : "*Similarly generalised findings were accepted in relation to the poor detention conditions.46 Also pertinent was the fact that the Court had in the previous two years found degrading detention conditions in three cases against Greece. Whether the applicant had been subjected to the prevailing practices was in dispute, but the Court treated the general information as supporting the applicant's allegations*" Cathryn Costello, 'Dublin-Case NS/ME: Finally, an End to Blind Trust across the EU?' (2012) 2 Asiel en Migrantenrecht 83.
[71] ECJ, Case C-396/11, *Radu* (29 Jan 2013)
[72] ECJ, Case C-399/11, *Stefano Melloni vs Ministerio Fiscal* (26 Feb 2013)
[73] Xanthopoulou (n 49).

suspension which did not, in the end, prevent the execution of the EAW, this was an acceptable limit[74].

The real change then came from *Aranyosi and Caldararu*, where the ECJ explicitly accepted that the EAW be "postponed" on grounds of the Article 4 of the CFR (Protection against torture and degrading/inhumane treatment)[75].

The concessions toward the ECtHR were still very limited. The ECJ did not rely on any Strasbourg ruling on other mutual trust instrument (despite the rich case-law on the matter), instead referring only to the case-law on Article 3 ECHR and the conditions of detention. It also only agreed to a postponement of the EAW, rather than the non-execution[76]. Moreover, the protection against inhumane and degrading treatment seemed to be the only one warranting the non-execution of the EAW, rather than fundamental rights in general. Lastly, the test used by the ECJ is a two-step test : first, a control *in concreto* of the risks of violation of article 3 (looking for systemic or generalized deficiencies), then a control *in concreto* to ensure that the rights of the individual at hand are effectively at risk. This is a much higher standard than the ECtHR's preferred test, and one that the ECJ had already moved on from in Dublin cases[77].

The ECJ had therefore, seemingly on its own, moved on from a blind trust system to a restrained, or "*individualized" trust*[78]. While not fitting exactly in the requirements for the operationalization of the degree of similitude or the convergence/divergence, this can still intuitively and with sufficient confidence be characterized as a moderate convergence with

[74] ECJ, C-Case C-168/13 PPU, *Jeremy F v. Premier Ministre* (30 May 2013)
[75] ECJ, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (5 Apr 2016)
[76] ECJ, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (5 Apr 2016)
[77] Xanthopoulou (n 49).
[78] Xanthopoulou argues that for EAW, we went from blind trust (up to *Aranyosi*) to limited trust, but we have not had yet a "individualized trust" phase which exists in Asylum cases Xanthopoulou (n 49).

the ECtHR (H2b). As will be explored, however, this convergence was not actually spontaneous : the ECJ was forced into a trade-off between policy preference and legitimacy, in order to safeguard its authority in this issue-area.

4.1.2. Independent variables : the ECJ under pressure

During these first years of the judicial saga, Member State were overall enthusiastic about the EAW, as the States themselves were the one who had initiated this new instrument in the early 2000s. Domestic Courts were more critical of the instrument, as shown from both individuals rulings from multiple domestic jurisdictions and statistics on the executions of the EAW, although the pressure was still limited. The ECtHR, for itself, was also already indirectly challenging the authority of the ECJ, although in a limited fashion, as the only opportunity it had to do so was through its jurisprudence on the Dublin cases.

- *Member States :*

For all cases covered in this period, the ECJ received a high number of Observations submitted by member States : from 5 in *Jeremy F* to 11 in the *Aranyosi and Caldararu* case. This typically shows a high level of interest of Member States in the case, and a will to make sure their preferences are accounted for by the Court. Unfortunately, these Observations are not publicly available, it is therefore not possible to use them to establish what the position of the States were. However, this lets as know that the issue was at the very least salient for States, rather than one on which they were indifferent. Various elements can however help to fill in the gaps and hint toward which position the majority of States took.

First, Member States, rather than the EU Commission, were at the origin of the EAW. The 1999 European Council of Tampere noted :

> *"[…] the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having*

> *been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement."*[79]

linking it to the principle of mutual trust throughout. The adoption of the EAWFD in 2002 is heavily related to EU Member States' wish for heightened cooperation in criminal and in particular terrorist matters in the wake of 9/11[80].

Second, States transposition of the instrument happened fairly quickly and effectively: as of November 2004, less than two years after the adoption of the EAWFD, all Member States except Italy had implemented the relevant domestic legislative changes[81]. Of the three who experience the most delays, two were due to their Constitutional Court blocking the process, rather than their Governments[82]. When there were issues of inappropriate implementation, only three States (Estonia, Ireland and Cyprus) had actually enacted fundamental-rights based grounds for refusal of execution which fell outside the limits of the EAWFD [83]. Three States even enacted changes to their own Constitution which were required for the transposition of the EAWFD.

It must be noted that the EAWFD was amended in 2009, in order to include a new ground of non-execution of a EAW, but this new ground only covered some trials *in*

[79] Conclusion of the European Council of Tampere, 15-16 October 1999, para 35.
[80] Jane O'Mahony, '"Bringing Process Back in": Investigating the Formulation, Negotiation and Implementation of the European Arrest Warrant from a Policy Analysis Perspective' [2007] EUSA 10th Biennial Conference, Montréal, Canada.
[81] Commission of the European Communities, COM(2005) 63 final. p2
[82] Scott Siegel, 'Courts and Compliance in the European Union: The European Arrest Warrant in National Constitutional Courts' [2008] Jean Monnet Working Paper 05/08. p8
[83] Commission of the European Communities, COM(2005) 63 final, p5

abstentia[84] ; this means that there was an opportunity for States to change the FDEAW if it did not suit their preferences in 2009, but no issue based on fundamental rights was addressed then.

- *[add interview data]*

- *Domestic Courts*

While fundamental rights themselves were not meant to be a ground for refusal of execution of the EAW due to the principle of mutual trust, very early on Courts started ground their refusal to execute on Article 1(3) of the EAWFD. Early statistics are difficult to interpret, as not all countries responded to the questionnaire sent by the Council of the EU regarding the issuing and execution of EAW in each country. Moreover, while the questionnaire does ask what were the grounds for refusal of the execution, there was no "*fundamental rights*" category. The earliest explicit mention of Court refusing the execution of the EAWdue to fundamental rights in these report is from 2012 only, where the Lithuanian authorities mention that, in three cases "*the surrender was refused as it would have violated the fundamental human rights and freedoms*."[85] Then, in 2014, Courts from Germany, France, Poland, Austria, and Sweden cited "Fundamental Rights" as official grounds for some refusals of the EAW they had received, although each reporting only one or two occurrences[86]. In 2015, this number rises to 13 for Germany alone, 4 in France and 4 in Austria, added to 2 refusals from Ireland questioning the quality of "*independent judicial*

[84] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA
[85] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2012
[86] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2014, p26

power of the emitting entity[87]. In 2016, when the *Aranyosi and Caldararu* ruling was given by the ECJ, the number had risen to 40 for Germany, and three other countries noting they did not have the information available[88].

These number, while on the rise, appear to still be fairly moderate ; but these numbers, according to the States themselves, are fairly incertain. To truly capture the pressure domestic were exercising at this point on the ECJ, it is possible to focus on some cases by the highest domestic Courts. First, in the Melloni case , the Spanish Tribunal Constitucional in Plenary Chamber (2011) made use of the preliminary reference procedure for the very first time, explicitly asking for the possibility to "*grant[..] these rights [to defense] a higher level of protection than that derived from the Law of the European Union, in order to avoid a limiting or harmful interpretation of a fundamental right recognized by the Constitution of that Member State*"[89]. In Jeremy F (2013), the French Conseil Constitutionnel was also making its first use of the preliminary reference procedure, asking for the possibility to add an appeal procedure in order to guarantee the constitutionally protected right to Defense, although the Conseil was this time simply asking for a postponement of the EAW, not a definitive right to refuse[90]. Lastly, in 2015, the German Federal Constitutional Court issued a ruling where it reviewed the legality of the EAWFD in light of the German constitutional identity, which could potentially violate the principle of human dignity[91] . The BVerG noted that :

> *"In particular within Europe, the principle of mutual trust applies in extradition proceedings. However, this trust can be shaken. The principles*

[87] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2015.
[88] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2016
[89] Tribunal Constitucional AUTO 86/2011, 9 June 2011
[90] Conseil Constitutionnel, Décision n° 2013-314P QPC, 4 Apr 2013
[91] Bundesverfassungsgericht, 2 BvR 2735/14, 15 Dec 2015, para 50

> *that govern extraditions based on international agreements […] can be applied by analogy to extraditions executing the Framework Decision on the European arrest warrant to the extent at issue in this case […]"*[92]

By the time of the *Aranyosi and Caldararu* cases, the German Court asking the preliminary question framed its interrogation not in term of whether to execute the EAW or not, but only asking *how* it should refuse to execute it. The challenges to the authority of the ECJ by domestic Courts is therefore particularly clear,

- *Between European Courts*

First, on the topic of mutual trust in particular, as mentioned before the cases came from the *Dublin* line of jurisprudence. The landmark cases of the ECtHR on this topic are 2011's *MSS* and 2013's *Tarakhel*. In MSS, the ECtHR considered that the Belgian authority should have used the "sovereignty clause" of the Dublin regulation when they were faced with the knowledge that there were deficiencies in the protection of human rights in Greece, in particular with regards Article 3 ECHR[93]. The mutual trust meant to exist between Member States when they use the Dublin regulation was not explicitly mentioned in this ruling, it is generally acknowledged that MSS represent a real threat to mutual trust at it was understood and used under EU law[94]. The ECtHR confirmed this in *Tarkhel* :

> "*It is also clear from the M.S.S. judgment that the presumption that a State participating in the "Dublin" system will respect the fundamental rights laid down by the Convention is not irrebuttable*."[95]

[92] Bundesverfassungsgericht, 2 BvR 2735/14, 15 Dec 2015 para 67
[93] ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09 (21 Jan 2011)
[94] Costello (n 70); Giulia Vicini, 'The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust' (2015) 8 European Journal of Legal Studies 50.
[95] ECtHR, Tarakhel v. Switzerland Application No.29217/12 (4 Nov 2014) para 103.

On a more systematic level, the relationship between the two Courts was, until 2014 at least, faire cooperative. The ECtHR was still following its 2005 *Bosphorus* doctrine, considering that the EU legal order was offering a protection "equivalent" to the ECtHR's, judges were meeting each other and dialoguing both in person and through their case-law[96]. This doctrine was confirmed in the *Michaud* case of 2013[97]. It was however criticized in part of the scholarship and in by civil society, in particular after the ECJ's *Melloni* case, which was considered to be a blow to the protection of fundamental rights in Europe[98].

The threat of the ECtHR toward the ECJ was therefore moderate and non-systematic, as it focused on this particular issue and insistently pointed out the divergences, rather than systematically threatening the overall autonomy of the EU legal order.

4.1.3. Tracing the mechanism : convergence of the ECJ as self-legitimization

At this point, a correlation can be observed between on the one hand the challenges to the authority of the ECJ from both multiple, high-deputation domestic Courts, and the ECtHR; and on the other hand, the concessions the ECJ made to move toward the ECtHR in anticipation of the its future case-law on the EAW. In order to further support the explanation that these two elements are causally linked, multiple Process Tracing Observations can be identified.

Was the ECJ aware of challenge ? Two of the cases brought before the ECJ during this period came from Constitutional Tribunals, and for both the matter was important enough that this was their very first use of the preliminary reference procedure. Moreover, while the case involving the German Constitutional Court was not sent for a preliminary ruling, the

[96] Krommendijk (n 1) 822–823; Laurent Scheeck, 'Solving Europe's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance' [2005] Questions de Recherche, Sciences Po 40.
[97] ECtHR, *Michaud v. France*, Application No. 12323/11) (6 Dec 2012)
[98] See for example the AIRE Center submission in the *Avotins* case (ECtHR, *Avotins v Latvia*, Application No. 17502/07 (26 May 2016), para 94-95)

EAW I decision was very heavily commented by the legal doctrine[99]. Writing of the judges show that there is a clear interest in how these Courts were then receiving the ECJ's jurisprudence. In a 2014 article, then ECJ Judge (and future President of the Court when the *Aranyosi and Caldararu* case was decided) Koen Lenaerts analysed how the Tribunal Constitucional received the *Melloni* preliminary ruling noting that it "*followed a reasoning grounded in the methods of interpretation provided for by the Spanish Constitution, rather than in the EU principle of primacy*"[100].

Second it is clear that the ECJ was aware, if not following attentively the case law of the ECtHR on the question of mutual trust in Dublin cases, since it was by then engaging in a judicial back on forth on the matter. But it was aware of the heavy similitude between the Dublin Regulation and the EAWFD regarding mutual trust. The parallel was drawn by the AG in the *Radu* case[101], and even more in the *Aranyosi and Caldararu* case[102]. Lenaerts notes that the decision to *not* fully follow the logic of NS was a deliberate choice of the ECJ[103].

Did the ECJ recognize the challenge as actually being a threat to its authority? This was not the first time that criticism from domestic Courts would be seen as a credible threat to the authority of the Court[104]. Still, in order to show that once again, the ECJ judges could not ignore that Domestic Courts were clearly challenging the authority of the Court and of the

[99] See for example : Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi: BVerfG 15 December 2015, 2 BvR 2735/14, Solange III, and ECJ (Grand Chamber) 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru' (2016) 12 European Constitutional Law Review 549; Alexander Thiele, 'Die Integrationsidentität des Art. 23 Abs. 1 GG als (einzige) Grenze des Vorrangs des Europarechts' (2017) 52 Europarecht (EuR) 367.
[100] Koen Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection' (2015) XXXIV Polish Yearbook of European Law 2014 135. p151
[101] Opinion of the Advocate General, ECJ, Case C-396/11, *Radu* (29 Jan 2013)
[102] ECJ, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (5 Apr 2016)
[103] Koen Lenaerts and José A Gutiérrez-Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law' [2016] Research Handbook on EU Criminal Law 7.p 21
[104] Bill Davies, 'Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law' (2012) 21 Contemporary European History 417; Schimmelfennig (n 60); Alter, *Establishing the Supremacy of European Law* (n 36).

EU legal system, one can rely on the AG's conclusions in the Melloni case, criticizing the position of the Tribunal Constitucional :

> "*That interpretation infringes the principle of the primacy of European Union law inasmuch as it would mean, in each case, giving priority to the legal rule affording the highest level of protection to the fundamental right at issue. In some cases, national constitutions would therefore be given primacy over European Union law [and] would also prejudice the uniform and effective application of European Union law within the Member States*."[105]

Was the ECJ Aware of the trade-off between authority and policy preferences ? The existence of a trade-off between the on the one hand, an effective and simplified extradition system based on mutual trust, and on the other, exceptions based on fundamental rights, has always been clearly apparent. For example, in the *Radu* case, the AG noted:

> "*The Court has, no doubt having regard to this consideration, held that 'the principle of mutual recognition, which underpins the Framework Decision, means that […] the Member States are in principle obliged to act upon a European arrest warrant'.[…] That must plainly be correct, since**, if the position were otherwise, the objectives underlying the decision would risk being seriously undermined***."[106]

Or finally the AG in *Aranyosi* :

> "*In view of the number of Member States faced with a malfunctioning prison system, and in particular a problem of generalised prison overcrowding,*

[105] Opinion of the Advocate General, ECJ, Case C-399/11, *Stefano Melloni vs Ministerio Fiscal* (26 Feb 2013)
[106] Opinion of the Advocate General, ECJ, Case C-396/11, *Radu* (29 Jan 2013) ; although the AG in the end disagreed with this assessment.

> ***that interpretation would have the effect, as we have seen, of introducing a systematic exception to the execution of European arrest warrants issued by those States, which would lead to the paralysis of the European arrest warrant mechanism****. ''*[107]

The ECJ itself, in the *Melloni* case, when it was still refusing to give any exception to the execution of the EAW, noted that : "*That interpretation [by the constitutional court] of Article 53 of the Charter would undermine the principle of the primacy of EU law*" and that it would undermine the effectiveness of EU law on the territory of that State[108].

Court focus on authority, importance of implementation ? : [*data in collection*]

Less focus on policy preferences? : [*data in collection*]

Does the ECJ use of other Court's jurisprudence argumentatively and downplay differences?

The way the ECJ refers to the ECtHR when is particularly interesting. Multiple times, it relied on the ECtHR's case-law on detention, as a way to provide information on actual detention conditions of a Member State[109], rather than engaging on the terrain of the ECtHR's jurisprudence on Dublin regulations and mutual trust. Moreover, once the Luxembourg judges compromise and accept some exceptions in Aranyosi, they do so immediately by connecting Article 4 CFR to Article 3 ECHR[110].

Framing of the other Court as an ally/agreeing : [No data available since there is no ECtHR ruling on the matter at this point]

[107] ECJ, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (5 Apr 2016)
[108] ECJ, Case C-399/11, *Stefano Melloni vs Ministerio Fiscal* (26 Feb 2013), para 56-59
[109] See *Melloni*, para 50 ; *Jeremy F*, para 43 ; *Aranyosi and Caldararu* para 43.
[110] ECJ, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (5 Apr 2016) para 86.

4.2.Phase 2 : From *Aranyosi* to *Bivolaru* : standstill and rise in tension

The second phase of this jurisprudential saga is marked by the first relevant cases of the ECtHR on the fundamental-rights based exceptions to the EAW. But contrary to what could have been expected, this did not lead the ECJ to converge even more with Strasbourg Court. Instead, both Courts reached a standstill, each maintaining their jurisprudence diverging from the other (4.2.1). As will be seen in this section, this unexpected outcome maintained to this day, can be explained by the diverse threats and supports expressed toward the position of each Court, which balance each other (4.2.2), without both Courts reacting differently to the different levels of threats (4.2.3).

4.2.1. Mapping the outcome of each Court

Three ECtHR cases are here relevant : *Pirozzi* (2018), *Romeo Castano* (2019) and *Bivolaru and Moldovan* (2021)[111]. Through all three, Strasbourg judges maintained divergences with the ECJ : most dramatically, they used an *in concreto* test when evaluating whether the execution of an EAW violates the rights of an individual or not. This means that it is not necessary for the person targeted by the EAW to prove any sort of system-wide deficiency, although this can support their claim. Instead, they only need to show, for their own individual situation, that their right are at risks. But the ECtHR differed from the ECJ in other aspects : when the only exception accepted so far by the ECJ was in case of torture and inhumane or degrading treatment, the ECtHR was the first to accept that the violation of a right to fair trial would also be acceptable ground for non-execution ; the confirms the thesis that for the ECtHR, fundamental rights in general are a possible ground to non-execution, a

[111] ECtHR, *Pirozzi v Belgium*, Application No.21055/11 (17 April 2018) ; ECtHR, *Romeo Castano v Belgium*, Application No 8351/17 (9 July 2919) ; ECtHR, *Bivolaru and Moldovan v France*, Applications No. 40324/16 et 12623/17 (25 March 2021) ;

very broad approach. The ECtHR also always demanded the non-execution of the EAW, when the ECJ initially pushed for a simple "postponement"[112].

The ECJ, for its part, had some very light convergence with the ECtHR, but the outcome was overwhelmingly a status quo, throughout the 5 cases of this period : *ML*, *LM*, , *RO*, *Dorobantu* and *Openbaarminstrie*[113]. The alteration to its traditional jurisprudence consist in adding the right to fair trial to the possible ground of non-implementation, purely due to its "*cardinal*" nature in the *LM* case [114]; it also stopped explicitly requiring a "*postponement*" of the EAW, settling for the executing authority "*refusing the execute*"[115]. But the overwhelming divergence comes from the upholding of a two-step test introduced in Aranyosi : the existence of a violation or risk of violation in order to refuse to execute the EAW must be based in an assessment both *in concreto* (existence of systemic deficiencies) and *in concreto* (real, individualized risk). This is maintained throughout the entire jurisprudence, with the sole exception of RO[116]. It must be noted that the ECJ also referred to the ECtHR less and less in its jurisprudence: present in *ML* but not related to the MAE, on the MAE but very limited in *Dorobantu*[117] none in *LM*, none in *RO*, none in *Openbaar Ministrie*. The overall assessment is therefore one of extremely limited convergence, with strong differences between both Courts maintained to this day.

4.2.2. Between threats and allies : challenges and supports to European Courts

- *Member States*

[112] For example : *Melloni*, para 98-99.
[113] ECJ, Case C-220/18 *ML*, (25 July 2018) ; ECJ, Case C-216/18, *LM* (25 July 2018) ; ECJ, C-327/18, *RO* (19 Sept 2019) ; ECJ, Case C-128/18, *Dorobantu* (15 Oct 2019) ; ECJ, Joined cases C-354/20 PPU and C-412/20 PPU, *L and P* (17 Dec 2020).
[114] Was actually mentioned in *Tupikas* earlier, but the case falls outside the dataset.
[115] For example : *Dorobantu*, para 48.
[116] It is not clear why in this case in particular, the Court settled for an *in concreto* assessment only. The case itself, however, was fairly unusual, in that it also involved Brexit-related issues.
[117] *Dorobantu,, para 57*

Member States' preferences are, as in the previous period, difficult to establish with certainty, but indirect evidence can still give some indications. The number of Observations submitted to the ECJ is till high for this period : a minimum of five in *Openbaar Ministrie*, to a maximum of nine in the *Dorobantu* case. This still demonstrates a high level of saliency for the issue, although not necessarily indicating preferences. It can be inferred that States did have a preference for an effective and simplified extradition procedure through the EAW, which would have made them more amenable toward the ECJ's approach, with limited exceptions and a higher standard (two-step test) for non execution. This supported by the lack of attempt to revise the EAW, even though the Parliament asked for the Commission to start a reform of the process in 2016[118]. An illustration is also found in the current European Arrest Warrant Bill in Ireland, which amends the relevant domestic legislation, which changes the current legislation that :

> " *provides that a person shall not be surrendered if doing so would be incompatible with the European Convention on Human Rights, would contravene any provision of the Constitution or would be otherwise discriminatory or against human rights. It is proposed to repeal [this section], deleting the reference to a contravention of the Constitution, as this is not provided for in the framework decision."*[119]

This is an interesting State to look at, as it will be seen alter that this mark a net difference between Governements and their Domestic Courts. But while Governements favour the ECJ's approach, it must be noted that this does not

[118] European Parliament resolution on the European Parliament's priorities for the Commission Work Programme 2016 (2015/2729(RSP)) ; European Parliament resolution on the Commission Work Programme 2016 (2015/2729(RSP)).
[119] European Arrest Warrant (Amendment) Bill 2022, Presented by the Minister for Justice or Ireland,10th March, 2022

translate into a threat to the authority of the ECtHR, despite Strasbourg's less favourable approach. Either because of the reputational cost of entering in conflict with a Human Rights Court on such sensitive issue, or because the ECtHR is not exceedingly impeding the effectivity of the EAW, there is no empirical observation of acts which would amount to a challenge of the ECtHR from States.

- *Domestic Courts*

Identifying the preferences of Domestic Courts show two broad possible alternatives. The main point of contention seems to be the test a judicial authority should rely on when deciding on the potential non-execution of a EAW, keeping in mind that the ECJ asks for an *in concreto* AND *in concreto* test, whereas the ECtHR only asks for the *in concreto* test.

Some domestic Court express a preference for an *in concreto* test only. This amounts to considering the existence of systematic deficiencies in the issuing authority's State, and as a direct result refusing to execute the EAW. This was favored by the Irish High Court in the *LM/Celmer* case[120] as well as the lower court referring the *Openbaar Minsitrie* case[121]. In Romeo Castano, the lower Court apparently conducted an *in concreto* test only, which the Belgian Court of Cassation took no issue with. This test is easier when the systemic deficiencies are already acknowledged and established, for example in the case of the rule of law crisis in Poland and Hungary. The advantage is here that the lower Court does not have to then require more information specific to the individual at hand from the issuing authority ; it can immediately put and end to the procedure,

[120] ECJ, Case C-216/18, *LM* (25 July 2018) para 50.
[121] ; ECJ, Case C-216/18, *LM* (25 July 2018)

On the other hand, other Domestic Courts asked for an *in concreto*, individualized test only, or at least were willing to use one. The two lower Courts in Germany asking the preliminary questions in both *Generalstaadtantwaltschaft* and *Dorabantu* clearly sought to obtain a lot of information regarding the exact setting where the individual would be detained, the size of the cell, hygiene conditions, etc… a purely *in concreto* test, as one required by the ECtHR, has the advantage of not requiring for the domestic judge to first establish the existence of "systemic deficiencies" in the judicial or detention system of the issuing authority's country, and instead the judge only has to obtain information specific to the individual involved.

This short overview of the cases which were brought shows that lower Courts either favoured the ECtHR's test when considering the execution of the EAW, or were only willing to partially include the ECJ's test. It must be noted that the ECtHR, in its individual assessment does allow for system-wide considerations to be taken into account, as long as there are elements proving that the individual will be affected[122].

Statistics regarding the execution of the EAW also understand more quantitatively some of the challenges domestic Courts were posing. In 2017, 109 EAW were not executed in 7 different EU States on grounds of risk of violation of fundamental rights[123] ; 82 were refused on these grounds in 2018[124], 81 in 2019[125]. While these are not numbers so high that they would endanger the entire system of

[122] *Bivolaru and Moldovan*, para 123 and para 125
[123] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017
[124] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018
[125] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2019

the EAW, the sharp rise in courts refusing the executions of these warrants based on fundamental rights is not negligible.

- *European Courts*

Challenge of the ECJ toward the ECtHR : The fact the ECJ maintained the divergence with the ECtHR for multiple years, and so clearly, is in itself a threat to the authority of the ECtHR. According to Mitseligas, **"***The ECJ approach in Melloni […] has been perceived as a challenge to fundamental rights review by both the European Court of Human Rights*"[126].

From a systemic perspective, *Opinion 2/13*, in 2014, saw the Luxembourg Court give a negative Opinion to the accession of the EU to the ECHR. This opinion, coming on the heels of multiple years of negotiations and when it seemed that both Courts had reached an agreement, had a chilling effect on the relationship between the two Courts[127]. This is especially true in light of the arguments used by the ECJ to justify this negative opinion, the main one being the autonomy and specificity of EU law[128], thereby refusing to formally grant any authority to the ECtHR over the EU legal order. It can also be noted that it is during this time period, that the ECJ started to make less and less reference to the ECHR and the ECtHR's case-law in general, beyond cases on the EAW[129]. The ECJ clearly tried to gain more independence from the ECtHR, not making systematic references to the ECtHR case-law, and adopting different positions that the Strasbourg Court on different issues[130]. Instead

[126]Valsamis Mitsilegas, 'Judicial Dialogue, Legal Pluralism and Mutual Trust in Europe's Area of Criminal Justice' (2021) 46 European Law Review 579.)
[127] Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 Fordham International Law Journal 955, 13; Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105, 13.
[128] Opinion pursuant to Article 218(11) TFEU (Opinion 2/13), 18 December 2014
[129] de Búrca (n 9) 74–76.
[130] Platon (n 2).

of being an instrument of harmony, the CFR became a way for the ECJ to emancipate itself from the confines of the ECHR and its interpretation by the ECtHR.

Challenge of the ECtHR toward the ECJ : The pressure that the ECtHR was exercising on the ECJ was less systemic and more focused on specific issue area. Indeed, while Opinion 2/13 had largely frozen the relationship between the two Courts, the ECtHR still upheld the Bosphorus doctrine in its 2016 *Avotins*[131] ruling. This means EU law was still benefitting from a presumption of mutual trust – although could still be rebutted, and EU law was still safe from the ECtHR's review as long as it did not suffer from "manifest deficiencies". It is interesting that the very last ruling of the dataset, *Bivolaru and Moldovan*, saw the very first time since that the Strasbourg Court actually found this presumption to be rebutted[132]. This is the clearest of threats to the authority, autonomy and independence of EU law and the ECJ, but no new case from the ECJ has responded to it so far.

The ECtHR however maintained a high level of pressure on the ECJ specifically in this issue area. Not only did it maintained the divergence without changing its position once, it was very keen on not having its jurisprudence misinterpreted as support for the ECJ's jurisprudence. In the *Romeo Castano* case, Strasbourg judges ended up finding that the non-execution of the EAW has actually been a violation of the rights of the victims of the person targeted by the warrant. But even as it was concluding that the EAW should have been executed in this particular case, it added to its ruling :

> "*The current ruling shall not interpreted as reducing the obligation of State to not extradite an individual toward a state asking for their extradition when*

[131] ECtHR, *Avotins v Latvia*, Application No. 17502/07 (26 May 2016)
[132] ECtHR, *Bivolaru and Moldovan v France*, Applications No. 40324/16 et 12623/17 (25 March 2021) para 126.

> *there are serious reasons to believe that the individual, if extradites toward this state, could run a real risk to be submitted to a treatment violating Article 3 [on the protection against torture and inhumane or degrading treatments]*"[133]

It can be concluded that the ECtHR was indeed challenging the ECJ's authority during this period.

4.2.3. Tracing the mechanism : no need for legitimization, no convergence

- ECJ : explaining the very limited convergence

The ECJ was challenged in its authority by both Domestic Courts and the ECtHR, although it may have been implicitly supported by Member States. This partially matches Hypothesis H2b, which expects a weak to medium convergence. The convergence is indeed weak and on non essential points, as the test used by the ECJ (two-steps analysis of the situation, requirement violations of fundamental rights *in concreto* and *in concreto*) remains different from the ECtHR's purely *in concreto* test.

Does the ECJ know and identifies the threat ? : Different elements show that the ECJ was aware of the challenges to its authority coming from domestic Courts, and identified it as such. First, this was clear from the preliminary rulings themselves, where the domestic Courts were making their preferences known. For example, in the *LM* case, the Irish Court explicitly asked for the possibility to only perform the *in concreto* test, rather than the one mandated by the ECJ[134]. But the Luxembourg Judges notes that this preference of the Irish High Court amounted to an automatic refusal of execution of the EAW if it originated from Poland[135].

[133] « *le présent arrêt ne saurait être interprété comme réduisant l'obligation des États de ne pas extrader une personne vers un pays qui demande son extradition lorsqu'il y a des motifs sérieux de croire que l'intéressé, si on l'extrade vers ce pays, y courra un risque réel d'être soumis à un traitement contraire à l'article 3* " ; ECtHR, Romeo Castano v Belgium, para 92.
[134] ECJ, Case C-216/18, *LM* (25 July 2018)
[135] ECJ, Case C-216/18, *LM* (25 July 2018)

This is confirmed by President of the ECJ Koen Lenaerts, who notes that "*limiting the assessment to the first step (thereby foregoing the second step) would amount to suspending the implementation of the entire European Arrest Warrant mechanism in respect of the issuing Member State*."[136]. Another insight from the writings of President Lenaerts is that ECJ judges also kept track of rulings from Domestic Courts which did not make it to the ECJ as preliminary rulings, but were still relevant to this topic. In 2017, for example, he comments a decision of the BVerG as follows:

> *"[In] Mr C. v. Order of the Kammergericht, the German Constitutional Court held that the Basic Law did not preclude the execution of an EAW issued by a UK court, despite the fact that the right to remain silent is not protected in the same way in the UK as in Germany. […] In that regard, the German Constitutional Court ruled that only where the core (the so-called "Kerngehalt") of the accused's right to remain silent (as provided for in Art. 1(1) of the Basic Law, a constitutional provision protecting human dignity as part of Germany's constitutional identity) is adversely affected will German courts refuse to execute an EAW*."[137]

- [*interview data on whether the Courts followed the statistics on refusal to execute EAW for FR-related reasons*]

It is more difficult to know how aware of the ECtHR's case-law the ECJ was, and whether it perceived it as an actual threat to its authority. The ECJ overall very rarely mentions the ECtHR in this series of rulings, and despite its prolific writings on the matter of mutual trust

[136] Koen Lenaerts, 'The Court of Justice of the European Union as the Guardian of the Authority of EU Law: A Networking Exercise' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe in It?* (Springer 2019) <https://doi.org/10.1007/978-3-662-58841-3_2> accessed 18 April 2022.
[137] Koen Lenaerts, 'La Vie Apres l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust' (2017) 54 Common Market Law Review.; although President Lenaerts does not seem to consider this ruling to necessarily be opposed to the ECJ's approach or authority as, in the end, the BVerG still ordered the execution of the EAW.

in the AFSJ and the case-law of the ECJ on the matter, President Lenaerts also very rarely mention the Strasbourg Court [138]. Moreover, this was after Opinion 2/13 and the cooling of the relationship between both Courts, as judges had stopped their formal meetings.

Being said this, the ECJ was definitely not fully in the dark : in *LM*, the AG referred to the ECtHR's *Romeo Castano* case, even if the ECJ did not[139] ; the ECJ ended up referring to this case in *Dorobantu* ; and even if it was not citing the ECtHR's case-law on the EAW often, it did rely on its jurisprudence on the conditions of detention, or judicial independence. More likely than not, avoiding references to *Pirozzi* and *Romeo Castano* was deliberate. Lastly, the Court was aware of the 2016 *Avotins* ruling, where the ECtHR maintained the Bosphorus presumption of equivalent protection of EU law, and this was interpreted as a sufficiently reassuring sign and the ECtHR being "*willing to recognize more generally the importance of the principle of mutual trust*." [140] It seems that as far as the ECtHR goes, the ECJ was aware of the differences and disagreement, but did not necessarily conceptualize its position as a threat. This explains why it is not really present in the rest of the mechanism, and why the convergence is actually very weak.

Does the ECJ focus on policy goals or on authority? Faced with this definite threat from domestic Courts, and less so by the ECtHR, did the ECJ know that it was faced with a trade-off between its policy goals and its authority ? In its ruling, the ECJ very much still repeated the importance of the goals of the AFSJ and the facilitated extradition procedure . The focus on policy goals is particularly strong as even when the ECJ started to allow more and more

[138] For example : Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779; Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law 3.
[139] Opinion of the Advocate General ; ECJ, Case C-216/18, *LM* (25 July 2018)
[140] Lenaerts, 'La Vie Apres l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust' (n 137).

exceptions to the execution of a EAW, it initially tried to maintain that the EAW should be postponed and not fully refused, in order for the goals to be fulfilled later :

> "*limitations on that principle must remain exceptional and, where applicable, must operate with a view to restoring trust in the future, instead of destroying it forever. That is why the ECJ opted in that judgment for postponing execution rather than denying it from the outset*"[141]

But as time went on, the ECJ also gave up on this, compromising slightly more, as it accepted that the domestic simply "put an end" to the procedure,

[data : authority not sufficiently threatened by Courts ?]

Are there argumentative self-legitimation strategies ? This step of the mechanism is particularly interesting. In order to compromise and maintain as much of the efficiency of the EAW as possible, while still seeking to support its own authority, the ECJ very rarely explicitly rely on the ECtHR's ruling as self-legitimization. But interestingly, the Court brough new elements to its legal reasoning. The first on is the objective of the EAW to avoid impunity or create safe havens for individuals criminally suspected or convicted ; it only appeared in the *ML* case , and was then mentioned again in the *Openbaar Ministrie* case and the *Dorobantu* case, while it had never been before. Second, the ECJ brings forward a new reason for the two part, in concreto then in concreto test it requires to refuse the execution of the EAW in *Openbaar Ministrie* : only the European Council can fully suspense the use of a EAW for an entire country, according to the EAWFD ; using only an *in concreto* test, and refusing all EAW from this Member State amounts to taking this decision on behalf of the European Council.

[141] Lenaerts, 'La Vie Apres l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust' (n 137).

This is a new argument, which was absent from the Aranyosi case where the ECJ introduced this test.

What seems to appear is that the ECJ is challenged enough that it needs to bolster the legitimacy of its reasoning, but here does not decide to do so by converging with the ECtHR ; instead it uses other argumentative methods.

Does the ECJ ignores, downplays or criticizes the ECtHR's case law? The ECJ mainly ignores or downplays the ECtHR's jurisprudence, instead of openly or critically engaging with it. It has been mentioned above that references to the ECtHR's case-law in the ECJ's jurisprudence in this second period are fairly rare, but when it does so in *Dorobantu*, it does not note any potential contradiction between the two Courts[142]. Moreover, the ECJ encouraged domestic to rely on the ECtHR's jurisprudence when it came to finding proof of systemic deficiencies in the legal system, for example. Indeed, it if was really unthreatened, or did not consider itself particularly challenges, the ECJ could either fully disengage from the ECtHR's jurisprudence, or identify the divergences clearly in order to ask for actors implementing EU law to follow its approach only. Instead, the ECJ still operates a surface-level convergence with the ECtHR, as a way to self-legitimize. But has been seen that the ECtHR was not really seen as the real threat to the authority : the targeted audience of this self-legitimization is actually Domestic Courts.

- *ECtHR*

The ECtHR was challenged in its authority on the issue at hand by the ECJ, but different elements show this was not indeed not sufficient to push it into self-legitimization strategies,

[142] *Dorobantu* (15 Oct 2019) para 57

Does the ECtHR conceptualize challenge as threat ? The ECtHR was clearly very aware of the ECJ's evolving case-law. First, it constantly made references to the Luxemburg Court in the three rulings included in its period. These references were extensive, and included not only the most commented rulings, but also the most recent ones ; Robert Spano, President of the ECtHR, commented on the Openbaar Ministrie case[143], and in the *Bivolaru and Moldovan case*, the ECtHR made reference note only to the *LM* and *ML* case, but also *Openbaar Ministrie* and *Dorobantu*[144]. These references are thorough, and clearly identify the two-step test of the ECJ. When the ECtHR found that Belgian judges' refusal to execute an EAW was a violation of Article 2 ECHR, Judges Spano and Pavili went out of their way to add a separate opinion, neither really dissenting nor concurring, but instead noting :

> « *Ainsi qu'il ressort clairement de la jurisprudence constante de la Cour, l'interdiction posée par l'article 3 de la Convention est absolue. Rien dans le présent arrêt ne devrait être interprété dans un autre sens (paragraphe 92 de l'arrêt)* »[145]

The ECtHR was clearly aware of the threat of the ECJ to its authority regarding this matter, but did not react to it, as it was not a sufficient one.

Court focus on policy goals exclusively ?: [need data]

Does the ECtHR argumentatively rely on the ECJ ? Indeed, the ECtHR not only did *not* alter its own outcome or reasoning, but it did include the ECJ's case-law in its own argument to give eve the appearance of consensus. Instead, references to the Luxembourg case-law are

[143] Robert Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' [2021] European Law Journal 1.
[144] ECtHR, *Bivolaru and Moldovan v France*, Applications No. 40324/16 et 12623/17 (25 March 2021), para 49-55
[145] ECtHR, *Romeo Castano v Belgium*, Application No 8351/17 (9 July 2919), Opinion concordante du Juge Spano, à laquelle se rallie le Juge Pavli.

typically done in the section on the "*relevant applicable law*", but not further mention of them is made once the part on the Appreciation of the Court is reached.

Court ignores or engages critically with other European Court and its dissimilarities :

Contrary to the ECJ, the ECtHR does not shy away so much from noting divergences. As mentioned above, it states what the standing jurisprudence of the ECJ is, but then openly adopt a totally different test in *Pirozzi*, *Romeo Castano* and *Bivolaru and Moldovan*. When the ECJ seems to consider that the ECtHR already agrees with its approach in *Dorobantu*, President Robert Spano has a very different take on the question :

> "T*he Strasbourg Court has not yet taken a position on whether the two-step test, adopted by the CJEU within the context of the EAW in cases related to judicial independence, conforms to Article 6 § 1 of the Convention*."[146]

The ECtHR therefore did not feel forced into any convergence with the ECtHR on this issue. In the *Bivolaru and Moldovan* ruling, it is unclear if the ECtHR fully condemned the ECJ's approach or not ; but for the first time, it revoked the presumption of equivalent protection, due to the domestic court involved not conducting a sufficiently thorough assessment of the detention condition this individual targeted by the EAW would be subjected to in Romania[147]; in a sense, since the French jurisdiction theoretically failed to properly conduct the *in concreto* test, it was in line neither with the ECJ not with the ECtHR. But this also reinforces that the Strasbourg Court strongly opposes an *in concreto* test as is required by the ECJ, and does so openly. It is interesting to note that representatives from the Council of Europe brought up the *Bivolaru and Moldovan* ruling themselves to the table of negotiation

[146] Spano (n 143).
[147] ECtHR, *Bivolaru and Moldovan v France*, Applications No. 40324/16 et 12623/17 (25 March 2021),

of the EU to the ECHR[148], certainly due to the pressure they knew it would place on the EU side.

5. Conclusion

The ECJ and the ECtHR's dialogue is multi-faceted and ever-changing. The goal of this exploratory case-study has been to explore some of the drivers of this dialogue, affecting how each Court relate to the other. It offers an explanation based on a strategic use of the dialogue, where one Court can refer to another in hope of legitimizing its own position. Yet, this is a double edge-sword : in doing so, said Court is forced to give up at least some of its policy preferences, for the sake of the coherence of its legal argumentation. In the case study presented here, it is the ECJ which had to give up more ground than the ECtHR, as it was faced with more challenges by multiple relevant actors.

Of course, both this theory and the methodology of this research have their limit. The goal is not to explain, in absolute manner, every single reference or absence of reference to the ECJ in the ECtHR's ruling, and vice-versa ; and this is a single case-study -albeit covering multiple decades of cases- on a topic with the particularly of having a very low degree of saliency in the legal and political debate.

Still, this theory offers multiple ways forward for further research. First, the complexity and wealth of case-law of the ECJ and the ECtHR calls for further testing of this theory, in particular to test the remaining hypotheses extracted from the general theoretical framework. This would include more salient or politically sensitive issues which have been at stake in other

[148] 9th Meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights, para 10.

jurisprudential sagas of the two European Courts, such as the right to strike[149], the protection of transsexuals[150], women's rights[151], the businesses' right to privacy[152], Data Protection[153] or Asylum cases[154].

Second, the external validity of the theory could be tested by case-studies over similarly overlapping regional Courts, such as the East African Court of Justice and the African Court of Human and People's Rights for example.

Lastly, one factor has been mentioned throughout but not included as a variable per se : litigants themselves. For this theory, they are a necessary condition, a first step, which give the opportunity for an IC to position itself with regards to another one, rather than impacting directly what this position will be. But strategic litigants, in particular, can play a fundamental role as kickstarters of the process. Recent research on strategic litigation before the ECJ has shown how much impact they have had on the rise of the ECJ in the 70s, but similar studies regarding the ECtHR, or the role of litigants in the context of overlapping Courts could yield much insight. Whether international law is fragmented or remain coherent can only be known if the potential for a conflict between two legal orders is actually activated[155]. Understanding

[149] Amy Ludlow, 'The Right to Strike: A Jurisprudential Gulf Between the CJEU and ECtHR' in Theodore Konstadinides and others (eds), *Human Rights Law in Europe - The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014); Albertine Veldman, 'Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR' (2013) 9 Utrecht Law Review 104.
[150] Angus Campbell and Heather Lardy, 'Transsexuals - The ECHR in Transition' (2003) 54 Northern Ireland Legal Quarterly 209.
[151] Samantha Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8 Human Rights Law Review 647; Janneke Gerards, 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights: Who Takes the Lead?' in Thomas Giegerich (ed), *The European Union as Protector and Promoter of Equality* (Springer International Publishing 2020).
[152] Marius Emberland, 'Protection against Unwarranted Searches and Seizures of Corporate Premises under Article 8 of the European Convention on Human Rights: The COLAS Est Sa v. France Approach' (2003) 25 Michigan Journal of International Law 77.
[153] Síofra O'Leary, 'Balancing Rights in a Digital Age' (2018) 59 Irish Jurist 59.
[154] Samantha Velluti and Francesca Ippolito, 'The Relationship between the ECJ and the ECtHR: The Case of Asylum' in Kanstantsin Dzehtsiarou and others (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR* (Routledge 2014).
[155] Christian Kreuder-Sonnen and Michael Zürn, 'After Fragmentation: Norm Collisions, Interface Conflicts, and Conflict Management' (2020) 9 Global Constitutionalism 241.

how (strategic) litigants approach the situation of overlapping ICs, in particularly in the case of Courts as influential as the ECJ and the ECtHR, could yield much-needed insight for scholars researching European Human Rights Law and International Adjudication.

APPENDIX 1 : Index

		Answer (Score associated)		Maximum /Minimum score	
Category		**Dissimilarity**	**Similarity**		
Test/legal standard used by the Court	An identical test is…		Used (0) Mentioned but not used /partly used (0.5) None (1)	Max : 1 Min : 0	Max : 3 Min : 1
	A different test is…	Used (2) Mentioned but not used /partly used (1.5) None (1)		Max : 1 Min : 2	
Outcome of the case :	On the rebuttal of mutual trust	Dissimilar (1.5), Uncertain (1)	Identical (0), On a different legal basis (0.5), Uncertain (1)	Max : 1.5 Min : 0	Max : 3 Min : 0
	On the test to extradite nonetheless	Dissimilar (1.5) Uncertain (1)	Similar (0) Uncertain (1)	Max : 1.5 Min : 0	
References to the other Court's case-law	Some pertinent case-law of the other Court is mentioned	No (2)	Yes (0) Mentions the other Court without specific case-law (+0.5)	Max : 2 Min : 0	Max : 3 Min 0
	If YES, the case-law is cherry-picked/irrelevant	YES (0.5)	No (0)	Max : 0.5 Min : 0	
	If NOT cherry-picked, the Court	Explicitly does not follow (1)	Explicitly follows (0) Implicitly does not follow (0.5)	Max : 1 Min : 0	
Similarity/Dissimilarity Score				Maximum : 9 Minimum : 1	