

**EUROPEAN UNION ACCESSION TO THE EUROPEAN
CONVENTION ON HUMAN RIGHTS
(LEGAL AND JUDICIAL IMPLICATIONS)**

A Master's Thesis

**by
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Ankara
January 2012**

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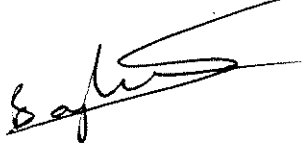
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ABSTRACT

EUROPEAN UNION ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(LEGAL AND JUDICIAL IMPLICATIONS)

Akın, Çiğdem

M.A., Department of International Relations
Supervisor: Prof. Dr. Yüksel İnan

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Even though accession to the European Convention on Human Rights (ECHR-Convention) has been on the agenda of the European Union (EU) since 1970's; concrete steps to this end has recently been taken in 2010, between the EU and the Council of Europe, and the Draft Accession Agreement was finalized in July 2011. Taking into consideration this Draft text and the related legislative instruments adopted under the auspices of the Council of Europe and the EU; this thesis will try to question whether the Union's accession to the ECHR will have implications for the legal status and the judicial protection of fundamental rights at the EU level. Accordingly, the research will try to explain the present state of affairs for fundamental rights protection at both the EU and the ECHR level and then will try to analyze whether the accession will have implications for legal status and judicial protection of fundamental rights at the EU level. Relying on the analysis made through the research, this work reaches to the conclusion that the EU's accession to

the Convention will not cause significant changes for the legal status and the judicial protection of fundamental rights at the EU level.

Keywords: Fundamental Rights, the EU, the ECHR, the Draft Accession Agreement

ÖZET

AVRUPA BİRLİĞİNİN AVRUPA İNSAN HAKLARI SÖZLEŞMESİNE TARAF OLMASININ HUKUKİ VE YARGISAL ETKİLERİ

Akın, Çiğdem

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Tez Yöneticisi: Prof. Dr. Yüksel İnan

Ocak 2012

Avrupa Birliği'nin (AB) Avrupa İnsan Hakları Sözleşmesi'ne (AİHS-Sözleşme) taraf olması 1970'li yıllardan beri Birliğin gündeminde olmasına rağmen; AB ve Avrupa Konseyi arasında bu konudaki kesin adımlar 2010 yılından itibaren atılmış ve 2011 yılı Temmuz ayında Katılım Anlaşması Taslağı oluşturulmuştur. Bu tez, Katılım Anlaşması Taslak metni ile AB ve Avrupa Konseyi'nin kabul ettiği diğer hukuk metinlerini göz önünde bulundurarak; Birliğin AİHS'ye katılımının AB düzeyinde temel hakların hukuki statüsü üzerinde ve bu haklara sağlanan yargısal korumada etkisinin olup olmayacağını sorgulayacaktır. Bu bağlamda, bu çalışmada AB ve AİHS hukuk düzenlerinde temel haklara sağlanan mevcut koruma sistemi açıklanmaya çalışılacak, ve sonra katılımın AB düzeyinde temel hakların hukuki statüsüne ve bu haklara sağlanan yargısal korumaya etkileri olup olmayacağı incelenmeye çalışacaktır. Çalışma boyunca yapılan analizlere dayanarak bu tez, Birliğin AİHS'ye taraf olmasının, AB düzeyinde, temel hakların hukuki statüsüne ve

bu haklara sađlanan yargısal korumaya kayda deđer bir etkisinin olmayacađı sonucuna ulaşmaktadır.

Anahtar Kelimeler: Temel Haklar, AB, AİHS, Katılım Anlaşması Taslađı

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LIST OF ABBREVIATIONS AND ACRONYMS

AB	: Avrupa Birliği
AİHS	: Avrupa İnsan Hakları Sözleşmesi
Art.	: Article
CDDH	: Steering Committee for Human Rights
CDDH-UE	: Steering Committee for Human Rights and European Union
Draft Accession Agreement	: Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms
ECHR	: European Convention on Human Rights
ECJ	: European Court of Justice
ECR	: European Court Reports
ECtHR	: European Court of Human Rights
Ed., Eds.	: Editor, Editors
EHRR	: European Human Rights Reports
EU	: European Union
Para.	: Paragraph
TEU	: Treaty on European Union

TFEU	: Treaty on Functioning of the European Union
The Treaties	: Treaty on European Union and the Treaty on Functioning of the European Union
The Charter	: Charter of Fundamental Rights of the European Union
The Convention	: European Convention on Human Rights
v.	: versus
VCLT	: Vienna Convention on the Law of the Treaties

CHAPTER I

INTRODUCTION

The European Union's¹ efforts to initiate and further its political integration process based on normative values have resulted it to put emphasis on the certain principles which are common to its Member States. This has been the reason behind the Union's references to "human rights and fundamental rights" concepts at its relations with its Member States and the world since 1980's (Manners, 2002: 240-241 and Quinn, 2001: 867). It has accepted "respect for human rights" as one of the founding principles of the Union and has secured its protection within its legal order. It has also made this principle as a condition for developing its external relations policy (Diez, 2005: 618). Most significantly, it listed "accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms"² among the 1993 Copenhagen Criteria³, as one of the conditions for entry into the EU. While

¹The term "European Union" will be used to cover institutions and bodies of the Union in this study.

²The Convention was opened for signature in Rome on November 4, 1950, and entered into force on September 3, 1953 (Council of Europe, 2010: 1). At present it has 47 Contracting Parties all of which are members of the Council of Europe. The Convention will be hereinafter referred to as "the European Convention on Human Rights".

³The criteria for accession to the European Union was declared by the European Council in Copenhagen at 21-22 June 1993. The Conclusions of the Presidency did state as follows: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union." (http://ec.europa.eu/bulgaria/documents/abc/72921_en.pdf).

this strong emphasis to human rights have been assisting the Union to further its political integration process; its being not a party to the Convention and this preventing acts of its institutions to be reviewed by the European Court of Human Rights, has been claimed to convey a negative message by giving the impression of disparate legal protection for human rights (Bemelmans, 2008). This claimed impression in turn has resulted in questioning normative identity of the Union and thus its political legitimacy. Accordingly, being party to the ECHR, which has been considered as a constitutional instrument of European public order in the field of human rights (Moravcsik, 2000: 218), has been considered by the Union as a significant step towards furthering its political integration process that is based on normative values and thus overcoming the questions about its political legitimacy (Quinn, 2001: 873).

While accession to the Convention has long been on the agenda of the European Union; the legal impediments to accession were recently overcome both at the EU and the Council of Europe level. Overcoming these impediments, official talks on accession have finally started on 7 July 2010 and the Draft Accession Agreement was subsequently finalized on 12th-14th October 2011 (Groussot, Pech and Lock, 2011: 2).

The common motive for the Union and the Council of Europe to support the Union's accession to the Convention is they have both considered accession as a significant step towards achieving coherence and consistency of fundamental rights protection in Europe (Bemelmans, 2008).

The Council of Europe⁴, which was founded by the Western European States to promote human rights, the rule of law and pluralistic democracy (Klebes and Rohmer, 2005: 20); established a human rights protection system under the ECHR . The Convention aims to fulfill its basic aim to make each and every individual in Europe aware of his civil and political rights and of guarantees of their effective protection (Nowicki, 2000: 171) *via* laying down a set of common minimum standards for their protection (Greer, 2006: 216). Besides providing for rights, the Convention also sets forth a collective enforcement mechanism for ensuring the effective protection of these rights within its Contracting Parties' areas of jurisdiction. It guarantees civil and political rights not only through inter-state complaints procedure, but also through a judicial individual complaints procedure. Accordingly, individuals may resort to the European Court of Human Rights (ECtHR) after exhausting domestic remedies⁵. While execution of the Court's judgements lies with the Contracting Parties, supervision of the execution of the ECtHR's rulings at the domestic level rests on the Committee of Ministers⁶ (Nowak, 2003: 160, 171). By accepting the jurisdiction of the Court and the supervisory powers of the Committee of Ministers, the Contracting Parties undertake fully to comply with the agreed standards and suffer the consequences for the violations of the Convention rights. These features of the Convention mechanism led it to be

⁴The Council of Europe was founded on 5 May 1949 with 10 founding states and by the conclusion of the Treaty of London. At present it has 47 Contracting Parties (Royer, 2010: 3).

⁵"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken" (ECHR, art. 35, para. 1).

⁶The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution" (ECHR, art. 46, para. 1 and 2). For execution of the judgements of the Court, see, for instance, Abdelgawad, Elisabeth Lambert. 2002. The Execution of Judgements of the European Court of Human Rights. Council of Europe Publishing.

viewed as a constitutional instrument of European public order in the field of human rights⁷ (Moravcsik, 2000: 218).

The European Union has its roots in the European Communities⁸ and flourished into a single body which has a distinct legal personality⁹ apart from its 27 Member States. Even though the Union is able to act independently from its Member States, its ability to act as a separate entity is limited with the competences conferred upon it by its members with the Treaties¹⁰, to achieve the objectives set out therein, and thus competences not conferred upon the Union by the Treaties remain with the Member States¹¹. The Union sets a new legal order which has a special and distinct legal nature. This so called special legal nature of the Union emanates from its autonomy with its own rights and a legal order independent of the Member States. As a consequence the Member States and their nationals are subject to those rules within the EU's areas of competence (Borchardt, 2010: 32). To be more precise, the Union established an autonomous legal order which is independent of its Member States' and thus created a self-sufficient body of law. Not only binding on them but also on their citizens in the areas where the Member States had transferred their sovereignty

⁷ For a detailed study of Council of Europe's human rights protection mechanism, see, for instance, Akıllıoğlu, Tekin. 2010. İnsan Hakları: Kavramlar, Kaynaklar ve Koruma Sistemleri. İmaj Yayınevi.

⁸ For a detailed explanation of the European Union Law's history, see, for instance, Borchardt, Klaus Dieter. 2010. The ABC of European Union Law. Luxembourg: Publications Office of the European Union.

⁹ "The Union shall have legal personality" (The Treaty on European Union, art. 47).

¹⁰ The Union is founded on the Treaty on European Union (TEU) and on the Treaty on Functioning of the European Union (TFEU) as stated in Article 1(3) TEU. These two Treaties are hereinafter will be referred to as "the Treaties".

¹¹ "The limits of Union's competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States" (The Treaty on European Union, art. 5, para. 1 and 2).

to the Union¹². Preserving this autonomous legal order requires uniform and coherent application of the EU law that the Court of Justice of the European Union (ECJ-Court of Justice) has created principles of primacy, direct effect and direct applicability of the Union law in all Member States (Borchardt, 2010: 32).

While the ECHR only aims to achieve its sole objective of protection of civil and political rights which are set therein, the Union aims to achieve its wide-ranging objectives, covering economic, social and political action, set forth under Article 3 TEU. These objectives do not include “protection of fundamental rights” as an explicit objective. However Article 6 TEU, the European Union Charter of Fundamental Rights¹³ (the Charter) and case law of the ECJ on fundamental rights proves character of “protection of fundamental rights” as an “objective” of the EU (Brandtner and Rosas, 1998: 472 and Von Bogdandy, 2000: 1335).

Even though accession to the Convention has been considered both by the Council of Europe and the European Union as a significant step towards achieving coherence and consistency of the protection of fundamental rights in Europe¹⁴; whether the accession will have significant implications for the legal and judicial status of the EU fundamental rights requires specific attention since the EU legal

¹²See, for instance, C-6/64, *Flaminio Costa v. ENEL* [1964] ECR 1141. For a detailed analysis of the “competence” issue, see, for instance, Kaczorowska, Alina. 2011. *European Union Law*. Routledge Publishing, 79-108.

¹³The Charter of Fundamental Rights of the European Union has been given the same legal value as the Treaties as stated under Article 6 TEU with the Treaty of Lisbon, which entered into force on 1 December, 2009. Thus, the Charter has a binding character the same as the Treaties.

¹⁴ See, Bemelmans, Marie-Louise. 2008. “Accession of the European Union/European Community to the European Convention on Human Rights”; Council of Europe Parliamentary Assembly Report. Doc. 11533.
<http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71249/20100324ATT71249EN.pdf>; Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) 210 final. 2 May 1979. Bulletin of the European Communities, Supplement 2/79.

order has been increasingly guaranteeing these rights at the EU level¹⁵. To be more precise, fundamental rights protection at the EU level has been developed over time, in accordance with and even more than the protection afforded by the ECHR and its enforcement mechanism. Even, the ECtHR in its *Bosphorus*¹⁶ case explicitly referred to the European Union's equivalent protection for fundamental rights guaranteed by the Convention. This high level of protection afforded by the Union to the EU fundamental rights has resulted in a debate whether the accession will make any difference for the better protection of EU fundamental rights¹⁷.

Prior to the Lisbon Treaty, which provided for explicit competence to the Union for accession to the ECHR under Article 6 TEU, the Union had no competence to accede to the Convention¹⁸ (Kokott and Hoffmeister, 1996: 664). That was why the literature on EU fundamental rights had paid more attention to explaining the level of fundamental rights protection at the EU level and indirect role of the ECHR in this¹⁹. Moreover, the studies made have mostly focused on the EU

¹⁵For detailed study of fundamental rights protection at the EU level, see, for instance, Ehlers, Dirk (ed.) 2007. *European Fundamental Rights and Freedoms*. Berlin: De Gruyter Recht. Craig, Paul and Grainne de Burca. 2011. *EU Law: Texts, Cases, and Materials*. New York: Oxford University Press, 362-407.

¹⁶*Bosphorus v Ireland* [2006] 42 EHRR 1, 45036/98. In its *Bosphorus* ruling the ECtHR declared that it would presume that a state had not departed from the Convention when it did no more than implement legal obligations flowing from its membership to an international organization, in this case the EU, as long as fundamental rights within that organization received equivalent protection to that provided by the Convention (Perez, 2009: 33). See also, Kuhnert, Kathrin. 2006. "Bosphorus: Double standards in European human Rights Protection?". *Utrecht Law Review* 2(2).

¹⁷See, for instance, Bemelmans, Marie-Louise. 2008. "Accession of the European Union/European Community to the European Convention on Human Rights". Council of Europe Parliamentary Assembly Report. Doc. 11533. <http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71249/20100324ATT71249EN.pdf>, supra note 21; Margaritis, Konstantinos G. 2011. "European Union accession to the European Convention on Human Rights: an institutional "marriage". Department of Transnational Legal Studies: VU University Amsterdam, Faculty of Law 13.

¹⁸See, Opinion 2/94, [1996] ECR I-1759. See, for the explanation why the Union did not have implied competence to accede to the Convention at the time, for instance, Koutrakos, Panos. 2006. *EU International Relations Law*. Hart Publishing, 128-130.

¹⁹See, for instance, Craig, Paul. 2006. *EU Administrative Law*. Oxford University Press, 484-544; Chalmers, Damian and Adam Tomkins. 2007. *European Public Law: Text and Materials*. Cambridge University Press, 231-272; De Burca, Grainne. 2002. "Convergence and Divergence in European

Charter of Fundamental Rights and the possible consequences of accession on the relationship between the Charter and the ECHR²⁰. However, both by the changes brought by the Lisbon Treaty, and also the ongoing accession negotiations between the mandates of the Union and the Council of Europe necessitates more detailed studies to be made concerning political and legal implications of the accession both for the EU and the ECHR. In particular, the European Union being the first non-state actor and also, the first non-Contracting Party of the Council of Europe that will become a party to the Convention (O'Meara, 2010: 1813) gives legal and judicial implications of this accession an importance. This is why this study tries to answer the question of "how will accession of the European Union to the ECHR affect the legal status and judicial protection of fundamental rights at the EU level?" While trying to answer this question, this thesis will argue that the EU accession to the Convention will not cause significant changes for the legal status and the judicial protection of fundamental rights at the EU level²¹.

Legal and judicial implications of accession have long been emphasized both within the literature, the EU and the Council of Europe. Accordingly, the accession will, formalize the status of the Convention in the Union legal order (Bilen, 2005: 49), will strengthen the protection of the rights and freedoms of the individuals, will eliminate different interpretations of terms in the field of fundamental rights from the side of the ECJ and the ECtHR (Saltinyte, 2010: 181), will confirm the European Union's essence as a "Union based on law" and will strengthen the principle of legal

Public Law: The Case of Human Rights" in Paul Beaumont Carole Lyons and Neil Walker (eds.) *Convergence and Divergence in European Public Law*. Hart Publishing, 131-150.

²⁰See, for instance, Bilen, Ali. 2005. "EU Charter: Rival or Complementary?", Utrecht: LLM Thesis; Chalmers, Damian and Adam Tomkins. 2007. *European Public Law: Text and Materials*. Cambridge University Press, 231-272.

²¹While it would be better to analyse not only the legal and judicial implications of accession on the EU fundamental rights, but also its political consequences; such a study would be beyond the scope of this study and thus, requires a separate research to be made.

certainty, to the extent that the European Union institutions will be subject to the same external review of the conformity of their acts and decisions as Member States (Bemelmans, 2008) and will close the gap of judicial protection in the EU. Moreover, accession will complement the introduction of a legally binding Charter of Fundamental rights, will reflect the Union's specificity as a distinct legal entity vested with autonomous powers, will enable the Union to be represented in ECtHR with an EU judge and to take part in the Committee of Ministers when it exercises its supervisory functions (Reding, 2010 and Bemelmans, 2008).

The research question of the study requires “fundamental rights” concept to be clarified. This concept will be used for both the guaranteed rights at the EU and the ECHR level. While what constitutes “fundamental rights” will be discussed in the next chapter in detail; it is worth mentioning that “human rights” concept is considered to have a broader scope than the “fundamental rights” and is outside the scope of this study²². Since the legal and judicial implications of accession is the subject matter of this research; legal texts adopted both by the EU and the Council of Europe concerning fundamental rights, and also the case law of the ECJ and the ECtHR will be the sources mostly used. Moreover, accession of the EU will not only be to the Convention but also to its Protocol and to the Protocol No. 6 to the

²²Even though there is no clear-cut distinction between “fundamental rights” and “human rights” concepts; the term “fundamental rights” often used to refer to civil and political rights, comprises an obligation on the part of the state not to interfere with the individual’s basic rights to life, liberty, and property, and include the right to privacy, free speech, freedom from slavery and torture, the right to due process and freedom from arbitrary arrest and, the right to life. The term “human rights”, on the other hand, often used to refer to the state’s obligation to provide the individual with the basic needs of human life, often referred to as social and economic rights and including rights such as food, shelter, clothing, and employment (Foster, 2011:7). For the concepts of “fundamental rights” and “human rights”, see also, Kapani, Münci. 1993. Kamu Hürriyetleri. Ankara: Yetkin Yayınları; Kaboğlu, İbrahim. 1994. Özgürlükler Hukuku. İstanbul: AFA Yayınları; Mumcu, Ahmet. 1992. İnsan Hakları ve Kamu Özgürlükleri. Ankara: Zirve Ofset. For the contrary view claiming “fundamental rights” concept to have a meaning broader than the “human rights” concept, see, for instance, De Witte, 1999. “The Past and Future Role of the European Court of Justice in the Protection of Human Rights” in Alston, Philip, Mara Bustelo, and James Heenan (eds.) *The EU and Human Rights*. Oxford University Press, 860-861.

Convention. Accordingly, “accession to the ECHR” expression will be used in this study to include accession to those three legal instruments. Moreover, “fundamental freedoms” concept will not be used in this study in order not to cause confusion between the use of the term within the Convention system and within the EU²³.

This research starts with a focus on the general description of the current status of the ECHR within the EU legal order, in order to give the necessary background information for the following chapters. In this respect, chapter two will explain the EU’s accession process to the Convention and the Draft Accession Agreement initially, and then will try to clarify the legal basis for protection of fundamental rights both within the EU legal order and within the Convention system. The Chapter will conclude with the explanation of the position and status of guaranteed fundamental rights within the legal systems of the Union and the Contracting Parties of the Convention.

Giving the background information on the status of the Convention within the EU legal order, the other two chapters will focus on a more detailed analysis on the implications of accession on specific matters. Accordingly, the third chapter is organized in a way that suits the analysis of any possible impact of accession on legal matters. Thus, each section of this chapter will start with explaining the ECHR and the EU system concerning the issue in question and will conclude with analyzing whether the accession will have any implications on the protection of fundamental rights at the EU level. The chapter will explain the present legal status of guaranteed fundamental rights, undertakings of the Contracting Parties, interpretation,

²³While the term “fundamental freedoms” used to explain common market rights, which comprise free movement of goods, persons, services and capital (Barnard, 2010: 9) ; the ECHR uses the same term with respect to rights guaranteed in a catalogue of fundamental rights (Ehlers, 2007: 18).

addressees and beneficiaries, limitations, territorial and temporal scope of these rights²⁴; and will try to analyze whether accession will have any implications on them at the EU level.

The following chapter will focus on the judicial implications of accession on the EU legal order. Since the issue of jurisdiction is broad in scope, this chapter is organized differently than the previous one even though it is also on implications of the accession. Accordingly, the first two sections of the Chapter will try to explain the judicial protection afforded by the Union and the Convention at present. The chapter will conclude with analysis section questioning whether the accession will have any implications for the judicial protection afforded by the Union to the fundamental rights at the EU level. Finally, the last chapter will present the concluding remarks of the research.

²⁴For determining which sections to include under the third chapter, the book called “European Fundamental Rights and Freedoms” (Ehlers, 2007) have been utilized.

CHAPTER II

FUTURE STATUS OF THE ECHR WITHIN THE EU LEGAL ORDER

The current chapter will focus on explaining the status of the fundamental rights within the laws of the Contracting Parties to the Convention and within the EU law both in the present circumstances and after the accession. In order to comprehend the future status of the Convention at the EU level, the evolution of the accession process and the provisions of the Draft Agreement on the accession of the EU to the ECHR will be explained beforehand. The legal basis for the protection of fundamental rights both at the ECHR and EU level, and the existing status of fundamental rights both at the ECHR Contracting Parties' and at the EU legal orders will then be explained in the following sections which will conclude with the analysis of the Convention's status at the EU level following the accession. Accordingly, the first section of the Chapter will describe the accession process to the Convention and the provisions of the Draft Accession Agreement. Second section will begin with explaining the legal basis for protection of fundamental rights both at the ECHR and EU level and will conclude with explaining the nature of the Convention in the EU legal order after the accession. The last section will explain the

position of guaranteed fundamental rights within the legal systems of both the ECHR Contracting Parties and the EU, and the status of the Convention within the EU legal order following the accession.

2.1. The Accession Process and the Draft Accession Agreement

Accession to the Convention has been on the agenda of the European Union expressly since the Memorandum of the European Commission of 1979²⁵, in which the Commission considered accession to the Convention as the initial step towards protection of fundamental rights at the EU level. Resolution adopted by the European Parliament in 1979²⁶ supported the view of the European Commission concerning accession to the European Convention (Çavuşoğlu, 1994: 143). The Commission continued its positive stance with regard to accession to the Convention and issued a Communication of November 1990²⁷ in which it pointed to a gap in the EU legal system that could be filled by the Union's accession to the ECHR. The European Commission argued that the EU's accession would promote the uniform protection of fundamental rights in the EU and its Member States and also present the Union's legal order as a comprehensive legal order with constitutional guarantees equivalent to those in the Member States. Moreover, accession considered to complement the fundamental rights protection at the EU level rather than establishing an alternative measure for the review and enforcement these rights (Miller, 2000: 16).

²⁵Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) 210 final. 2 May 1979. Bulletin of the European Communities, Supplement 2/79.

²⁶Resolution of April 27, 1979, O.J. C 127/69 (1979) (Scelba Report).

²⁷Commission Communication, CONS DOC 10555/90, 4 December 1990.

Following the initiatives of the Union institutions, the Council of the European Union requested an opinion from the Court of Justice on 26 April 1995, concerning whether accession of the Union to the ECHR was compatible with the Treaties. The Court has ruled in its Opinion 2/94 on whether the Union has the power to accede to the ECHR. It has investigated the competence of the Union to conclude an agreement for accession and the compatibility of such an agreement with the Treaties. It has found that the Union was not so empowered; that Article 308 of the Treaty Establishing the European Community (Article 352 TFEU) was not a sufficient basis for granting the Union the authority to ratify the ECHR²⁸.

Impediments were also existent at the Council of Europe front. The ECHR was only open to Council of Europe Member States²⁹ and had some provisions preventing non-state entities and non-members of the Council of Europe to accede³⁰. These concerns led the Committee of Ministers of the Council of Europe in March 2001 to instruct the Steering Committee for Human Rights³¹ (CDDH) to examine the legal and technical questions that had to be addressed by the Council of Europe in the

²⁸See, Opinion 2/94, [1996] ECR I-1759. In this case the Court ruled that the Community had no competence to accede to the Convention. Although respect for human rights is a condition for the lawfulness of Union acts, accession would entail a substantial change in the Union system at the time for the protection of human rights that it would entail the entry of the Union into a distinct international institutional system as well as integration of all the provisions of the Convention into the Union legal order. Such a modification would be of constitutional significance and could be brought about only by way of treaty amendment (Polakiewicz, 1999: 60-61). See also, Arnulf, A. M. 1996. "Opinion 2/94 and Its Implications for the Future Constitution of the Union" in CELS Occasional Paper. The Human Rights Opinion of the ECJ and its Constitutional Implications. June (1).

²⁹Text of the Article 59 ECHR was amended by the Article 17(2) of Protocol No. 14 to the Convention allowing the European Union to accede. Before that the Convention was only open to the signature of the members of the Council of Europe (Bilir, 2006: 154)

³⁰For instance, wording of the Convention provisions and the terms used for nation states such as "inter-state cases", "national security" and etc.

³¹For Steering Committee for Human Rights, see, for instance, Bond, Martyn. 2010. The Council of Europe and Human Rights. Council of Europe Publishing, 69-70.

event of possible accession of the EU to the ECHR. The CDDH adopted a report identifying those issues in 2002³².

The legal impediments for the accession were finally overcome both by the Lisbon Treaty's amendment to the TEU and by the Protocol No. 14 to the ECHR. Accordingly, Article 1(8) of the Treaty of Lisbon³³ amended Article 6(2) TEU as "the EU shall accede to the ECHR". In addition, Article 17(2) of Protocol No. 14³⁴ amended Article 59(2) as "the European Union may accede to the Convention", permitting EU accession to the Convention. Following establishment of the legal grounds allowing for accession, the European Commission proposed negotiation directives for the EU's accession to the Convention on 17 March 2010. On 4 June 2010, EU Justice Ministers gave the Commission the mandate to conduct the negotiations on their behalf. At the Council of Europe front, the Committee of Ministers of the Council of Europe gave an *ad-hoc* mandate to its Steering Committee for Human Rights on 26 May 2010, to elaborate with the EU the necessary legal instrument for the EU's accession to the ECHR (Council of Europe, 2011).

Finally official talks on the European Union's accession to the Convention started on 7 July 2010 (Council of Europe, 2011). The "Steering Committee for Human Rights and European Union (CDDH-UE)" entrusted the task of elaborating an accession instrument to an informal group of 14 members, 7 coming from Member States of the EU, which are the Netherlands, France, the United Kingdom,

³²Steering Committee for Human Rights. 2002. "Study of Technical and Legal Issues of a possible EC/EU accession to the European Convention on Human Rights". Report adopted by the Steering Committee for Human Rights at its 53rd meeting (25-28 June 2002), DG-II(2002)006.

³³The Treaty of Lisbon was signed on 13 December 2007 in and came into force on 1 December 2009 (Europa, 2011).

³⁴Protocol No. 14 entered into force on 1 June 2010 (Council of Europe factsheet, 2010).

Germany, Finland, Latvia and Romania and 7 coming from non-Member States of the EU, which are, Albania, Armenia, Croatia, Norway, Russia, Switzerland and Turkey, chosen on the basis of their expertise (Kuijer, 2011: 24). This informal working group held working meetings with the European Commission, reporting regularly to the CDDH on progress and on outstanding issues. In the context of these meetings, the informal group also exchanged views with representatives of civil society, who regularly submitted comments on the working documents. Total of eight working meetings took place between July 2010 and June 2011. A draft agreement was first produced in February 2011 but a number of unresolved legal issues required further discussion and it was not until 19 July 2011 that a fully-fledged version of the draft agreement on the accession of the EU to the ECHR, consisting of 12 amending articles, was published alongside an explanatory report. “Draft legal instruments on the accession of the European Union to the ECHR³⁵” comprises “Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms³⁶”, “Draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgements and of the terms of friendly settlements.” and “Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms”. The draft and explanatory report were subsequently finalized at an extraordinary meeting of the CDDH held on 12th-14th October 2011³⁷ (Grousot, Pech and Lock, 2011: 2)³⁸.

³⁵Final version of the Draft Legal Instruments on the Accession of the EU to the ECHR. 19 July 2011. CDDH-UE (2011) 16. http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents_en.asp.

³⁶Hereinafter “the Draft Accession Agreement”.

³⁷Extraordinary meeting report of the Steering Committee on Human Rights (CDDH) on European Union accession to the European Convention on Human Rights with the Informal Group on Accession

Once the Committee of Ministers adopts the Draft Accession Agreement, its entry into force will necessitate a cumbersome procedure. Firstly, the 47 Contracting Parties to the Convention and the EU will have to sign it. Secondly, the EU will have the option of making reservations to the Convention to the extent that EU law as it stands on the day of the signing of the agreement is not in conformity with any particular provision of the ECHR. Ratification of the agreement comprises ratification both at the Contracting Parties' to the Convention and at the EU level. As regards the EU, Article 218 TFEU provides for a special ratification regime for EU's accession to the ECHR. Accordingly, the Council of the EU will have to unanimously agree to adopt the decision concluding the agreement after having obtained the consent of the European Parliament. The decision of the Council of the EU concluding the accession agreement will then have to be approved and ratified by each EU Member State in accordance with their respective constitutional requirements. Moreover, the agreement will also have to be approved by all 47 current Contracting Parties to the ECHR, including the 27 EU Member States in their capacity as parties to the ECHR, in accordance once again with their respective national constitutional requirements (Groussot, Pech and Lock, 2011: 16-17).

The specific characteristics of the Union's legal order and the Union being the first non-state entity acceding to the Convention, required changes in the Convention mechanism. The Union did foresee the necessity of preserving its specific characteristics that, it pre-determined the conditions to which it may accede under Article 6(2) TEU, Article 2 Protocol No. 8 to the Treaty of Lisbon and

of the EU to the Convention (CDDH-UE) and the European Commission, 12-14 October 2011, Strasbourg.
http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH/UE_documents_en.asp.

³⁸The website of the Council of Europe's Informal group on EU accession to the ECHR (CDDH-EU) offers easy access to the draft legal instruments and other informative documents:
http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents_en.asp.

Declaration on Article 6(2) TEU. In the context of these, accession will affect only the Union's field of competence, where the Member States are already subject to scrutiny by the Court of Justice. Thus, accession to the Convention will not mean any new obligations for the EU Member States, but will afford their citizens better protection against any Union measures which might infringe fundamental rights (Jacque, 1993: 903). Moreover, accession to the Convention will not affect the specific features of Union law. Preamble to the Draft Accession Agreement reflects the mentioned concerns of the Union and states as follows: "...having regard to the specific legal order of the European Union, its accession requires certain adjustments to the Convention system to be made by common agreement".

The Draft Accession Agreement aims at preserving the equal rights of all individuals under the Convention, the rights of applicants in the Convention procedures, and the equality of all Contracting Parties with the rules it establishes concerning the Convention system. It provides for the modalities of accession from the point of treaty law and legal, technical and corresponding possible amendment solutions to the Convention (Myjer, 2006: 306). According to the Explanatory Report to the Draft Accession Agreement, main reasons behind its conclusion are the EU being neither a State nor a member of the Council of Europe and it has its own specific legal system. These required certain adaptations to the Convention system which are better to be made with an accession agreement instead of a Protocol or an amendment to the Convention (CDDH-UE (2011) 16 fin: 11).

The Draft Accession Agreement comprises twelve articles. Article 1 of the Agreement provides for the scope of the accession and amendments to Article 59 of the Convention, which is on signature and ratification. Accordingly, the Union will

not only accede to the Convention, but also to the Protocol to the Convention and to Protocol No. 6 to the Convention on abolition of death penalty. Moreover, Article 59 of the Convention is amended to permit the Union to accede to the Protocols to the Convention and to make reference to the Accession Agreement for further details of accession in order to limit the amendments made to the Convention. The Article also clarifies that accession to the Convention imposes on the EU, obligations with regard to acts, measures, or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Technical amendments are also handled under the same provision for preparing the Convention's text for the participation of a non-state entity.

Article 2 of the Accession Agreement sets forth the issue of reservations to the Convention and its Protocols. Accordingly, the conditions applicable to other Contracting Parties with regard to reservations, declarations and derogations under Article 57 ECHR will also apply to the EU. Besides, for reasons of legal certainty, an amendment is made to the Article 57 ECHR, by which the status of the Union is explicitly stated. Article 3 of the Agreement introduces a new mechanism to the Convention system, called "co-respondent mechanism" allowing the EU to become a co-respondent to proceedings instituted against one or more of its Member States and the EU Member States to become respondents to proceedings instituted against the EU. Inter-Party cases are dealt with under Article 4 of the Agreement. Changing the "inter-state" title of the Article 33 of the Convention as "inter-party;" the Agreement highlight that all parties to the Convention will be able to bring a case against the EU and vice versa.

Article 5 of the Agreement is on the interpretation of Article 35 and 55 of the ECHR. This provision clarifies that the proceedings before the ECJ shall be understood as constituting neither procedures of international investigation or settlement, nor means of dispute settlement. Election of a judge to the ECtHR from the EU is set out in Article 6 of the Agreement and participation of the EU in the Committee of Ministers of the Council of Europe when it exercises its supervisory functions on the Convention system is dealt with under Article 7. Article 8 of the Agreement provides for the calculation method of the EU contribution to the expenditure related to the Convention. Article 9 of the Agreement concerns the relation of the EU with a number of Council of Europe conventions and agreements which are strictly linked to the Convention system. This Article ensures that the EU, as a Party to the Convention, respects the relevant provisions of these instruments and is, for the purpose of their application, treated as if it were a Party to them. The Agreement concludes with the usual final clauses, which are related to signature and entry into force, reservations and notifications. Under Article 11, no reservation to the Accession Agreement itself is permitted.

Paying attention to the provisions of the Draft Accession Agreement before proceeding with further analysis was necessary since it includes certain legal issues which are crucial for assessing the legal and judicial implications of accession for the protection of fundamental rights at the EU level. That's why only a snapshot of the Agreement's provisions is given above and further analysis of its provisions on legal and judicial matters will be covered in the related sections of the following chapters. Accordingly, scope of accession, co-respondent mechanism, inter-party cases, election of judges, participation of the EU in the Committee of Ministers of the Council of Europe, and signature and entry into force of the Agreement will be

explained and analyzed in the following chapters, with regard to their legal and judicial implications for the protection of fundamental rights at the EU level.

2.2. Legal Basis for Protection of Fundamental Rights

The ECHR is a multilateral treaty³⁹ signed and ratified under the auspices of the Council of Europe (Erdal and Bakırcı, 2006: 34). It is open to signature of the members of the Council of Europe and even though it is not a member of the organization, accession to the Convention is also open to the European Union⁴⁰. While, there is no explicit reference to the Convention within the text of the Statute of the Council of Europe, the Statute empowers Committee of Ministers to conclude conventions to further the aim of the Council of Europe⁴¹. The Convention was concluded on this basis (Schlüter 2006: 35) and since its entry into force on 3 September 1953 it has been considered as to establish the most effective human rights protection system in Europe (Nowak, 2003: 159). The text of the Convention has been amended by fourteen Protocols⁴². Of these Protocols, eight are additional

³⁹Treaties concluded under the Council of Europe's auspices include conventions, agreements, arrangements, charters, codes and outline or framework conventions. Whatever they are called, they all have the same legal scope. Thus, the title chosen has no effect on their legal character on the legal system which applies to them (Rohmer and Klebes, 2005: 97).

⁴⁰ See, *supra* note 28.

⁴¹“On the recommendation of the Consultative (Parliamentary) Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by Governments of a common policy with regard to particular matters. Its conclusions shall be communicated to Members by the Secretary General.” (Statute of the Council of Europe, art. 15, para. a).

⁴²First Protocol titled “Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms” (ETS no. 009) entered into force on 18 May 1954. “Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions” (ETS no. 44) entered into force on 6 May 1963. “Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention” (ETS no. 45) entered into force on 21 September 1970. “Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto” (ETS no. 46) entered into force on 2 May 1968. “Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental

and bind only those States which are party to them. The Protocols Nos. 1, 4, 6, 7, 12 and 13 widen the catalogue of rights recognized in the Convention and thus are normative in character. Protocols Nos. 9 and 10 refer to the guarantee mechanism instituted in 1950 and are not normative in character. Protocols Nos. 3, 5, 8, 11 and 14 on the organization of the guarantee mechanism and its authority, are on the other hand amendment protocols. Accordingly, different than additional protocols, they require the ratification of all Contracting Parties to the Convention since they can be considered as constitutional amendments. Protocol No. 11 rendered the ninth and tenth additional protocols since it modified the guarantee mechanism established in 1950 (Salcedo, 2006: 361-362). Protocol No. 2 to the Convention is on conferral of consultative jurisdiction to the Court at the request of the Committee of Ministers.

Fundamental rights protection at the European Union level has its legal basis in various EU law sources (Ehlers, 2007: 373). Accordingly, explanation of the EU law sources⁴³ is necessary for better understanding of the EU law sources on fundamental rights. Sources of primary law determine the legal framework within

Freedoms, amending Articles 22 and 40 of the Convention" (ETS no. 55) entered into force on 20 December 1971. "Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty" (ETS no. 114) entered into force on 1 March 1985. "Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms" (ETS no. 117) entered into force on 1 November 1988. "Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms" (ETS no. 118) entered into force on 1 January 1990. "Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms" (ETS no. 140) entered into force on 1 October 1994. "Protocol No. 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms" (ETS no. 146) not entered into force. "Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby" entered into force on 1 November 1998. "Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms" (ETS no. 17) entered into force on 1 April 2005. "Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances" (ETS no. 187) entered into force on 1 July 2003. "Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention" (ETS no. 194) entered into force on 1 June 2010 (Council of Europe, 2011).

⁴³For sources of the EU law, see, for instance, Chalmers, Damian and Adam Tomkins. 2006. *European Union Law*. Cambridge University Press, 131-144; Fairhurst, John. 2010. *Law of the European Union*. England: Pearson Education Limited, 56; Raitio, Juha. 2010. *The Principle of Legal Certainty in EC Law*. Kluwer Academix Publishers, 83-123.

which the EU implements its policies. It includes the Treaty on European Union, the Treaty on the Functioning of the European Union, the Protocols annexed to these Treaties and to the Amending Treaties, the Charter of Fundamental Rights of the European Union, treaties that are related to the Founding Treaties and which either amend or enlarge them⁴⁴. International agreements concluded by the Union with one or more States or international organizations do have their place between primary and secondary sources of the Union law (Rosas and Armati, 2010: 48). Secondary sources of EU law consist of those listed under Article 288 TFEU. These are regulations, directives, decisions, recommendations and opinions. The jurisprudence of the ECJ, consisting of formal decisions and the principles enunciated in its judgements and opinions, is also source of the Union law. General principles of the Union law arise from a variety of sources, in particular, common traditions of the EU Member States and case law of the Court of Justice in particular, also is a source of the Union law⁴⁵.

While fundamental rights may be subject of any of these sources⁴⁶; main sources of EU fundamental rights are general principles of EU law and the Charter. These two sources are listed in Article 6 TEU. According to this provision, the Charter, and the general principles of the Union's law as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States constitute the sources of fundamental rights protection at the EU level.

⁴⁴These comprise Merger Treaties, the Single European Act, the Treaty on European Union, the Treaty of Amsterdam, the Treaty of Nice, the Treaty of Lisbon and the Treaties of Accession (Fairhurst, 2010: 68). Detailed information on these legislative instruments are available at <http://eur-lex.europa.eu/en/treaties/index.htm>.

⁴⁵For a detailed explanation of the general principles of law as a source of the Union law, see for instance, T. C., Hartley. 1988. *The Foundations of European Community Law*. Clarendon Law Series, 129-152.

⁴⁶See for other sources, for instance, Ehlers, Dirk (ed.) 2007. *European Fundamental Rights and Freedoms*. Berlin: De Gruyter Recht, 373-375.

Fundamental rights have been considered as part of the general principles of the Union's law and thus protected by the Court of Justice since the Court's *Stauder v City Ulm*⁴⁷ case. The Court reasoned its protection of fundamental rights as part of general principles of the Union law through its latter cases. In the *Internationale Handelsgesellschaft*⁴⁸ case, it declared that fundamental rights protection as general principles of the Union law inspired by the constitutional traditions common to the Member States. In its subsequent cases it also mentioned international agreements for the protection of human rights on which Member States have collaborated or of which they are signatories⁴⁹ can supply an additional source for inspiration (Değer, 2009: 41-45). Starting with the *Rutili v. Minister for Interior*⁵⁰ case, the Court also referred to the ECHR provisions explicitly in its many rulings as a significant source of inspiration for developing fundamental rights as general principles of the Union law (Değer, 2009: 80-89). Moreover, the Charter of Fundamental Rights of the European Union provides for a catalogue of fundamental rights and according to Article 6(1) TEU has the same legal value as the Treaties.

While the ECHR constitutes only an indirect source for fundamental rights protection at the EU level since it is considered by both the Article 6 TEU and the case law of the Court of Justice as an inspiration for protection of fundamental rights as part of general principles of EU law⁵¹; following the accession of the Union to the ECHR, the Convention will become part of the Union law as a mixed international

⁴⁷C-29/69, *Stauder v City Ulm* [1969] ECR 419.

⁴⁸C-11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁴⁹ See, for instance, C-4/73, *Nold* [1974] ECR 491.

⁵⁰C-36/75, *Roland Rutili v. Minister for Interior* [1975] ECR 1219.

⁵¹There is an ongoing debate on the status of the Convention within the EU law. While it is generally accepted that the Convention is a source of inspiration for fundamental rights protection as general principles of Union law (See, Guild and Lesieur, 1998: 51); there also exists views claiming that the Convention is part of the EU law (Drzemczewski, 1981:135-136).

agreement⁵² (Lock, 2010: 11). Thus, it will be a direct source for EU fundamental rights protection (Weiler, 2005: 30). Even though there exists different conceptions and categorizations for the term “mixed agreement” within the literature⁵³; mixed agreements will be defined as “agreements which include among their Contracting Parties not only the European Union but also one or more of its Member States” (Rosas, 2000: 200) in this study.

2.3. The Position and Status of Guaranteed Fundamental Rights within the Legal Systems of the Contracting Parties

The ECHR requires its Contracting Parties to secure rights set forth in the Convention but it does not oblige them to incorporate its provisions into their domestic law. It leaves the manner in which the Contracting Parties secure these rights within their law to their discretion (Polakoewicz, 2001: 32-33). The logic behind this approach of the Convention is its aim to set only minimum standards for fundamental rights protection at the European level but not to provide for uniformity of fundamental rights at Europe (Gaja, 2000: 603). Monist or dualist approaches are utilized by the Contracting Parties to incorporate the Convention within their municipal laws (Schlüter, 2006: 48). While ratification of the Convention is adequate for giving internal effect to it under the monist approach; dualist approach requires

⁵²For detailed analysis of the mixed agreements, see for instance, Schermers. 1983. “A Typology of Mixed Agreements” in D. O’Keeffe and H.G. Schermers. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 25-26; Björklund. 2001. “Responsibility in the EC for Mixed Agreements: Should Non-Member Parties Care?”. *Nordic Journal of International Law*, 70, 389.

⁵³For different definitions and categorizations of mixed agreements, see, for instance, Rosas, Allan. 2000. “The European Union and Mixed Agreements” in Alan Dashwood and Christophe Hillion (eds.) *The General Law of E.C. External Relations*. London: Sweet and Maxwell, 203-207; Koutrakos, Panos. 2006. *EU International Relations Law*. Hart Publishing, 150-152; Arcas, Rafael Leal. 2001. “The European Community and Mixed Agreements”, in *European Foreign Affairs Review* 6: 483-513.

substantive norms of the Convention to be transformed or adopted in order to be applicable in internal laws of the Contracting Parties (Weissbrodt and De La Vega, 2007: 4-5)⁵⁴. The status of the Convention within the hierarchy of internal legal norms varies considerably from one Contracting Party to another⁵⁵ (Perez, 2009: 28). For instance, the Convention may be given directly applicable international law status with superiority over the whole domestic legal order, part of the Constitution, directly applicable law with superiority over internal legislation, given the rank of statutory law or not having formal internal legal validity (Polakiewicz, 2001: 36-45). Moreover, self-executive quality⁵⁶ of the Convention is an issue dependent on the domestic systems of the Member States (Wagnerova, 2005)⁵⁷.

Understanding the position and the status of fundamental rights at the EU level requires explanation of the principles of primacy, direct applicability and direct effect, which govern the relationship between the EU and its Member States (Perez, 2009: 34). Primacy of the Union law over national laws of the Member States is a

⁵⁴For a detailed analysis of the monist and dualist approaches see Brownlie, Ian. 2008. *Principles of Public International Law*. New York: Oxford University Press, 31-33; Briggs, Herbert W. 1952. *The Law of Nations*. New York: Appleton-Century-Crofts Inc, 64-65; Pazarcı, Hüseyin. 2004. *Uluslararası Hukuk Dersleri*: 1. Kitap. Turhan Kitabevi, 19-21.

⁵⁵For studies regarding the reception and effects of the Convention within the Contracting Parties' laws, see Blackburn, Robert and Jorg Polakiewicz (eds.) 2001. *Fundamental Rights in Europe*. Oxford University Press; Sweet, Alec Stone and Helen Keller (eds.) 2008. *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford University Press.

⁵⁶The term "self-executing" may be used to state a principle of the particular system of national law that certain rules of international law do not need incorporation in order to have internal effect. Besides, the term is also used to describe the character of the rules themselves. Which means, a national court may hold that, as a matter of interpretation, a treaty obligation could not be applicable internally without specific local legislation (Brownlie, 2003: 48). Whether a treaty provision is or is not self-executing within a particular national system is a matter to be decided under national law of that country and criteria for making such a determination may differ in various countries (Leary, 1982: 54). For discussions on self-executing quality of the ECHR, see, for instance, Çavuşoğlu, Naz. 1994. "İnsan Hakları Avrupa Sözleşmesi ve Avrupa Topluluk Hukuku'nda Temel Hak ve Hürriyetler Üzerine". Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi İnsan Hakları Merkezi Yayınları. Özel Dizi No. 1, 94-96.

⁵⁷See also Council of Europe. 2009. *Reforming the European Convention on Human Rights: A Work in Progress, A Compilation of Publications and Documents Relevant to the Ongoing Reform of the ECHR*. Council of Europe Publishing, 345-346; Dijk, Pieter, Godefridus J. H. Hoof, G. J. H. van Hoof, A. W. Heringa. 1998. *Theory and practice of the European Convention on Human Rights*. Martinus Nijhoff Publishers, 17; Polakiewicz, Jörg. 1999. *Treaty-Making in the Council of Europe*. Council of Europe Publishing. 156-160.

general principle accepted by the Court of Justice in *Costa v. ENEL*⁵⁸ case and developed further through its case law⁵⁹. At present, the principle is not set forth within the Treaties, but is explicitly regulated by the Declaration No.17 attached to the Treaty of Lisbon. According to this Declaration

With the well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member State, under the conditions laid down by the said case law.

An opinion of the Council Legal Service on the primacy of EU law set out in 11197/07 (JUR 260) was also quoted within this Declaration, which asserted that, “...the fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle”.

In accordance with the Declaration No. 17 attached to the Treaty of Lisbon; Treaties provisions on fundamental rights, the Charter, international agreements concluded by the Union guaranteeing fundamental rights and secondary sources of the Union law on fundamental rights do have primacy over national laws of the Member States⁶⁰.

⁵⁸For the related case law, see, for instance, C-11/70. Internationale Handelsgesellschaft, [1970] ECR 1125; C 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629. For the development of the principle, see, for instance, Craig, Paul and Grainne De Burca. 2008. EU Law: Text, Cases, and Materials. New York: Oxford University Press.,344-378; Stierstorff, Martin. 2005. “The Relationship Between Community Law and National Law”. Jean Monnet/Robert Schuman Paper Series 5(33).

⁵⁹See, for instance, C-106/77, Simmenthal II, [1978] ECR 629 and C-106/89 Marleasing, [1991] ECR I-7321. Even though it is generally accepted that the EU law takes primacy over the national law of Member States, this principle is still disputed among the Member States. While the ECJ have been ruling that the primacy even extends to national constitutional law and preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with the Union law; many national Supreme or Constitutional Courts have made clear that the national constitutions are and ultimately remain the highest mandatory reference (Pernice, 2010: 51, 55). For different approaches of the EU Member States, see, for instance, Grabenwarter, Christoph. 2007. “National Constitutional Law Relating to the European Union”, In Armin Von Bogdandy and Jürgen Bast,(eds.) Principles of European Constitutional Law. Hart Publishing, 95-144.

⁶⁰While the ECJ have been ruling that the legal status of a national measure was not relevant to the question whether EU law should take precedence; some EU member states argue that the principle of primacy should not automatically apply to specific individual administrative acts. For this matter, see, for instance, Craig, Paul and Grainne de Burca. 2011. EU Law: Texts, Cases, and Materials. New York: Oxford University Press, 260-262.

Besides primacy of EU fundamental rights, their direct applicability and direct effect also need to be addressed since primacy of the Union law obtains its force through these principles⁶¹. Direct applicability means that a Union norm is in force and must be applied, not only by the Union institutions but also in the legal orders of the Member States⁶² (Rosas and Armati, 2010: 63). Accordingly, as a rule, except the Treaties, directives⁶³; and international agreements concluded by the Union that do not require adoption of legislative measures at the Union or national level, other binding EU law sources are directly applicable⁶⁴ (Kaczorowska, 2008: 295-298).

Direct effect of a Union norm means it can be invoked by an individual as the only source of a right that would not otherwise exist (Rosas and Armati, 2010: 64-65). The conditions for a norm to have direct effect are being clear, being unconditional, requiring in principle no further legislative intervention either on the part of the Member States or on the part of the Union institutions to implement it or to give it effect⁶⁵ (Winter, 1972: 434). Direct effect of EU law norms guaranteeing fundamental rights require the norm to be analyzed whether it fulfills the criteria to be directly effective regardless of the EU law source it is derived from (Craig and De Burca, 2008: 271). Thus, any EU law provision which is clear, unconditional and does not require in principle further legislative intervention either on the part of the

⁶¹For the distinction between direct effect and direct applicability, see, for instance, Winter, T. 1972. "Direct Applicability and Direct Effects". *Common Market Law Review* 9: 425; Arnall, Anthony. 2006. *The European Union and Its Court of Justice*. New York: Oxford University Press, 185-186.

⁶²The term should not be confused with the problem of incorporation of Treaty law in the domestic legal orders (Winter, 1972: 427).

⁶³Directives are not directly applicable since they become fully applicable only when the period prescribed for transposition has passed (Rosas and Armati, 2010: 64).

⁶⁴For detailed analysis of direct applicability of different EU law sources, see, for instance, Rosas, Allan and Lorna Armati. 2010. *EU Constitutional Law: An Introduction*. Oxford: Hart Publishing, 63-65; Winter, T. 1972. "Direct Applicability and Direct Effects" in *Common Market Law Review*: 9: 425-438.

⁶⁵See also C-41/74, *Van Duyn v. Home Office* [1974] ECR 1337.

Member States or on the part of the Union institutions to implement it or to give it effect may be invoked by individuals before national courts (Kaczorowska, 2008: 299-326). Accordingly, the Charter provisions on rights but not on principles do have direct effect (Ehlers, 2007: 381 and Craig, 2006: 508-512). General principles of EU law are also considered to be directly effective (Baykal, 2010: 376).

In addition to the principles mentioned above, status of international agreements that the Union is party within the EU and its Member States requires attention since the ECHR is an international agreement. The EU generally follows a monist approach (Schermers, 1975: 83 and Eeckhout, 2011: 326 and Uerpmann & Wittzack, 2007: 162)⁶⁶ to international law that, international agreements become part of the Union law through the act of conclusion⁶⁷, thus, without any further acts of incorporation or transposition unless the Treaties provide otherwise (Rosas and Armati, 2010: 65)⁶⁸. Act of conclusion generally contain a provision to the effect that “the Presidency of the Council is hereby authorized to designate the person empowered to sign the Agreement in order to bind the European Union”⁶⁹ (Craig and De Burca, 2008: 197). Thus, the agreement binds the EU at the same time both at the EU and international level. Whether the agreement in question will also have direct effect and direct applicability is another matter, which depends on the structure and

⁶⁶For the debate in the literature whether monist or dualist approach is adopted to international agreements concluded by the Union see for instance, Weiler, J. H. H. (ed.) 2005. *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*. New York: Oxford University Press., 93.

⁶⁷Act of conclusion is a decision adopted (normally) by the Council to conclude, on behalf of the Union, international agreements with third states or international organizations (Rosas and Armati, 2010: 65).

⁶⁸For claims denying the monist approach towards international agreements concluded by the Union and argue in favour of dualist approach, see for instance, Uerpmann-Wittzack, Robert. 2006. “The Constitutional Role of Multitreaty Systems” in Armin von Bogdandy and Jürgen Bast, eds., *Principles of European Constitutional Law*. Hart Publishing, 162-163.

⁶⁹See for the international agreement conclusion procedure at the EU level, for instance, Koutrakos, Panos. 2006. *EU International Relations Law*. Hart Publishing, 137-144.

content of each agreement (Rosas and Armati, 2010: 65; Craig and De Burca, 2008: 207 and Kaczorowska, 2008: 297)⁷⁰. Besides, the Court of Justice generally applies a two stage analysis to assess whether the provisions of the international agreement in question has direct effect. At first, it examines whether the agreement is in general capable of stipulating directly effective provisions by examining the purpose, the spirit, the general scheme and the terms of the agreement. Secondly, it examines whether the provision in question contains a clear and precise obligation which is not subject to the adoption of any subsequent measure (De Burca, 2002: 3).

Article 218 TFEU sets forth the procedure for conclusion of the ECHR. Accordingly, consent of the Parliament and unanimous decision of the Council are required for the agreement on accession. Moreover, approval of the act of conclusion by the Member States in accordance with their constitutional requirements is necessary for its entry into force. It will bind the Union both at the EU and international level with the signature of the accession agreement if the act of conclusion includes a provision stating “the Presidency of the Council is hereby authorized to designate the person empowered to sign the Agreement in order to bind the European Union.” On the entry into force and when the EU will be bound by the Convention at the international level, Article 10 paragraphs 3 and 4 of the Draft Accession Agreement states as follows:

3. This Agreement shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Contracting Parties to the Convention.....and the European Union have expressed their consent to be bound by the Agreement.....
4. The European Union shall become a Party to the Convention, to the Protocol to the Convention and to Protocol No.6 to the Convention at the date of entry into force of this Agreement.

⁷⁰See also, Craig, Paul and Grainne de Burca. 2008. EU Law: Texts, Cases, and Materials. New York: Oxford University Press, 207

Since the EU, distinct from its Member States, will accede to the Convention; the status of the Convention within the hierarchy of EU law sources needs to be explained. In general terms, primary sources of the Union law do have primacy over the secondary sources (Kaczorowska, 2011: 233). However, detailed analysis shows that the issue of hierarchy of EU law sources is a more complicated one. First of all, the foundations of the EU legal order inspired by Article 2 TEU⁷¹ prevail over all other parts of primary law⁷². General principles of the Union law also do have primacy over the Treaties since all the EU law sources must be applied and interpreted in accordance with them⁷³ (Baykal, 2010: 377). Other primary sources of the Union law are ranked below the two sources mentioned. Moreover, international agreements do have primacy over secondary sources but have lower rank than the primary sources of the EU law⁷⁴ (Rosas and Armati, 2010: 48)⁷⁵. Secondary sources are below these sources but there is also a different hierarchy among the secondary sources themselves⁷⁶. Accordingly, legislative acts have the higher rank, delegated

⁷¹“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail” (TEU, art. 2).

⁷²That is explicitly stated in the Kadi judgement: the EU constitutional order consists of some core principles which may prevail over provisions of the Treaties and thus written primary law. Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-6351.

⁷³Primacy of general principles of the Union law over the Treaties does not mean that Treaty provisions can be annulled due to being contrary to these principles. However, the Treaties should be applied and implemented in accordance with the general principles of the Union law (Baykal, 2010: 377).

⁷⁴The ECJ also held that international agreements are supreme over all secondary Community law; see, for instance, C-104/81, Hauptzollamt Mainz v. C. A. Kupferberg & Cie. Kga. A., [1982] ECR 3641 (Berkey, 1998: 628).

⁷⁵For related case law, see, for instance, C- 61/94 Commission v Germany [1996] ECR I-3989, para 52; Case C-341/95 Bettati [1998] ECR I-4355. Joined Cases C-402/05 P and C-415/05 P Kadi, para 307-308 (Rosas and Armati, 2010: 48).

⁷⁶The Treaty of Lisbon introduces a hierarchy for secondary law by drawing distinction in Articles 289, 290 and 291 TFEU between legislative acts, delegated acts and implementing acts. Legislative acts are legal acts which are adopted through ordinary or special legislative procedures. Delegated acts are non-legislative acts with a broad scope which supplement or amend certain non-essential parts of a legislative act. When uniform conditions are required for implementation, implementing acts are generally adopted by the Commission pursuant to a legislative act or delegated act (Craig and De Burca, 2011: 112-115; Kaczorowska, 2011: 213-228).

acts are in the middle and implementing acts are below them. Measures of national law necessary to implement Union legal acts do have the lowest rank, thus below the secondary sources (Rosas and Armati, 2010: 42).

Following the accession, the status of the Convention within the hierarchy of Union norms will be below primary law but above secondary law since it is an international agreement (Rosas and Armati, 2010: 48). Moreover, being a binding source of the Union's law as explicitly mentioned under Article 216(2) TFEU; it will have primacy over national laws (Wessel, 2011: 3) of the Member States when the issue at stake is about EU fundamental rights. The Convention's direct applicability following its entry into force will depend whether it will require adoption of legislative measures at the Union or national level (Kaczorowska, 2008: 298). Similarly, its direct effect within the EU legal order is a matter to be decided by the Union itself.

CHAPTER III

LEGAL IMPLICATIONS OF ACCESSION ON THE EU LEGAL ORDER

The current chapter will try to provide an explanation and analysis of the EU and the ECHR legal systems for fundamental rights protection. The aim of this analysis is to shed light to the current legal status of fundamental rights protection both at the EU and also at the ECHR level and to see whether accession will have any significant legal implications for the EU system of fundamental rights. Accordingly, each section will begin with explaining the current systems provided by both the EU and the ECHR and will conclude with the evaluation of the legal implications of the EU's accession to the Convention at the EU level. This chapter will try to describe and evaluate the guaranteed fundamental rights, undertakings of the Contracting Parties with regard to protection of fundamental rights, interpretation, addressees and beneficiaries, limitations of these rights, territorial and temporal scope of protection both at the EU and the ECHR level.

3.1. Guaranteed Fundamental Rights

Main body of the ECHR guarantees thirteen rights that are civil and political in nature. These rights are the right to life (Article 2); prohibition of torture (Article 3); prohibition of slavery and forced labour (Article 4); the right to liberty and security (Article 5), the right to a fair trial (Article 6); no punishment without law (Article 7); the right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9), of expression (Article 10), and of peaceful assembly and association (Article 11); the right to marry (Article 12); the right to an effective remedy (Article 13); and finally the prohibition of discrimination (Article 14)⁷⁷.

The catalogue of rights recognized in the Convention has been extended through Additional Protocols Nos. 1, 4, 6, 7, 12, 13. The First Protocol, that is Protocol to the Convention, provided for protection of property, the right to education, and the right to free elections. Protocol No. 4 prohibited three forms of conduct by government, being imprisonment for debt, the expulsion of nationals and collective expulsion aliens, and required everyone lawfully within the territory of a state to have freedom of movement. Protocol No. 6 provided for the abolition of the death penalty. Protocol No.7 required a right of appeal in criminal matters, compensation for wrongful conviction, and the right not to be tried or punished for the same offence twice, procedural safeguards relating to expulsion of aliens and equality between spouses. Protocol No.12 provides a general prohibition of discrimination and Protocol No.13 provides a complete abolition of death penalty.

⁷⁷For a detailed analysis of the rights protected by the ECHR, see, for instance, Renucci, Jean-François. 2005. Introduction to the European Convention on Human Rights. Council of Europe Publishing, 9-94.

Even though various fundamental rights are guaranteed within different EU law sources as mentioned under the previous chapter; the Charter provides for a suitable guideline *via* its binding catalogue of rights to see which fundamental rights are protected at the EU level in general⁷⁸. The Charter regulates three categories of rights which are not only civil and political but also economic, social and cultural in nature (Rosas and Armati, 2010: 154). The first category includes fundamental rights and freedoms as well as basic procedural rights guaranteed by the ECHR and derived from the constitutional traditions common to the Member States; such as right to life (Article 2) and liberty (Article 6), freedom of thought (Article 9) and expression (Article 11) and association (Article 12), privacy and family life (Article 7), equality (Title III), prohibition of torture (Article 4), non-discrimination (Article 21), and rights of children rights of persons with disabilities (Article 26). The second category includes fundamental rights that pertain only to the Union's citizens; such as participation in elections (Article 39), access to documents (Article 42) and to the ombudsman (Article 43), and right to good administration (Article 41). The last category comprises economic and social rights; such as social security and social assistance (Article 34), fair and just working conditions (Article 31) (Piris, 2010:152)⁷⁹.

⁷⁸Specific Treaties articles such as Article 157 TFEU ensuring male and female workers equal pay for equal work or work of equal value, Article 18 TFEU on prohibition of discrimination on grounds of nationality; directives on non-discrimination, which are Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; general principles of the Union' law such as right to equality, the right to an effective judicial remedy (Raitio, 2010: 103-104; Ehlers, 2007: 373-374); international agreements, to which the Union is party, such as UN Convention on the Rights of Persons with Disabilities are examples for EU law sources on fundamental rights other than the Charter.

⁷⁹For a detailed analysis of the Charter provisions, see, for instance, Mock, William B. and Gianmario Demuro (eds.) 2010. Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union. Carolina Academic Publishing.

Even though the Charter goes beyond civil and political rights protection (Foadi and Andreadakis, 2011: 609); the wording of the Article 52(5) of the Charter leads to a distinction made between rights and principles. This Article states as follows:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.

Thus, rights constitute subjective rights which may be directly invoked by individuals before courts; and principles define an objective to be respected by the EU legislature and the Member States in exercising their competences (Ehlers, 2007: 381 and Craig, 2006: 508-512). While such a distinction exists within the Charter, there is no a concrete definition about what constitutes rights and what constitutes principles (Bilen, 2005: 38-40 and Craig, 2006: 511-512).

When the comparison is made between the Charter and the ECHR provisions, it will be understood that the ECHR provisions have already been guaranteed at the EU level.

Table 1: Comparison between the Charter and the ECHR

CHARTER PROVISION	CORRESPONDING ECHR PROVISION
Article 1 Human dignity	Not in the ECHR
Article 2 Right to life	Article 2 corresponds to Article 2 of the ECHR titled "Right to life" and Article 6(2) of the Protocol No. 6 to the ECHR
Article 3 Right to the integrity of the person	Not in the ECHR
Article 4	Article 4 corresponds to Article 3 of the ECHR

Prohibition of torture and inhuman or degrading treatment or punishment	titled "Prohibition of torture"
Article 5 Prohibition of slavery and forced labour	Article 5(1) and (2) correspond to Article 4 of the ECHR titled "Prohibition of slavery and forced labour"
Article 6 Right to liberty and security	Article 6 corresponds to Article 5 of the ECHR titled "Right to liberty and security"
Article 7 Respect for private and family life	Article 7 corresponds to Article 8 of the ECHR titled "Respect for private and family life"
Article 8 Protection of personal data	Considered to fall under Article 8 ECHR titled "Right to respect for private and family life"
Article 9 Right to marry and right to found a family	Article 9 corresponds to the Article 12 of the ECHR titled "Right to marry", but its scope may be extended to other forms of marriage if these are established by national legislation
Article 10 Freedom of thought, conscience and religion	Article 10(1) corresponds to Article 9 of the ECHR titled Freedom of thought, conscience and religion"
Article 11 Freedom of expression and information	Article 11 corresponds to Article 10 of the ECHR titled Freedom of expression" without prejudice to any restrictions which Community law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR
Article 12 Freedom of assembly and of association	Article 12(1) corresponds to Article 11 of the ECHR titled "Freedom of assembly and association", but its scope is extended to European Union level
Article 13 Freedom of the arts and sciences	Considered to fall under Article 10 ECHR titled "Freedom of expression"
Article 14 Right to education	Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training. Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents
Article 15 Freedom to choose an occupation and right to engage in work	Not in the ECHR
Article 16 Freedom to conduct a business	Not in the ECHR
Article 17 Right to property	Article 17 corresponds to Article 1 of the Protocol to the ECHR
Article 18 Right to asylum	Not covered directly, but considered under Article 3 of the ECHR in ECtHR case law
Article 19	Article 19(1) corresponds to Article 4 of

Protection in the event of removal, expulsion or extradition	Protocol No 4. Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the ECtHR
Article 20 Equality before the law	Not in the ECHR
Article 21 Non-discrimination	Corresponds to Article 14 ECHR titled "Prohibition of discrimination"
Article 22 Cultural, religious and linguistic diversity	Not in the ECHR
Article 23 Equality between men and women	Not in the ECHR
Article 24 The rights of the child	Not in the ECHR
Article 25 The rights of the elderly	Not in the ECHR
Article 26 Integration of persons with disabilities	Not in the ECHR
Article 27 Workers' right to information and consultation within the undertaking	Not in the ECHR
Article 28 Right of collective bargaining and action	Corresponds to Article 11 of the ECHR titled "Freedom of assembly and association"
Article 29 Right of access to placement services	Not in the ECHR
Article 30 Protection in the event of unjustified dismissal	Not in the ECHR
Article 31 Fair and just working conditions	Not in the ECHR
Article 32 Prohibition of child labour and protection of young people at work	Not in the ECHR
Article 33 Family and professional life	Not in the ECHR
Article 34 Social security and social assistance	Not in the ECHR
Article 35 Health care	Not in the ECHR
Article 36 Access to services of general economic interest	Not in the ECHR
Article 37	Not in the ECHR

Environmental protection	
Article 38 Consumer Protection	Not in the ECHR
Article 39 Right to vote and to stand as a candidate at elections to the European Parliament	Not in the ECHR
Article 40 Right to vote and to stand as a candidate at municipal elections	Not in the ECHR
Article 41 Right to good administration	Not in the ECHR
Article 42 Right of access to documents	Not in the ECHR
Article 43 Ombudsman	Not in the ECHR
Article 44 Right to petition	Not in the ECHR
Article 45 Freedom of movement and of residence	Not in the ECHR
Article 46 Diplomatic and consular protection	Not in the ECHR
Article 47 Right to an effective remedy and to a fair trial	Article 47(1) corresponds to Article 13 of the ECHR. Article 47(2) and (3) correspond to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation
Article 48 Presumption of innocence and right of defence	Article 48 corresponds to Article 6(2) and(3) of the ECHR
Article 49 Principles of legality and proportionality of criminal offences and penalties	Article 7 ECHR
Article 50 Right not to be tried or punished twice in criminal proceedings for the same criminal offence	Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States.

Sources: "Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50" and Mock, William B. and Gianmario Demuro (eds.) 2010. "Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union". Carolina Academic Publishing.

Accordingly, accession to the Convention will not make any difference for the rights guaranteed at the EU level. In fact, the Union affords a more extensive protection. Right to marry and right to found a family is an example of this extensive protection. While the Article 12 of the Convention makes a restrictive interpretation for this matter and holds that right to marry refers to traditional marriage between persons of opposite biological sex; the Charter's Article 9 neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. Other examples where the Union offers more extensive protection than the ECHR are right to life, prohibition of torture and inhuman or degrading treatment, prohibition of slavery and forced labour, freedom of thought, conscience and religion, freedom of expression, right to property, right to education, right to liberty, right to an effective remedy and right to a fair trial (Bilen, 2005: 30-33). Moreover, it should be kept in mind that it is always possible for the Court of Justice to develop further fundamental rights through its case law as general principles of the Union law (Groussot and Pech, 2010: 3).

3.2. Interpretation of Fundamental Rights

The general principles for interpretation of treaties⁸⁰ are set forth within Articles 31 to 33 of the Vienna Convention on the Law of the Treaties⁸¹ and the Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations⁸². The ECtHR stated in its *Golder* case that it should be guided by Article 31-33 of the VCLT, which are “generally accepted principles of international law (Dijk and others, 1998: 72). The ECJ also considers several provisions of these two treaties, including the ones on interpretation, to constitute generally accepted principles of international law and applies them in the interpretation of international agreements concluded by the Union (Wouters and Eeckhoutte, 2002: 11). Accordingly, rules of interpretation set forth within these two treaties are applicable for the interpretation of ECHR provisions and for the EU fundamental rights. However, the rules of interpretation set forth within these two treaties do not provide clear-cut solutions to all problems of treaty interpretation due to the special features of a treaty in question as Dijk and others put it. This is the case for treaties on the protection of fundamental rights (1998: 72).

The principal rule for treaty interpretation is laid down in Article 31(1) of both treaties mentioned above. Accordingly, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The same Article further

⁸⁰For general principles of interpretation, see also, Pazarcı, Hüseyin. 2004. *Uluslararası Hukuk Dersleri*: 1. Kitap. Turhan Kitabevi, 195-206; Ünal, Şeref. 2005. *Uluslararası Hukuk*. Yetkin Yayınları, 60-61.

⁸¹Vienna Convention on the Law of the Treaties was done at Vienna under the auspices of the United Nations on 23 May 1969 and entered into force on 27 January. http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁸²Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations was done at Vienna on 21 March 1986 and is not yet in force. http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf.

provides indications for the “context of a treaty” and states that the “context” of a treaty includes not only the text but also its preamble, annexes and any agreement or instrument in connection with the conclusion of the treaty and any subsequent agreement and practice regarding its interpretation. Also, any relevant rules of international law applicable in relations between the parties shall be taken into account along with the context. Lastly, last paragraph of the Article sets forth that a special meaning is to be given to treaty terms if it is established that the Contracting Parties so intended. Supplementary means of interpretation are mentioned under Article 32. This Article states that the preparatory work of the treaty and the circumstances of its conclusion, shall be used in order to confirm the meaning resulting from the application of Article 31; or to determine the meaning when the interpretation according to Article 31 “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable”. Providing for these bases of interpretation, VCLT and the Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations attempt to enunciate principles that are applicable to all types of treaties and thus it does not differentiate in any explicit way between groups of treaties by reference to their subject matter, nor mentions the application of treaties to individuals (Orakhelashvili, 2008: 301-338). Article 33 of both treaties is on the interpretation of treaties authenticated in two or more languages. Accordingly, in case of a difference between the authentic texts of the treaty, which is subject to interpretation, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted.

As in the case for the interpretation of any other treaty, the structure of reasoning in fundamental rights interpretation may rest on the above mentioned five

bases (Toufayan, 2005: 7). However, application of these five bases for interpretation is not always adequate due to specific features of a treaty in question. In the case of treaties on fundamental rights, the specific object and purpose, which is the protection of the individual, results central and crucial role to be given to the object and purpose of these treaties⁸³ (Dijk and others, 1998: 73). This object and purpose ground for interpretation requires at least four principles to be taken into account. The first of these principles is the “effectiveness rule”. This principle requires that interpretation of a treaty on fundamental rights make its purpose, that is, protection of individuals’ rights, effective. Second one is the “evolutive interpretation” since fundamental rights are not static and thus require dynamic interpretation. “Rule of autonomous interpretation” means, fundamental rights treaties’ provisions should be given meaning as part of the relevant treaty arrangement and not, for instance, the same meaning as the relevant word would possess under the internal law of the Contracting Party. The last principle is the “proportionality.” This principle implies the need to strike a proper balance between the different interests (Orakhelashvili, 2008: 301-335 and Dijk and others, 1998: 73-77).

Interpretation of the ECHR depends both on the general principles of interpretation laid down in the VCLT⁸⁴ and to the case law of the ECtHR⁸⁵ which takes into account specific principles of fundamental rights interpretation mentioned above. For instance, Article 33 VCLT is relevant for the Convention’s interpretation since the Convention is authenticated in two languages, English and French. Thus, in

⁸³For specific features of treaties on fundamental rights, see, for instance, Toufayan, Mark. 2005. “Human Rights Treaty Interpretation: A Postmodern Account of Its Claim to Speciality”. Centre for Human Rights and Global Justice Working Paper, 2.

⁸⁴General principles of interpretation laid down in the VCLT considered as guidelines for interpreting the Convention with the case *Golder v. United Kingdom* [1979-1980] 1 EHRR 524 (Çavuşoğlu, 1994: 75).

⁸⁵Article 45 ECHR extends the jurisdiction of the Court to the interpretation of the Convention.

case of a difference in meaning the two authentic texts, the meaning which best reconciles the texts, having regard to object and purpose of the treaty is to be adopted (Dijk and others, 1998: 72). In addition to general principles of interpretation, different rules of interpretation are applied by the Court due to specific features of the Convention. These so called specific features are being a treaty aimed at protection of individuals, effective interpretation to achieve the object and purpose of the treaty, dynamic or evolutive, autonomous interpretation, margin of appreciation and proportionality principles (Dijk and others, 1998: 72-96). The Court emphasized the very specific nature of the Convention as a consequence of being fundamental rights centered in the case of *Austria v. Italy*⁸⁶ as follows:

The obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.

Also in *Wemhoff v. Federal Republic of Germany*,⁸⁷ the Court noted that, because the Convention is a law-making treaty, it is necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the objective of the Treaty. The application of the effectiveness principle also pointed out by the Court as follows:

In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions interpreted and applied so as to make its safeguards practical and effective⁸⁸.

⁸⁶ *Austria v. Italy*, 788/60, decision of 11 January 1961, Yearbook 4, p. 116.

⁸⁷ *Wemhoff* [1979-1980] 1 EHRR 55.

⁸⁸ See for instance, *Golder v. United Kingdom* [1979-1980] 1 EHRR 524.

Evolutionary interpretation principle has also been confirmed by the Court on many occasions stating that the Convention is a living instrument which must be interpreted in the light of present day conditions⁸⁹. The logic and importance of the principle of autonomous interpretation was explained by the Court in the case of *Engel and Others v. the Netherlands*⁹⁰. In this case the Court stated as follows:

If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 [articles providing minimum rights to those who are charged of a criminal offence] would be subordinated to their sovereign will. Latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.

Margin of appreciation and proportionality are another specific principles utilized for the interpretation of the Convention. Margin of appreciation applies whenever the review of a case under the Convention requires the Court to make assessments of the weight of the various interests at stake or of the seriousness of a particular situation, especially where the national authorities, by reason of their direct and continuous contact with vital forces of their countries, are in a better position than the Court to make the assessment and where national opinions may legitimately vary⁹¹ (Dijk and others, 1998: 85). Thus, this principle entitles Contracting Parties to act, under institutional supervision, in deviation from their ordinary Convention obligations. It denotes the arrangement within the legal framework established by the Convention according to which the Contracting Party has the initial freedom to determine scope of its obligations. Considering domestic circumstances, it does not require, absolute uniformity among the Contracting Parties (Orakhelashvili, 2008:

⁸⁹ See, *Loizidou v. Turkey* [1995] EHRR 99.

⁹⁰ *Engel and Others v. the Netherlands*, judgment 6/8/1976, Series A, No. 22.

⁹¹ For margin of appreciation principle, see, for instance, O'Donnell, Thomas. 1982. “The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights”. *Human Rights Quarterly* 4.

197-2001); and thus the Court respects the primacy of the national authorities in protecting fundamental rights (Gerards and Senden, 2009: 645). However, application of this principle is only possible when the obligation to which it relates is indeterminate; such as national security, territorial integrity of States, public safety, prevention of disorder, protection of health or morals, public order, protection of the rights and reputation of others, prevention of disclosure of information received in confidence and maintenance of the independence and impartiality of the judiciary.

The proportionality principle controls recourse to the margin of appreciation (Orakhelashvili, 2008: 197-201). None of the provisions in the Convention refer explicitly to this principle, but the Court made it one of the key elements of its interpretation of the Convention, since the 1960's (Salcedo, 2006: 386). This principle consists of three tests, which are the suitability, the necessity and the proportionality *stricto sensu* (in the strict sense) tests, applied to the allegedly infringing measure. The suitability or appropriateness test refers to the relationship between the means and the end. The question asked is whether the chosen measure is suitable or appropriate in order to achieve the given aim proposed to be achieved by using the chosen measure. The necessity test implies that the Court assesses whether the chosen measure is necessary to achieve the proposed goal, in the meaning that the measure should be chosen which is least restrictive on the given norm. In the third test the measure's proportionality is assessed *stricto sensu*, meaning that a measure is disproportionate if it, although suitable and necessary, nevertheless imposes an excessive burden on the individual (Harbo, 2010: 165).

Interpretation of the EU fundamental rights depends on the general principles of interpretation laid down in the VCLT and VCLT between States and International

Organizations or between International Organizations (Wouters and Eeckhoutte, 2002: 11), the Charter (Article 52), and the case law of the Court of Justice since the Court of Justice is authorized under Article 19(1)⁹² TEU to ensure that the law is observed in the interpretation of the Treaties. Article 33 VCLT may be considered as an example for application of the VCLT for interpretation at the EU level. Accordingly, EU legislation is drafted in several languages, which means, different language versions are all equally authentic and may have to be compared, if interpreting the provisions in a way which is consistent with nearly all of the language versions. In a situation where comparison deems to be necessary, the Court of Justice turns for guidance to the purpose and context of the provision⁹³. In addition to the general rules of interpretation, the Court of Justice applies also different rules of interpretation which emanates from specific features of the EU. These are effective, evolutive, autonomous interpretation and principle of proportionality. Moreover, principle of sincere cooperation does also have importance for the interpretation of the EU law by the Member States (Rosas and Armati, 2010: 59). The Court emphasized the very specific nature of the EU as a result of being an international organization conferring rights and obligations not only to the Member States but also to the individuals in its *Van Gend en Loos*⁹⁴ case as follows:

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights

⁹²“The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.” (TEU, Art. 19, para. 1).

⁹³See, for instance, C-296/95, *The Queen v. Commission of Customs Excise ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* [1998] ECR I-1605.

⁹⁴C-26/62, *Van Gend en Loos* [1963] ECR 3.

arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the community.

The Court underlined specific rules for the Union law's interpretation in *CILFIT v Ministry of Health*⁹⁵ case. The effectiveness of interpretation is one of those applied by the Court. Lord Denning touched upon this kind of interpretation of the Court stating

When the Court comes upon a situation which is to its mind within the spirit-but not the letter-of the legislation, it solves the problem by looking to the design and purpose of the legislature-at the effect which it was sought to achieve. It then interprets the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation.⁹⁶

In its *Portelange*⁹⁷ case the Court of Justice confirmed the dynamic nature of the EU law *via* stating that it can change its case law any time in another application made to it. Accordingly, the evolutive interpretation lies at the heart of dynamic nature of the Union law. Another principle applied by the Court for interpretation is the autonomous interpretation of the EU law as the Court also confirmed in its *Internationale Handelsgesellschaft*⁹⁸ case. Thus, the Union law uses terminology which is peculiar to it that the legal concepts do not necessarily have the same meaning in Union law as in the laws of the Member States (Arnull, 2006: 608). The Court applies the proportionality principle when it balances legislative and administrative measures against private interests, individual rights and fundamental freedoms, in addition to a number of other areas (Harbo, 2010: 171). Principle of sincere cooperation set forth under Article 4(3) TEU. Duty of sincere cooperation

⁹⁵C-283/81, *CILFIT v. Ministry of Health* [1982] ECR 3415.

⁹⁶C-187/87, *Saarland v. Minister for Industry* [1988] ECR 5013, 5402.

⁹⁷C-10/69, *Portelange v S.A. Smith Corona Marchant International and Others* [1969] ECR 309.

⁹⁸C-11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

binds all authorities of the EU Member States, including their courts. Accordingly, the national courts are required to interpret their national law in the light of the EU law that national judges act as the key players in providing the legal protection which individuals derive from the rules of the EU law (Rosas and Armati, 2010: 59).

These rules of interpretation, deriving from the specific features of the EU law and developed by the case law of the Court, are also applicable for EU fundamental rights since these rights are part of the Union law. In addition to these rules which are applicable for the EU law in general; the Treaties and the Charter provides for more specific rules regarding the issue of interpretation. Article 6(1) TEU under its third sub paragraph explicitly mentions the interpretation of the Charter. Accordingly, general provisions in Title VII of the Charter⁹⁹ and explanations referred to in the Charter will guide interpretation of fundamental rights in the Charter. Moreover, third paragraph of the same Article implicitly refers to interpretation of fundamental rights, which are part of the general principles of the EU law. Thus, Article 6(3) TEU makes it obligatory to interpret fundamental rights guaranteed under general principles of the EU's law in accordance with the ECHR and constitutional traditions common to the Member States (Lawson, 1994: 227).

While Articles 52 and 53 of the Charter addresses conflict of interpretation issue; Article 54 sets the limits for interpretation. Paragraphs 4 and 6 of Article 52 aim to ensure a harmonious interpretation of the Charter's provisions within Member States' juridical systems (Mock and Demuro, 2010: 344). Article 53 comes into play specifically when potential conflict of interpretation occurs between the ECJ and

⁹⁹Title VII named "General Provisions Governing the Interpretation and Application of the Charter" includes Article 51 on field of application, Article 52 on scope and interpretation of rights and principles, Article 53 on level of protection and Article 54 on prohibition of abuse of rights.

ECtHR. In such cases, the Article imposes the need for an interpretation of the fundamental rights protected by the Charter, which neither prejudices nor reduces the significance of the rights guaranteed by the national constitutions of the Member States, and by legal instruments for international protection (Mock and Demuro, 2010: 339).

There is an ongoing debate within the literature on the affect of accession for the divergent interpretations of the ECJ and the ECtHR¹⁰⁰ on the same matters. While some, such as Bilen (2005: 139) and Wetzel (2003: 2843-2845) claim that there exists certain divergences in the Convention's interpretation by the two Courts and these divergences may continue after the accession; Berghe (2010: 114-119) is in the view that such a problem does not exist and will not cause a problem after the accession. In his study Bilen argues that the reason for the divergent interpretations of the two Courts is because they both refer to "object and purpose" basis for interpretation. Accordingly, while the ECtHR interprets the Convention according to its objective, that the protection of the individual as a human being; the ECJ interprets it according to the Union's objectives, which is to further economic and social integration. In his study Berghe argue differently and demonstrate the unlikelihood of the conflict of interpretation between the two courts. First of all he refutes the claim that interpretation, based on object and purpose of a given treaty, applied by both courts cause conflict of interpretation by depending on the margin of appreciation doctrine. To be more precise, different objectives do not endanger significant divergences in interpretation since the ECtHR takes into account different contexts in which the fundamental rights issue arise and, it refers to the Contracting

¹⁰⁰For divergent interpretations of the Courts on the same matter, see, for instance, C-168/91, *Konstantinidis v Stadt*, [1993] ECR I-1191; Cases C-46/87, C-227/88, *Hoechst AG v. Commission*, [1989] ECR 2859; *Niemietz* [1993] 16 EHRR 97 (Wetzel, 2003: 2843-2845)

Parties' margin of appreciation and thus giving them discretion for interpretation (2010: 114). Moreover, he explains conflict avoidance strategies and mechanisms developed by the two courts over time. These are, the ECJ's direct references to the Convention, the EU legal instruments explicitly referring to the Convention, equivalent protection doctrine¹⁰¹ developed by the ECtHR in its *Bosphorus* judgement regarding the fundamental rights jurisdiction by the ECJ, and adjustment mechanisms that will be set forth by the Convention mechanism to prevent inconsistencies in interpretation (2010: 113-121).

Taking into account the rules for interpretation, applied both at the Union and the ECHR level, it may be deduced that the Union's accession to the Convention will not alter the current situation at the EU level regarding the interpretation of EU fundamental rights; even though the ECtHR will have the final word on the rights enshrined in the Convention (Kuijter, 2011: 21). To be more precise both Courts apply similar rules for interpretation such as evolutive and autonomous interpretation and proportionality; margin of appreciation principle applied by the ECtHR, will give discretion to the Union to preserve its vital choices on many issues; and the ECtHR recognized that equivalent protection is provided by the EU to fundamental rights in its case law. Moreover, the Court of Justice has already been drawing inspiration from both the ECHR and the case law of its Court, since Article 6(3) TEU and Article 52(3) and 53 of the Charter explicitly mentions the role of the ECHR. Also the Draft Accession Agreement sets forth a mechanism, prior involvement of the Court of Justice under co-respondent mechanism, to prevent any divergences in

¹⁰¹The doctrine of equivalent protection had already been announced in a decision by the European Commission of Human Rights, *M. and Co. v. Federal Republic of Germany* [1990] EHRR (Perez, 2009: 33).

interpretation¹⁰². These features may serve to prevent any conflicts of interpretation between the two Courts.

3.3. The Undertakings of the Contracting Parties

Obligations of the Contracting Parties under the Convention may be deduced from Article 1 ECHR (Ovey and White, 2010: 84). Due to the obligation derived from this provision¹⁰³, titled “obligation to respect human rights”, the Contracting Parties have to secure to everyone within their jurisdiction the guaranteed fundamental rights within the Convention. This Article confers double obligation upon the Contracting Parties. A negative obligation to not to infringe rights in the Convention and a positive obligation to ensure the rights protected by the Convention are guaranteed to those within the jurisdictions of the Contracting Parties *via* bringing their internal laws and practices in line with the provisions of the Convention (Ovey and White, 2010: 86). Regarding a particular situation which is of importance to the relations between EU and its Member States, the ECtHR stated in its *Matthews v. UK*¹⁰⁴ case that the Convention does not forbid any of its members from transferring competences to other international organization under the prerequisite of security of Convention rights. Moreover, the Contracting Party remains responsible after such a transfer. The ECtHR also stated in its *M. and Co. V. Germany*¹⁰⁵ case that transferring powers to an international organization does not infringe obligations of the Contracting Parties emanating from the Convention provided that the latter organization has equivalent protection (Mowbray, 2007: 71).

¹⁰²This mechanism will be explained in detail under Chapter IV Section 3.

¹⁰³“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” (ECHR, Article 1).

¹⁰⁴*Matthews v. UK* [1999] 28 EHRR 361.

¹⁰⁵*M. and Co. v. Germany* [1990] EHRR 13258/87.

The EU and Member States when implementing Union law have already been under an obligation to act in accordance with the EU fundamental rights since the ECJ considers these rights as prerequisites for legality of the EU acts¹⁰⁶, these rights form part of the EU law as general principles of EU law, and the Charter obliges them to respect (Groussot, Pech and Lock, 2011: 1-2). Court of Justice interpreted the obligation of the Member States to respect EU fundamental rights when they are implementing, applying, interpreting EU law¹⁰⁷ and when they take national measures derogating from the EU law¹⁰⁸ (Groussot, Pech and Lock, 2011: 1, 7 and Weiler, 1998: 67)¹⁰⁹. Also, Article 51(1) of the Charter obliges the Union and the Member States when they are implementing Union law to respect the rights and promote their application.

However, the obligations of the EU and the Member States with respect to international agreements concluded by the Union will be emphasized specifically since the Convention will become part of the Union law as a “mixed international agreement”. International agreements concluded by the Union are binding on the EU institutions and on the Member States as stated under Article 216(2) TFEU. As a consequence, both the Union and its Member States oblige to fulfill commitments undertaken pursuant to provisions of the international agreement in question. This obligation results from the Article 26 of the VCLT and VCLT between States and International Organizations or between International Organizations (Koutrakos,

¹⁰⁶See for instance, C-294/83, *Les Verts* [1986] ECR 1339, para. 23; Joined Cases C---402/05 P and C-415/05, P *Kadi and Al Barakaat* [2008] ECR I--6351, para. 316 (Groussot, Pech and Lock, 2011: 1).

¹⁰⁷C-5/88, *Wachauf* [1989] ECR 2609.

¹⁰⁸C-C-260/89, *Elliniki Radiophonia Tileorassi* [1993] ECR-2925.

¹⁰⁹EU fundamental rights’ applicability within the Member States is limited to Member State measures which fall within the scope of EU law. For related case law, see, for instance, C-12/86, *Demirel* [1987] ECR 3719; C-159/90, *Grogan* [1991] ECR I-4685; C-299/95, *Kremzow* [1997] ECR I-2629 (Groussot, Pech and Lock, 2011: 1).

2006: 184). Moreover, international obligations of the Union, assuming a Union law obligation by the Member States, also emanates from the duty of Member States under Article 4(3) TEU to take all appropriate measures, to ensure fulfillment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Union (Koutrakos, 2006: 185).

The principles of efficiency and assimilation, which can be derived from the principle of sincere cooperation, explain the obligations of the Member States regarding international agreements concluded by the Union. The principle of efficiency or effective application of EU law requires that Member States should guarantee effective legal protection for nationals and legal persons within their territory concerning rights arising from EU law. The principle of assimilation refers to the obligation of the Member States not to provide the provisions of EU law with an inferior and less effective means of implementation and legal protection than are provided by the similar types of provisions in national law (Raitio, 2010: 96).

Besides these general obligations deriving from the conclusion of an international agreement by the Union; mixed agreements require specific attention since Member States themselves are also under obligation to ensure these treaties are applied within their national legal orders as a consequence of concluding the agreement in question separate from the Union. The initial starting point to determine obligations of the EU Member States deriving from mixed international agreements is the competence clause added to such agreements¹¹⁰. However, not all agreements include such a clause (Steinberger, 2006: 839-840 and Cremona, 2006: 23-25). The

¹¹⁰For examples of declaration of competence by the European Community, see, European Commission, External Relations, DG RELEX/B2. "Agreements With a Declaration of Competence by the EU". <http://ec.europa.eu/world/agreements/viewCollection.do?fileID=58585>.

absence of a clear distinction of powers makes it difficult for third parties to determine the obligated party. In such situations, the Court of Justice suggests that the principle should be that the EU and its Member States are jointly liable¹¹¹. This joint obligation towards third parties results from the Union's and the Member States' duty of sincere cooperation because the EU law must be capable of fully complying with international obligations flowing from mixed agreements (Hillion, 2009: 24). Accordingly, Member States have an EU law obligation to implement a mixed agreement insofar as its provisions are within the scope of EU competence (Cremona, 2006: 16).

At present, Member States of the Union are themselves obliged to secure the compatibility of the Union law with the Convention as a consequence of being a party to an international organization because, the EU itself still is not under an international obligation to follow ECHR rights and freedoms since it is not a party to it (Jürgen, 2007: 171-172). However, accession to the Convention will result in international obligation for the Union distinct from its Member States limited to its competences. Article 1(c) of the Draft Accession Agreement states this as follows:

Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the Protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

In addition, since the Convention will become part of the Union law as a mixed international agreement; it will refer obligations both to the Union and its

¹¹¹See, for instance, C-316/91, *European Parliament v Council (EDF)* [1994] ECR I-625, and *Opinion Jacobs AG*, para 69; C-53/96, *Hermès* [1998] ECR I-3603, para 24. Further on international responsibility for mixed agreements, see, for instance, C Tomuschat. "Liability for mixed agreements" in O'Keeffe & Schermers; G Gaja, "The European Community's rights and obligations under mixed agreements" in O'Keeffe & Schermers (Hillion, 2009: 24).

Member States following the accession (Cremona, 2006: 20). Actually, Protocol No. 8 to the Treaty of Lisbon states that the accession will neither affect the competences of the Union or the powers of its institutions, nor will affect the situation of Member States in relation to the Convention. Accordingly, the Member States will only continue to act in accordance with the Convention when implementing and applying and derogating from the Union law (Groussot, Pech and Lock, 2011: 1, 7 and Weiler, 1998: 67). Thus, Member States' obligations under the Convention will not be affected (Mathisen, 2010: 32).

Since the EU has already been guaranteeing the Convention rights through general principles of EU law and the Charter, it has been under an indirect obligation to secure the Convention rights. Moreover, as a consequence of Protocol No. 8 to the Convention, the Member States' situation in relation to the Convention will not be affected that, the Member States will continue to be hold responsible for following Convention rights at the EU level only when they are implementing, applying and derogating from EU law. Accordingly, the significance of accession will lie with the direct obligation of the EU in relation to the Convention, instead of Member States' obligation to secure the compatibility of the Union law with the Convention as a consequence of being a party to an international organization.

3.4. Addressees and Beneficiaries

3.4.1. Addressees

The Convention rights are addressed to the Contracting Parties. Thus, the contractual obligation engages all branches of Contracting Parties' administrative structure and applies on all inter-party levels irrespective of the form and manner in which the Contracting Party may act. It includes individuals acting in the performance of a public power or duty, as well as those entities that are either owned by the state or at least controlled by the same (Ehlers, 2007: 41-45).

The EU fundamental rights are addressed to the EU, and Member States only when they are implementing, applying and derogating from the Union law (Weiler, 1998: 67 and Kühling, 2007: 522-526). The Charter contains a provision, which explicitly provides for the entities bound with the Charter rights. Article 51(1) of the Charter states that "the provisions of this Charter are addressed to the institutions, bodies, offices, and agencies of the Union with due regard to principle of subsidiarity and to the Member States only when they are implementing Union law" (Bilen, 2005: 45-47).

Following accession to the Convention, the EU, thus its institutions, bodies, agencies, its other organs, and officials acting on behalf of the Union will be the entities bound by the Convention at the international level. Article 1(c) of the Draft Accession Agreement states this explicitly as follows:

Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf...

3.4.2. Beneficiaries

The wording of the Article 1 of the Convention obliges the Contracting Parties to guarantee the rights to everyone within their jurisdiction. This being so, it follows that protection of fundamental rights in the Convention cannot be limited in their effect to the citizens of one country. Thus, the citizens of non-Member States enjoy the rights set out in the ECHR whenever they are under the jurisdiction of the Contracting Parties (Bilen, 2005: 10). The meaning of the term “everyone” can be deduced from Article 34, according to which the ECtHR can receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of violation of the rights set forth in the Convention (Ehlers, 2007: 39). However, the respective scope of a right may be inherently limited to a particular group, like right to marry. The state does not benefit from but is bound by the Convention rights. This holds true even if the state avails itself of private law patterns of organization, or if its actions are governed by private law” (Ehlers, 2007: 40). Moreover, since inter-state application is accepted by the Convention, Contracting Parties can also be considered as beneficiaries of the Convention rights.

At the EU level, Member States and not only the citizens but all human beings and legal persons are beneficiaries of EU fundamental rights (Kühling, 2007: 530). Besides, beneficiaries of the EU fundamental rights should be determined according to the features of the right in question. For instance citizens’ rights only apply to the citizens of the Union, right to marry is a right which can only be utilized by human beings and prohibition of discrimination is a right that is granted both to the individuals and Member States. In addition to Member States and individuals, entities with legal personality and groups of individuals can also be beneficiaries of

the EU fundamental rights if the nature of the right in question permits an application to non-natural persons (Ehlers, 2008: 385 and Kühling, 2007: 530).

Accession to the Convention will not alter the above mentioned beneficiaries of the fundamental rights at the EU level. In addition, the EU itself will become a beneficiary of the guaranteed rights by the Convention since it may take a case to the ECtHR against Contracting Parties to the Convention, excluding its own Member States. Article 344 TFEU obliges Member States not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein and Article 3 of Protocol No. 8 to the Treaty of Lisbon refers to this Article (Explanatory Report to the Draft Accession Agreement, para. 64). This is in accordance with the Article 55¹¹² of the Convention which allows its Contracting Parties to conclude a special agreement to utilize means of dispute settlement other than the Convention.

3.5. Limitations of Fundamental Rights

The ECHR has three main categories of limitation upon the rights it guarantees¹¹³. First of all, almost all rights in the Convention or its Protocols are potentially subject to derogation in time of war or other specified emergency, the conditions of which are set out in Article 15(1) ECHR (Peers and Ward, 2004: 142).

¹¹²For detailed analysis of Article 55 ECHR, see for instance, Shany, Yuval. 2003. *The Competing Jurisdictions of International Courts and Tribunals*. New York: Oxford University Press, 188.

¹¹³For different categorizations for limitations of fundamental rights contained in the ECHR, see, for instance, Çakmak, Cenap. 2007. "Shortcomings in ECHR and Other Council of Europe Legal Documents on Human Rights," *Uluslararası Hukuk ve Politika* 2(8): 117-132; White, Robin C. A. and Clare Ovey. 2010. *The European Convention on Human Rights*. Oxford University Press, 106-130; Salcedo, Juan Antonio Carrillo. 2006. "The European Convention of Human Rights" in Felipe Gomez Isa and Koen de Feyter (eds.) *International Protection of Human Rights: Achievements and Challenges*. Thematic Network on Humanitarian Development Studies, 365-367.

Under this paragraph, any Contracting Party may, in time of war or other public emergency, may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. Thus, authorities of the Contracting Parties are left a wide margin of appreciation. These rights may considered to be absolute in peace time. To exemplify, Article 5 includes certain rights which must be provided to a person arrested or detained and Article 6 provides for some standards on a right to a fair trial which must be adhered to, are such kind of rights. Secondly, there are certain rights which are absolute, as they are not subject either to specific limitations or to the emergency derogation permitted by Article 15(1) ECHR. These non-derogable rights are set out under Article 15(2) of the Convention. Accordingly, no derogation is permitted even in time of war or other public emergency from Article 2 on right to life, except in respect of deaths resulting from lawful acts of war, from Article 3 on prohibition of torture or to inhuman or degrading treatment or punishment, Article 4(1) on prohibition of slavery and servitude and from Article 7 on prevention of retrospective punishment for crimes. Finally, there are rights, such as right to respect for private and family life, right to freedom of expression, and the right to the peaceful enjoyment of property, interference with which is permissible subject to various qualifications. These include the requirement that any interference must be in accordance with the law, be necessary in a democratic society and be related to one or more of the permissible aims as set out in the relevant Article (Ehlers, 2007: 51-53 and Kühling, 2007: 533-536).

Besides these three categories of rights limitation, Article 17 of the Convention sets out a general rule on the scope of limitations (Ehlers, 2007: 52). This Article seeks to prevent abuses of the Convention and therefore precludes Parties from invoking its guarantees for any activity aimed at the destruction of the rights and freedoms or at their limitation to a greater extent that is provided for the Convention itself. This means that the Contracting Party to the Convention may prohibit and punish an abusive exercise of fundamental rights. At the same time, however, it is barred from imposing more stringent restrictions than envisaged by the ECHR (Ehlers, 2007: 52).

At the EU level, mainly the case law of the Court of Justice and the Charter provisions provide for limitations of the EU fundamental rights (Ehlers, 2007: 390). The approach of the Court of Justice is that the fundamental rights are not absolute and can be subject to restrictions in the general interest as long as those restrictions do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of that right¹¹⁴ (Baykal, 2010: 385 and Ehlers, 2007: 391). In its case law concerning fundamental rights, the Court of Justice makes references to ECtHR case law and principles, including the specific objectives justifying a limitation on the right, the requirement that limits be prescribed by law, and necessary in a democratic society, proportionality, and the margin of appreciation (Peers and Ward, 2004: 144; and Craig, 2006: 512). However, the case law of the Court claimed to be inconsistent regarding limitations since it applies to the EU limitation standards in some cases but the ECHR limitation standards in others without any explanation offered (Peers and Ward, 2004: 151).

¹¹⁴C-265/87, Schrader [1989] ECR 2237, para 15; C-5/88 Wachauf [1989] ECR 2609, para 18; C-177/90, Kühn [1992] ECR I-35, para 16; C-280/93, Germany v Council [1994] ECR I-4973, para 78.

The Charter provides for explicit rules on the limitations of the EU fundamental rights. A general rule on limitations that applies to exercise of all rights guaranteed by the Charter is set out in Article 52(1). Accordingly, any limitation on the exercise of rights guaranteed by the Charter must, be provided for by law, respect to the essence of those rights, respect to the principle of proportionality, be necessary and should correspond to the objectives of general interests recognized by the Union or to the need to protect the rights and freedoms of others. This general limitation within Article 52(1) is supplemented by two additional following paragraphs of the same Article which relate to the rights guaranteed by the Charter that are based on Treaties or on the ECHR. Article 52(2) sets forth a rule on the rights which are based on the Treaties. Accordingly, if a right in the Charter corresponds to a right in the Treaties; concerning Charter right will be exercised under the conditions and within the limits defined for the same right in the Treaties. Article 52(3) is on the relationship between the Charter and the ECHR. If these two documents sets out corresponding rights; the corresponding Charter right's meaning and scope shall follow the Convention's unless the Convention provides for a less protection. Article 53 of the Charter provides for another rule on limitations. Accordingly, the Charter cannot lower the fundamental rights standards exist in national, Union, and international legal orders. Moreover, Article 54 prohibits particular use of rights, that is, abuse of rights (Peers and Ward, 2004: 160-161).

The Charter also includes potential limitations clauses on some rights. First of all, there are rights, such as right to property and children at work, which refer expressly to possible limitations on the specific right. There are also provisions in the Charter which do not expressly refer to limits, but which could potentially be understood to accept such restrictions by reference to laws or practices. For instance,

national laws can govern the exercise of right to marry and right to conscientious objection. Finally, specific express limitations are allowed for the right to free and informed consent within the fields of medicine and biology, which must be according to the procedures laid down by law; and the processing of personal data, which can only be on the basis of consent or some other legitimate basis laid down by law (Peers and Ward, 2004: 154).

Accession to the Convention will require the Union to ensure limitations to EU fundamental rights are in accordance with the Convention. However, the case law of the Court of Justice have long been referring to the ECHR and its case law on limitations, and the Charter prevents the Union to apply lower standards than the Convention that; accession to the Convention by the Union will not have a significant changing effect on the limitations of the EU fundamental rights.

3.6. Territorial and Temporal Scope

Generally recognized rules of international law determine the temporal and territorial scope of both the ECHR and the EU fundamental rights (Ehlers, 2007: 389). According to Article 29 of the VCLT and of the VCLT between States and International Organizations or between International Organizations on territorial scope of treaties, a treaty is applicable to the whole territory of a Contracting Party, including those territories for whose international relations the Contracting Party in question is responsible. Temporal scope of a treaty is determined according to the date of entry into force. Accordingly, a treaty is not applicable to acts or facts that have occurred, or to situations that have ceased to exist, before the treaty entered into

force and was ratified by the Contracting Party in question as stated in Article 28 VCLT and in the VCLT between States and International Organizations or between International Organizations.

The phrase “within their jurisdiction” in Article 1 ECHR implies that the Convention’s territorial scope goes beyond its territory¹¹⁵. For example, a state is responsible for acts of its diplomatic and consular representatives abroad (Ehlers, 2007: 46 and Gözlügöl, 2002: 139). Thus, cases may be brought by persons who consider that their rights have been infringed by the agents of a Contracting Party when they are not within their territories (Bilen, 2005: 11). Moreover, the Convention does not have a retroactive effect and thus for any party ratifying the Convention, the Convention enters into force on the date of ratification or on another latter date decided by the Parties (Ovey and White, 2010: 87).

The territorial scope of EU fundamental rights, which can be deduced from Article 52 TEU¹¹⁶ and Article 355 TFEU¹¹⁷, is not only limited to territories of the

¹¹⁵“Jurisdiction of the states cover the activities of a State’s diplomatic or consular agents abroad, and events on board craft and vessels registered in, or flying the flag of, that State, or situations where agents of the Convention State, with the consent of the government of the territorial State, exercised public powers normally to be exercised by the territorial government” (Ovey and White, 2010: 90). See also, *Bankovic and Others v. Belgium and 16 Other Contracting States*, 52207/99, December 12, 2001.

¹¹⁶“1. The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

2. The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union” (TEU, art. 52).

¹¹⁷“In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:

1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349.

Member States but also covers legal relations outside the Union if these relations are strongly connected with the law of a Member State and as a consequence with the relevant rules of EU law (Ehlers, 2007: 389). “Entry into force” rule governs the temporal scope of the EU fundamental rights (Ehlers, 2007: 389).

Accession to the ECHR will have no changing effect on the territorial scope of EU fundamental rights since territorial jurisdiction of the EU coincides with its Member States’. Temporal scope of EU fundamental rights will not also be altered since “entry into force” rule governs both the temporal scope of EU fundamental rights and the Convention. Thus, the Convention will be applicable for the European Union with its entry into force. Article 10 of the Draft Accession Agreement clarifies the entry into force matter at the EU level. Accordingly, the Agreement will enter into force and the European Union shall become a Party to the Convention on the first day of the month following the expiration of a period of three months after the

2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II. EN 30.3.2010 Official Journal of the European Union C 83/197

The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:

(a) the Treaties shall not apply to the Faeroe Islands;

(b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol;

(c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.

6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission” (TFEU, art. 355).

date on which all High Contracting Parties to the Convention and the European Union have expressed their consent.

CHAPTER IV

JUDICIAL IMPLICATIONS OF ACCESSION

ON THE EU LEGAL ORDER

This Chapter focuses on the judicial aspects of accession. Since judicial protection for fundamental rights at the EU and the ECHR level is broad in scope; this chapter will be organized in a way that best suits the comprehension of the present state of judicial protection at both levels, and the implications of accession on the judicial protection of EU fundamental rights at the EU level. Accordingly, the first section will try to explain the present state of judicial protection at the ECHR level in general and with regard to the EU in particular. The next section will first try to explain the sources of the Court of Justice's authority and the scope of its judicial review powers; then will try to evaluate the role of the Court in fundamental rights protection. Finally, the last section will try to evaluate the changes that will be brought to the judicial system following the accession.

4.1. Judicial Protection within the ECHR System

4.1.1. In General

The ECtHR, which functions on a permanent basis and whose jurisdiction is mandatory for all Contracting Parties, was established to ensure the observance of the guaranteed rights in the Convention and its Protocols as stated in Article 19 ECHR. The Court is composed of a number of judges equal to that of High Contracting Parties to the Convention who are elected by the Parliamentary Assembly from a list of candidates nominated by the respective Contracting Party for a period of 9 years¹¹⁸, and thus 47 judges at present (Schlüter, 2006: 39).

The Court operates within the purpose of the Convention and its Protocols, by reference to the fundamental aims of the Council Europe. These mainly include that the Convention should operate as a common denominator for the Contracting Parties, representing a standard below which European human rights must not fall. Thus, serves to delineate thresholds for Contracting Party compliance and not ceilings within members' legal orders. Also, the Court has regularly emphasized the subsidiary nature of the Convention¹¹⁹. Article 35 ECHR specifically restricts the jurisdiction of the Court to cases where all domestic remedies must have been exhausted for individual applications¹²⁰ (Blackburn, 2001: 25). Before any application presented to the Court, the applicant must show that he or she pursued all possible avenues for redressing his or her grievance within domestic legal and administrative systems of the Contracting Party concerned. Moreover, the Court has

¹¹⁸“The judges shall be elected for a period of nine years...” (ECHR, art. 23, para. 1).

¹¹⁹See for instance, *Handyside v. United Kingdom* [1979-1980] 1 EHHR 737, para. 48. The court reached the same conclusion in the *Belgian Linguistic* [1979-1980] 1 EHRR 252, 1474/62, 1677/62, 1691/62, 1769/63, 2126/64. (Tümay, 2008: 204).

¹²⁰While this is the rule, there may be special circumstances in which the applicants do not have to exhaust domestic remedies (Ovey and White, 2010: 35).

viewed its role as facilitating an organic process and dialogue between the Contracting Parties' and the ECHR systems towards establishing a common European law on human rights (Blackburn, 2001: 27).

Any Contracting Party or individual claiming to be a victim of a violation of the Convention may lodge directly with the Court an application alleging a breach by a Contracting Party of one of the Convention rights (Schlüter, 2006: 45). Accordingly, the Court provides for two types of judicial proceedings, which are inter-state cases and individual applications. In addition to these two main judicial proceedings; the Court also decides on the question whether the Contracting Party has failed to fulfill its obligation to abide by the final judgement of the Court referred to it by the Committee of the Ministers (Article 46 ECHR) and also gives advisory opinion to the Committee of Ministers on the legal questions concerning the interpretation of the Convention and Protocols thereto (Article 47 ECHR).

Inter-state cases set forth under Article 33 ECHR allows each Contracting Party to refer to the ECtHR any alleged breach of the Convention and the Protocols thereto by another Contracting Party. The applicant party is neither required to only pursue its own rights, nor does it have to demonstrate any particular interest in the outcome of the case (Ehlers, 2007: 56). Individual applications can be regarded as an extraordinary right of appeal (Ehlers, 2007: 56). Article 34 of the Convention specifies that the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the Contracting Parties of the rights set forth in the Convention and its Protocols. An individual application can be made only by a person who is a victim of violation

of the rights guaranteed by the Convention and unlike state applicants; an individual applicant must have personal interest in bringing proceedings (Renucci, 2005: 106).

The Court is also competent to give advisory opinions at the request of the Committee of Ministers on legal questions concerning the interpretation of the Convention and its accompanying Protocols¹²¹. The Committee may also refer to the Court, questions concerning the execution and interpretation of final judgements as well as matters where it considers that a Contracting Party refuses to abide by such a judgement¹²².

The ECtHR delivers mainly two types of judgements. First, there is declaratory judgement as to whether a certain Contracting Party action is in conflict with the provisions of the Convention and its Additional Protocols. Secondly, the Court may award just satisfaction, which is binding (Renucci, 2005: 122) to the applicant under Article 41 of the Convention, which usually takes the form of pecuniary compensation for material and moral damages as well as for costs and expenses incurred before the Convention institutions (Renucci, 2005: 122).

Pursuant to Article 46(1) of the Convention, the Contracting Parties are under an international obligation to abide by the final judgement of the Court in any case to which they are parties. Since the Convention is silent on the legal effects of the Court's decisions within the domestic legal systems; judgements of the Court have no direct effect within domestic law and national authorities, and thus the

¹²¹“The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto” (ECHR, art. 47, para. 1).

¹²²If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee (ECHR, art. 46, para. 3).

Contracting Parties enjoy a degree of discretion as to the means by which to comply with a final ECtHR judgement in accordance with Article 46 of the Convention (Keller and Sweet, 2008: 13). On the other hand the Court refers to the well known principle of *restitution in integrum* (restitution to the original condition)¹²³ in international law regarding the discretion of the Contracting Parties as to the means to comply with its final judgement. Hence, whenever the Court concludes that there has been a breach of the Convention, the respondent party is under a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore, as far as possible, the situation existing prior to violation (Keller and Sweet, 2008: 704).

Supervision of the final judgements of the Court at the Contracting Party level is done by the Committee of Ministers, which is the highest political body of the Council of Europe, once it has been notified of them (Nowak, 2003: 171). More specifically, it examines whether any just satisfaction awarded by the Court to the applicant has been paid and whether the Contracting Party has actually taken the necessary steps, either through individual measures taken in consequence of the ruling against it. Moreover, if a State refuses to abide by a final judgement of the Court, it can bring proceedings before the Grand Chamber of the Court as provided for under Article 31(b) ECHR (Renucci, 2005: 124-125). The Secretary General is also empowered under Article 52 of the Convention to require a Contracting Party to furnish an explanation to him or her of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention (Blackburn, 2001: 23).

¹²³This translation is taken from Stimson, Frederic Jesup Stimson. 1999. Glossary of Technical Terms, Phrases and Maxims of the Common Law. New Jersey: The Lawbook Exchange, Ltd Union.

4.1.2. Review of the EU law

The ECtHR have already been deciding on cases involving violations of the ECHR by EU Member States with no EU law component, and over actions involving EU law. While the first situation, that is, violations of the ECHR by EU Member States with no EU law component, is related to compatibility of domestic situation and thus outside the scope of EU competence; the other one relates to the Union law (Di Federico, 2011: 26-27). Since the EU is not a party to the Convention yet, it cannot be held directly responsible for violations of the Convention on its alleged violations of Convention rights. Accordingly, the ECtHR declares any complaint directed against the EU admissible *ratione personae*¹²⁴ (jurisdiction from the point of persons)¹²⁵ (Scheeck, 2005: 860-861 and Lock, 2010:5). Besides, the Court holds the EU Member States responsible for fundamental rights violations emanating from the EU law (Lock, 2010: 5). However, the Court makes a distinction between the EU acts which give discretion to the EU Member States in implementation and the ones which do not give such discretion. The *Matthews*¹²⁶ case was on a breach of the Convention brought about by EU primary law. In this case the Court ruled that, while the Convention did not preclude the transfer by a state of national competences to an international organization, the responsibility of the states for violations of the Convention would continue even after such a transfer. The Court modified its ruling in its *Bosphorus*¹²⁷ case. In contrast to the *Matthews* case, the violation in *Bosphorus* could not be found directly in EU primary law, but in secondary law: an EU

¹²⁴See, *CFTD v European Communities*, alternatively: their Member States European Commission of Human Rights, 8030/77, 10 July 1978.

¹²⁵ Translation of the term is taken from International Criminal Court. 2010. Representing Victims before the International Criminal Court: A Manual for Legal Representatives. Office of Public Council for Victims, 124.

¹²⁶*Matthews v. UK* [1999] 28 EHRR 361.

¹²⁷*Bosphorus v Ireland* [2006] 42 EHRR 1.

regulation. Both primary law and regulations do not give any discretion to the Member States in implementation. In this case the Court ruled that the Member State in question (Ireland) complied with its Convention obligations on the basis that the EU provided fundamental rights protection equivalent to that of the Convention system, and that there was no dysfunction in the EU's control system such as to rebut that presumption in the case at hand. In the *Connolly*¹²⁸ case, in which all the EU Member States were alleged of violating a Convention right, the Court made clear that the EU Member States can only be held responsible where there was a domestic act of some sort which means that in cases where only the EU acted, such action would be immune from ECtHR's scrutiny. The reason for this is that EU action could not be attributed to the Member States and thus did not fall into their jurisdiction under Article 1 ECHR (Lock, 2010: 5-8).

Accordingly, the jurisdiction of the ECtHR on EU law through the responsibility of the EU Member States is limited to situations where an EU act leaves discretion in implementation to Member States. However, an EU act which leaves no discretion in implementation to the Member State, the state will be presumed to have acted in accordance with the Convention so long as the EU control system overall provides an equivalent level of protection for Convention rights (Craig and De Burca, 2011: 403; Di Federico, 2011: 26-27). Consequently, the ECtHR have already been ruling on the compatibility of EU law with that of the Convention indirectly (Perez, 2009: 33).

¹²⁸Connolly v. 15 Member States of the European Union, 73274/01, 9 December 2008.

4.2. Judicial Protection within the EU System

4.2.1. In General

The Court of Justice of the European Union, which comprises the Court of Justice, the General Court and specialized courts,¹²⁹ is empowered by the Article 19(1) TEU to ensure that in the interpretation and application of the Treaties the law is observed. The Court has one judge per EU member state (Article 19(2) TEU), appointed by common accord of the governments of the Member States in accordance with Article 253 TFEU.

Scope of the Court's jurisdiction is defined under Article 19(3) TEU. Accordingly, the Court rules on actions brought by a Member State, an institution or a natural or legal person; give preliminary rulings at the request of courts or tribunals of the Member States on the interpretation of Union law or the validity of acts adopted by the institutions; and rule in other cases provided for in the Treaties. Even though the Court's jurisdiction covers all aspects of the Union's law as a rule; specific Treaty articles limit its jurisdiction in various areas (El-Agraa and Ardy, 2011: 59-63).

The main types of cases that the Court of Justice has jurisdiction over are requests for a preliminary ruling, actions for failure to fulfill an obligation under the Treaties on the part of the Member States, actions for annulment, actions for failure

¹²⁹“Court of Justice of the European Union” will be used without any distinction made between the Court of Justice, the General Court and specialised courts.

to act, plea of illegality and action for recovery of damages¹³⁰ (El-Agraa and Ardy, 2011: 59-63).

Preliminary ruling procedure set forth under Article 267 TFEU enables any question of Union law to be referred to the Court of Justice at the request of any national court before which such a question arises, and thus provides for actions to be brought before the Court of Justice indirectly (Barents, 2009: 158). Accordingly, a national judge may request the Court of Justice to clarify a point of interpretation of Union law or may request it to check the validity of an act of Union law. A referral to the Court of Justice may be requested by one of the parties involved in the dispute, but the decision to do so rests with the national court. On the other hand, national courts against whose decisions there is no judicial legal remedy under national law have to request the Court of Justice to give preliminary ruling if one of the parties requests it pursuant to Article 267 TFEU (Ehlers, 2007: 396-397). The ruling given by the Court of Justice is an interlocutory one. Thus, it constitutes a step in the proceedings before the national court which, although bound by it, must proceed to apply it to the facts of the case (Arnull, 2006: 95).

Under Articles 258 and 259 TFEU, the European Commission or the Member States may bring enforcement proceedings against a Member State in breach of Treaty obligations. Article 260 TFEU requires Member State to comply with the Court's judgement. If the Commission considers that the state has not complied with the ECJ's decision, it may bring the case before the Court, after giving that state the opportunity to submit its observations. Commission can recommend an appropriate

¹³⁰For detailed analysis of the jurisdiction of the Court of Justice, see, for instance, Horspool, Margot and Matthew Humphreys. 2010. *European Union law*. Oxford University Press; Hargreaves, Sylvia. 2011. *EU Law Concentrate Law Revision and Study Guide*. Oxford University Press.

lump sum or penalty payment. The Court of Justice is not bound to follow this recommendation. It can set any level of penalty it wishes, with no upper limit (Hargreaves, 2011: 64-69)

Article 263 TFEU concerns actions for annulment of EU acts. Annulment actions may be brought by Member States, the EU institutions (against other EU institutions), and individuals. Member States, the European Parliament, the Council, and the Commission have an automatic right of access to the Court in such cases. By contrast, individuals' right of access, their 'standing' or "*locus standi*" to bring Article 263 proceedings is limited. They have to have direct and individual concern. According to 264 TFEU, if the grounds are established, the measure is declared void and the institution concerned must take measures to comply with the judgement (Hargreaves, 2011: 69-76)

Article 265 TFEU provides for actions against the EU institutions for failure to act. This Article allows Member States, institutions of the Union and any natural or legal person to challenge inaction by the EU institutions as well as by bodies, offices and agencies of the Union. According to Article 266, following a declaration of failure to act, the institution must take necessary measures to comply with the Court's judgement (Hargreaves, 2011: 76-77)

Article 277 TFEU, which provides for plea of illegality, may be invoked in the course of other proceedings, for instance in an action under Article 263, to challenge the underlying regulation on which a contested act is based. Any party, including natural or legal persons, can bring this action. The result is the declaration of inapplicability. (Hargreaves, 2011: 77)

Article 340 TFEU provides a mechanism for recovery of damages by individuals who have suffered losses as a result of EU action. According to this provision, in the case of non-contractual liability, the EU is only liable for acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to it. Where, more commonly, the claim concerns an act of an EU institution, three elements must be established: a wrongful or illegal act, damage and causation (Hargreaves, 2011: 78-81)

The Court's jurisdiction over mixed international agreements deserves specific attention since the Convention will become part of the Union law as a mixed international agreement following the accession (Lock, 2010: 11-12). Since these agreements become part of the Union law and bind not only the EU but also its institutions, the Court of Justice is competent to rule on them as long as the provision in question does not fall within the exclusive competence of the Member States (De Burca, 2002: 4). However, lack of express declaration of competence between the EU and Member States and the absence of a clear distribution of powers makes it difficult for third parties to determine the addressee of the non-compliance with specific provisions of a mixed agreement on the EU side. In such a situation the Court of Justice suggests that the principle should be that the EU and the Member States are jointly liable in order to ensure that the agreement is fully complied with (Hillion, 2009: 24).

Enforcement of the Court of Justice's decisions lies with the Member States themselves in accordance with Articles 280 and 299 TFEU. According to these provisions, the decisions of the Court of Justice are enforceable along the order of enforcement which is appended to the decision, without any further formality.

Enforcement is governed by the rules of civil procedure in force in the Member State's territory of which it must be carried out.

Supervision of compliance with the Court's judgements lies with the Commission and the Member States. Since the Commission is responsible to promote the general interest of the Union and to take appropriate initiatives to that end; it also oversees the application of Union law under the control of the Court of Justice of the European Union¹³¹. Accordingly, the Commission could supervise whether the Court's judgement is followed in the exercise of EU institutions and the Member States. The Member States could also supervise whether the Court's judgements are followed within their territories, in particular for preliminary ruling procedure, since they are under an obligation of sincere cooperation.

4.2.2. On EU Fundamental Rights

The jurisdiction of the Court of Justice on fundamental rights as general principles of law emanates from 19(1) TEU which empowers the Court to ensure that in the interpretation and application of the Treaties the law is observed (Değer, 2009: 38). By interpreting the word "law" within this paragraph; the Court developed general principles of the Union law through which the legality of Union and Member States actions could be determined (Craig and De Burca, 2011: 108-111)¹³². Starting with the confirmation of the existence of fundamental rights in the EU law as part of

¹³¹The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union..." (TEU, art. 17, para. 1).

¹³²Fennelly, Neil. 1996. "Legal Interpretation at the European Court of Justice." *Fordham International Law Journal* 20(3): 656-679.

general principles of the Union's law in its *Stauder* case and ruling in its *Nold II* case that it would strike down any provisions of EU legislation which are contrary to the fundamental rights protected by the constitutions of the Member States; the Court have increasingly ensured the role of fundamental rights in the EU legal order (Shelton, 2003: 112). In its fundamental rights jurisprudence the Court is inspired by the common constitutional traditions of the Member States, international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories, in particular the ECHR¹³³. Thus, the Court considers fundamental rights as an integral part of the general principles of the Union's law and validity of EU law would be judged in accordance with respect to fundamental rights¹³⁴.

Moreover, the legally binding Charter is also expected to constitute an important source for the Court's jurisprudence on fundamental rights by providing for a catalogue of rights (Doğan, 2009: 69 and Foadi and Andreadakis, 2011: 610). The provisions of the Charter allow the Court of Justice to address Member States' fundamental rights obligations directly, since, pursuant to Article 51(1) of the Charter, Member States are obliged to respect its provisions "when implementing Union law". Thus, the Court of Justice has the opportunity to hold the Member States directly responsible for breaches of Charter provisions. As Mathisen emphasized in his study, these provisions are now the natural starting point for addressing fundamental rights protection issues in the EU context (2010: 17). Starting with the

¹³³See, for instance, C-29/69, *Stauder v City Ulm* [1969] ECR 419, C-4/73, *Nold* [1974] ECR 491; C-36/75, *Roland Rutili v. Minister for Interior* [1975] ECR 1219.

¹³⁴C-29/69, *Stauder v City Ulm* [1969] ECR 419.

*Küçükdeveci*¹³⁵ case, the Court refers to the Charter as a source of fundamental rights rules (Foadi and Andreadakis, 2011: 598).

General features of the Court's jurisdiction explained in the above section demonstrate that the EU law does not provide for any special type of proceedings in fundamental rights matters. Thus, the Court of Justice is not a human rights court with general jurisdiction over the interpretation of the Convention or other international human rights instruments (Ehlers, 2007: 396). Accordingly, both the Union and the Member States can be subject to the review of the Court under the types of cases on which the Court has jurisdiction over (Ehlers, 2007: 396-398). Besides, the preliminary ruling procedure has a significant role for the protection of fundamental rights at the EU level since claims based on fundamental rights violations mostly invoked before the Court through this procedure (Wetzel, 2003: 2834; Drzemczewski, 1981: 133; Mathisen, 2010: 30).

While EU fundamental rights are primarily addressed to the Union; Member States are also subject to judicial review of the Court when they act contrary to the EU fundamental rights while implementing, applying¹³⁶ or derogating¹³⁷ from EU law or restricting EU rules on public policy, public interest, or other grounds¹³⁸ (Groussot, Pech and Lock, 2011: 3-7; Weiler, 1998: 66-76 and Craig & De Burca, 2011: 381-389). Since it is not always easy to determine the instances in which the Court of Justice has jurisdiction, Weiler in his study lays down the principal

¹³⁵C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG*.

¹³⁶See, for instance, C-5/88, *Wachauf* [1989] ECR 2609; Joined Cases 201 & 202/85, *Klensch* [1986] ECR 3477; C-36/94, *Siesse* [1997] ECR I-3573; *Bostock*, [1994] ECR I-955 (Knook, 2005: 369).

¹³⁷See, for instance, C-260/89, *ERT* [1991] ECR 2925; C-368/95, *Familiapress v. Bauer Verlag* [1997] ECR I-3689 (Knook, 2005: 370).

¹³⁸C-112/00, *Schmidberger v Republic of Austria* [2003] ECR I-5659 57 (Craig and De Burca, 2011: 386-388).

permutations of fundamental rights review in Union legal order as follows (1998: 75-76):

Table 2: Principal Permutations of Fundamental Rights Review in Union Legal Order

Type of measure	Conformity with ECHR	Conformity with EU fundamental rights standards	Conformity with National Fundamental Rights Standards	Result
EU measure	Violates	Violates	Violates	ECJ has jurisdiction
EU measure	Does not violate	Violates	Does not violate	ECJ has jurisdiction
Member State measure: implementing or applying EU law	Violates	Violates	Violates	The ECJ or the Member State have jurisdiction
Member State measure: implementing or applying EU law	Does not violate	Violates	Does not violate	The ECJ or the Member State have jurisdiction
Member State measure: implementing or applying EU law	Does not violate	Does not violate	Violates	Member State have jurisdiction
Member State measure: Derogation or restriction	Violates	Violates	Violates	The ECJ or the Member State have jurisdiction
Member State measure: Derogation or restriction	Does not violate	Violates	Does not violate	The ECJ should not enforce its own standard beyond ECHR core
Member State measure: Derogation or restriction	Does not violate	Does not violate	Violates	Member State have jurisdiction

Source: Weiler, 1998: 75-76¹³⁹

¹³⁹In his table Weiler uses the term “agency situation” for the situations in which the Member State applies or implements the Union law. The term “ERT situation” is used for the situations where the Member State relies on a derogation (1998: 67, 75-76). Thus, the table above is modified according to the scope of the study.

Thus, jurisprudence of the Court of Justice to review the compatibility of Member States' national laws or practices with the Convention or other fundamental rights law outside the scope of Union law. Such cases remain within the jurisdiction of the Member States¹⁴⁰ (Shelton, 2003:113; Binder, 1995; Craig, 2006: 486; Craig and De Burca, 2011: 388).

The ECHR's provisions have also been invoked before the Court of Justice, both by the parties in their submissions, as well as by member states and by the Commission¹⁴¹ (Dremczewski, 1981: 133). However, the Court have not ruled directly on alleged breaches of the Convention since the Convention is not a binding source of the EU law¹⁴² (Mathisen, 2010: 33 and Wetzel, 2003: 2838). It has utilized the Convention and its case law as inspiration for fundamental rights protection as general principles of law and makes explicit references to the Convention articles¹⁴³ and the case law of the ECtHR¹⁴⁴ (Scheeck, 2005: 850-853).

4.3. The Accession: More Judicial Protection or Not?

In general context, the accession will confirm existing practices of both courts since the ECtHR has been annexing the EU and since the ECJ has been aligning itself with the ECHR and its case law for long (Scheeck, 2005: 877). Thus, the judicial protection afforded by the Court of Justice and the ECtHR already

¹⁴⁰See, C-144/95, Maurin [1996] ECR I-2909.

¹⁴¹See, for instance, C-118/75, Watson and Belmann [1976] ECR 1185. C-98/79, Pecastaing v. Belgium, [1980] ECR 691 (Dremczewski, 1981: 133).

¹⁴²For instance, in its Emesa Sugar case (C-17/98 Emesa Sugar [2000] ECR I-665), the Court ruled that the ECHR is not binding on the Court of Justice but that it has a special significance for the development of the Court's concept of fundamental rights (De Burca, 2002: 159).

¹⁴³See, for instance, C-222/84, Johnston [1986] ECR 1651. , C-222/86, Heylens [1987] ECR 4097 cases (Scheeck, 2005: 850). C-370/05, Festersen [2007] ECR I-1129, C-60/00, Carpenter [2002] ECR I-6279 cases (Mathisen, 2010: 29)

¹⁴⁴See, C-13/94, P. v. S. and Cornwall County Council [1996] ECR; C-105/03 Pupino [2005] ECR I-5285 (Scheeck, 2005: 850); C-112/00, Schmidberger v Republic of Austria [2003] ECR I-5659 57 (Mathisen, 2010: 29)

proved that they are willing and capable of interacting notwithstanding the lack of formal coordination between the EU legal order and the ECHR system (Di Federico, 2011: 37)¹⁴⁵. Accordingly, formal accession to the ECHR will not significantly change the current state of affairs (Scheeck, 2005: 877). While the accession is considered not to make any significant change for fundamental rights jurisdiction at the EU level in general, it will have various consequences for the fundamental rights jurisdiction for specific issues. To summarize, all EU law will be under direct review of the ECtHR; addressees of the alleged violation of the Convention rights will be determined in accordance with the co-respondent mechanism; future of the equivalent protection doctrine will be clarified by the ECtHR in its future rulings; it will be possible for non-EU Contracting Parties to the Convention to bring a case against the Union under inter-party cases; the ECJ will have jurisdiction over the ECHR since it will become part of the Union law as a mixed international agreement; the relationship between the ECJ and the ECtHR will be a complementary one and the EU will be represented in the ECtHR with a judge and in the Council of Ministers when it exercises its functions concerning the Convention system.

As explained previously, the EU law has already been reviewed indirectly by the ECtHR except situations where EU Member States have no discretion to implement EU act in question. However, following the accession, all acts of the EU will be subject to the review exercised by the ECHR in the light of the rights guaranteed under the Convention, in the same manner as the other Contracting

¹⁴⁵ A great deal has been published about the relationship between ECtHR and ECJ. See, for instance, Canor. "Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?" in *European Law Review* 2000, 3: 3-21; D. Spielmann. "Human rights case law in the Strasbourg and Luxembourg courts: conflicts, inconsistencies, and complementarities" in P. Alston (ed.) 1999. *The EU and Human Rights*. Oxford: Oxford University Press, 757-780.

Parties to the Convention (O'Meara, 2010: 1818 and Doğan, 2009: 74). This would also mean that the ECJ will be subject to the jurisdiction of the ECtHR as other institutions of the Union. Hence, in cases where the ECJ has unsatisfactorily interpreted the Convention or avoided the fundamental rights aspect, the ECtHR could find a violation and give a correct interpretation of the Convention (Balfour, 2005: 20). Accordingly, accession to the ECHR would close the gap in the human rights protection against EU actions and omissions, which became evident in *Connolly*¹⁴⁶ case. The EU would in such a case be directly subjected to the control mechanisms established by the Convention. Moreover, individual applications directed against the EU would thus no longer be inadmissible (Lock, 2010: 9).

The question concerning the review of EU law by the ECtHR is the potential review of EU primary law by the ECtHR. The Court of Justice lacks the power to examine the compatibility of EU primary law with fundamental rights standards. However, accession will enable the ECtHR to review the compatibility of any provision of the EU primary law with the Convention rights (Groussot, Pech and Lock, 2011: 3-4). Actually, this is one of the reasons behind establishing co-respondent mechanism. To be more precise, Article 3(3) of the Draft Accession Agreement states as follows:

Where an application is directed against the European Union, the European Union Member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on Functioning of the European Union or another provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

¹⁴⁶ *Connolly v. 15 Member States of the European Union*, 73274/01, 9 December 2008.

Accordingly, the EU Member States may only become co-respondents in situations where an application before the ECtHR calls into question the compatibility with the Convention of a provision of the EU primary law (Groussot, Pech and Lock, 2011: 9).

As mentioned previously, the ECtHR accepted that the EU ensures equivalent protection in situations where Member States adopt measures that merely implement legal obligations flowing from EU membership. The Draft Accession Agreement is silent on applicability of this doctrine to the EU (Groussot, Pech and Lock, 2011: 9). Thus, the issue of equivalent protection doctrine applied by the ECtHR to the EU law matters needs specific attention for the future rulings of the ECtHR on disputes concerning EU law since it is unclear whether the ECtHR will continue to apply this doctrine. De Schutter argues that in the event of the Union acceding to the Convention, there are three possible scenarios (Bemelmans, 2008: 14). The first scenario is the expansion of the doctrine of equivalent protection to any situations where, at Contracting Parties' system equivalent protection is provided. A second scenario is the abandonment of the doctrine of equivalent protection. In this scenario, it will be the Union, not the EU Member State implementing the Union law under whose territorial jurisdiction the alleged violation has occurred, that will in fact have to respond, under the Convention, of the measures adopted. Thus, the European Union will be approached to the ECtHR as any other party to the Convention; the only difference is in the need to take into account the division of competences between the Union and the Member States. A third scenario, finally, is that nothing will change. Meaning the doctrine of equivalent protection will continue to be relied

upon by the ECtHR when examining the compatibility of measures adopted by the EU with the Convention¹⁴⁷.

The most significant consequence of accession for the jurisdiction regarding fundamental rights at the EU level is that individuals will have the right to bring their cases to the ECtHR directly against EU acts and against the EU. Thus, accession will grant individuals more judicial protection in terms of protection of fundamental rights since after exhausting remedies at the EU level, they can bring a case before the ECtHR (Mathisen, 2010: 32).

The ECtHR judge Costa and the ECJ judge Skouris draws a distinction between “direct actions and indirect actions” for the review of consistency with the Convention. While “direct actions” means actions directed against measures adopted by the EU institutions subsequent to the accession of the EU to the Convention; “indirect actions” means applications against acts adopted by the authorities of the Member States of the EU for the application or implementation of EU law. In the first situation, the condition relating to exhaustion of domestic remedies, imposed under Article 35(1) of the Convention, will oblige applicants wishing to apply to the ECHR to refer the matter first to the EU Courts, in accordance with the conditions laid down by EU law. Accordingly, it is guaranteed that the review exercised by the ECHR will be preceded by the internal review carried out by the ECJ. On the other hand, in the second situation, the applicant will have, first, to refer the matter to the courts of the Member State concerned, which, in accordance with Article 267 TFEU, may or, in certain cases, must refer a question to the ECJ for a preliminary ruling on

¹⁴⁷On the “future of the Bosphorus Test” see also, Groussot, Xavier, Laurent Pech and Gunnar Thor Petursson. 2011. “The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication”. Eric Stein Working Paper 1: 4.

the interpretation and/or validity of the provisions of EU law at issue. However, if, for whatever reason, such a reference for a preliminary ruling were not made, the ECtHR would be required to adjudicate on an application calling into question provisions of EU law without the ECJ having the opportunity to review the consistency of that law with the fundamental rights guaranteed at the EU level (Joint Communication: 24 January 2011)¹⁴⁸. Groussot, Pech and Lock explained the changes brought for individuals' access to the ECtHR alleging the EU for breach of the Convention rights as follows (2011: 14).

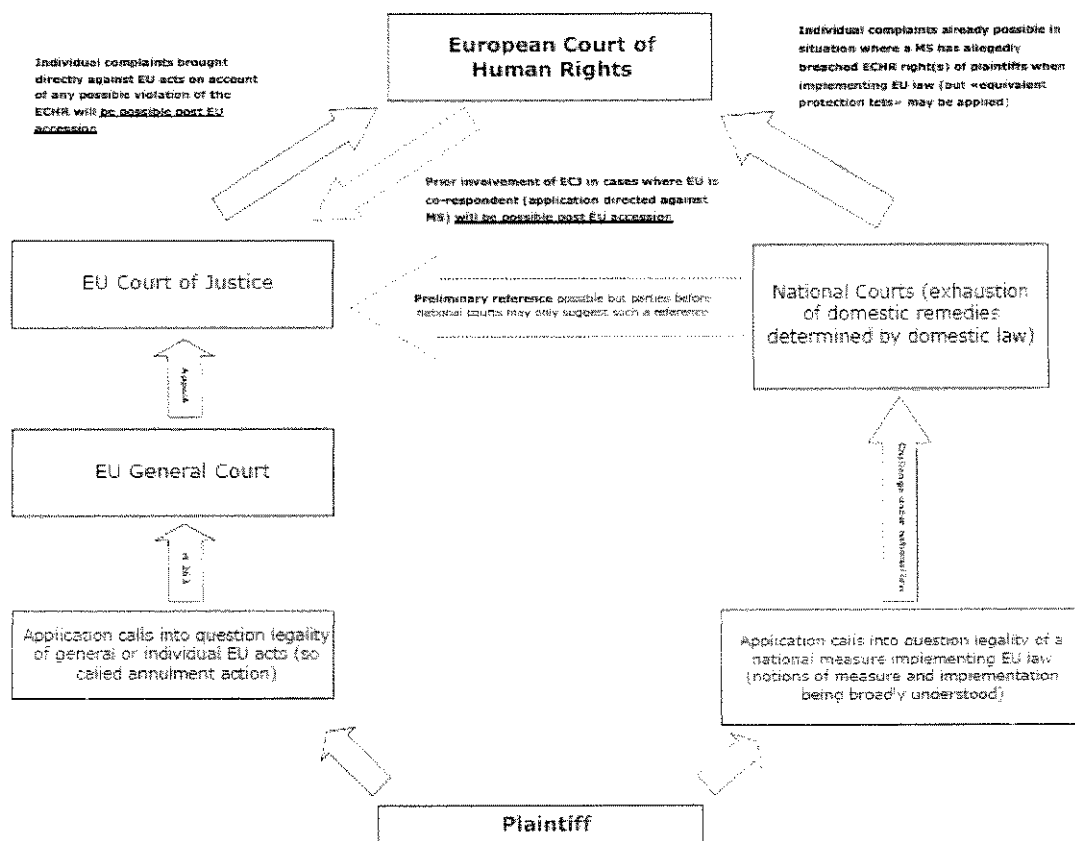


Figure 1 Access to the ECtHR for EU-related Complaints Pre and Post EU Accession

Source: Groussot, Pech and Lock, 2011: 4

¹⁴⁸The joint communication from Presidents Costa (ECtHR) and Skouris (ECJ). 24 January 2011. http://curia.europa.eu/jcms/jcms/P_64268/.

These different types of actions, which the judges Costa and Skouris explained, emanating from the specific situation of the EU as a non-State entity with an autonomous legal order from its Member States who have already been parties to the Convention, but whose acts may be implemented by its Member States necessitated specific mechanism to be introduced for the judicial process at the ECHR level, in order to clarify the addressees of the complaint made to the ECtHR Groussot, Lock and Pech (2011: 13). Accordingly, where appropriate, the co-respondent mechanism would enable the EU and/or Member States to join the proceedings as co-respondents (O'Meara, 2011: 1820).

This new mechanism is set forth under the Article 3 of the Draft Accession Agreement and added to the Article 36 ECHR. It allows the EU to become a co-respondent to proceedings instituted against one or more of its Member States and vice versa. With the introduction of this mechanism, the gaps will be avoided in participation, accountability and enforceability in the Convention system. This new mechanism is simplified by Groussot, Lock and Pech in their study as follows

compatibility with the Convention rights at issue of a provision of European Union law. If an application is directed against the EU, the Member State may only become co-respondent if there is a question as to the compatibility with the Convention rights at issue of a provision of the TEU, the TFEU or any other provision having the same legal value pursuant to those instruments. Thus, EU Member States can become co-respondents alongside the EU where a provision of EU primary law is allegedly in breach of the ECHR. The last situation is where an application directed against and notified to both the EU and the Member States. In such a situation, the status of any respondent may be changed to that of a co-respondent if the above conditions are met. If the conditions are met, the ECtHR is obliged to accept the party as a co-respondent in any of the situations mentioned (Groussot, Pech and Lock, 2011: 10-13). Third-party intervention mechanism may also be used by the EU, where the conditions for becoming a co-respondent are not met.

When the Court decides in favour of violation, it would do so jointly against the respondent and co-respondent. However, the respondent and the co-respondent may make joint submissions to the Court that responsibility for any given alleged violation should be attributed only to one of them. Respondent or co-respondent may request the referral of a case to the Grand Chamber under Article 43 of the Convention.

Sixth paragraph of Article 3 of the Draft Accession Agreement provides for the prior involvement of the ECJ in cases in which the Union is co-respondent in order to ensure that the ECJ has the opportunity to review the compatibility with the Convention rights at issue of the provision of EU law which has triggered the participation of the EU as co-respondent. Individuals are not always empowered by

the Union law to bring direct actions before the Court of Justice. Besides, the preliminary ruling procedure is always open to them before their national courts. However, since the power to make such a reference lies with the discretion of the national court, this procedure cannot be considered as a legal remedy that an applicant must exhaust before making an application to the Court. Such a situation might result in the ECtHR ruling on the conformity of an EU act with fundamental rights, without the ECJ having had the opportunity to do so. The involvement of the ECJ will only apply to cases in which the EU has the status of co-respondent and should take place before the ECtHR decides on the merits of the application. The ECJ will only assess the legal basis for the act or omission complained of by the applicant and its assessment will not bind the Court.

The co-respondent mechanism and the prior involvement of the ECJ in cases in which the Union is co-respondent will assist to comply with the EU Protocol No. 8, which requires that the accession agreement must include the necessary mechanisms to ensure that “proceedings by non-Member States and individual applications are correctly addressed to Member States and/ or the Union as appropriate” (Groussot, Pech and Lock, 2011: 10).

Following the accession not only individuals, but also non-EU Contracting Parties (ECHR Contracting Parties excluding the EU Member States) to the Convention will be able to take a case to the ECtHR alleging directly the EU breaching Convention rights. Article 33 ECHR enables Contracting Parties to the Convention to bring a case against the EU and vice versa. The Article mentioned is not amended by the Draft Accession Agreement as to provide a specific rule for cases that will be brought against the EU by other Contracting Parties. Thus, whether

inter-party applications to the Court involving issues of EU law between EU Member States, or between the EU and one of its Member States should be analyzed.

Article 3 of Protocol No.8 to the Treaty of Lisbon refers to the Article 344 TFEU, which states that EU Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. Hence, the EU Member States will not be able to take a case to the ECtHR when the issue at stake is concerned with EU law. However, Contracting Parties to the Convention excluding the EU and its Member States will be able to take a case against the EU if they allege the EU violating a right ensured within the Convention.

Article 344 TFEU is also related to Articles 35(2-b) and 55 of the Convention. Article 5 of the Draft Accession Agreement settles this matter and states as follows:

Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the Convention.

This provision of the Draft Accession Agreement removes the danger of EU Member States violating the ECHR where they are engaged in proceedings against each other before the ECJ even where such proceedings deal with ECHR provisions. Consequently, Article 344 TFEU will operate even after the accession and the ECJ will preserve its exclusive jurisdiction over the disputes between EU Member States (Groussot, Pech and Lock, 2011: 10).

Following the accession, the ECJ will be empowered to rule directly on the alleged breaches of the Convention since the Convention will become a direct source of the Union law as a mixed international agreement. As mentioned in the previous sections, the Convention has been considered as a source of inspiration for the EU fundamental rights as general principles of EU law. However, accession to the Convention will make the Convention a direct source of the Union law. Thus, the Court will be able to review the compatibility of the EU and Member States acts when implementing Union law with the Convention. This jurisprudence does not mean, however, that the Court can review the compatibility of Member States laws or practices outside the scope of Union law (Mathisen, 2010: 33). This is because accession to the Convention will not affect the Union's competences, which is explicitly stated in Article 6 TEU and Protocol No.8 to the Treaty of Lisbon, the juridical competences of the Court of Justice will not change and Member States' status with regard to the Convention. Thus, the cases that can be brought before the Court and the empowered litigants will remain the same. Such cases remain within the jurisdiction of the ECtHR (Groussot, Pech and Lock, 2011: 12). Moreover, there exists no declaration of competence between the EU and Member States that, it will be possible to hold the EU and Member States jointly liable for violations of the Convention rights (Hillion, 2009: 24).

Since, following the accession, the primary responsibility for securing compliance with the Convention will remain with the Court of Justice in the EU context; the role of the Court of Justice will be similar to national courts of last resort which has to be exhausted before the issuing of an application to the ECHR (Mathisen, 2010: 33). Accordingly, their relationship will not be that of subordination, but a complementary one (Doğan, 2009: 76). The role of the ECJ will

be confirmed as an internal court and the ECtHR will be the external one with regard to the judicial review of fundamental rights in the EU (Scheeck, 2005: 877). Thus, the ECJ will continue to take final decisions on all questions of Union law and if the ECtHR found incompatibilities between the Convention and EC or EU law, the relevant EU institutions would then be responsible for taking the action needed to bring the corresponding act, into line with the ECHR's requirements (Bilen, 2005: 171).

Accession to the Convention will also require the EU to take part in the ECtHR and other Council of Europe bodies concerned with the Convention mechanism. First of all, the EU will have a judge at the ECtHR as required in Article 22 of the Convention. Moreover, the EU will take part in the Committee of Ministers whenever it exercises its Convention-based functions under the conditions laid down under Article 7 of the Draft Accession Agreement.

According to Article 2 of the Draft Accession Agreement, an EU judge will be elected to the ECtHR by the Parliamentary Assembly of the Council of Europe amongst the list of three candidates nominated by the EU in accordance with the Article 22 ECHR following the accession. Preventing any discrimination amongst the Contracting Parties (Groussot, Pech and Lock, 2011: 8), Article 6 of the Draft Accession Agreement foresees a full time EU judge to the Court and sets forth the modalities of the EU Judge's participation in the work of the Court. Accordingly, the internal EU rules will define the modalities for the selection of the list of candidates in respect of the EU to be submitted to the Parliamentary Assembly. The elected judge will participate equally with the other judges in the work of the Court and have the same status and duties. An EU judge in the Court will also assist to ensure that

the specific characteristics of the Union's legal order taken into account and represented (Di Federico, 2011: 47)¹⁴⁹.

The Committee of Ministers of the Council of Europe has a number of functions concerning the Convention system amongst its other duties as the ultimate political authority of the Council of Europe. Article 7 of the Draft Accession Agreement enables the EU to take part in the Committee of Ministers when it takes decisions regarding the Convention system. Accordingly, the EU shall be entitled to participate in the Committee of Ministers, with the right to vote, when the latter takes decisions under the Convention rules, which are Article 26(2) ECHR on reducing the number of judges of the Chambers, Article 39(4) ECHR on the terms of friendly settlements, Article 46(2-5) on supervision of the execution of the Court's judgements. Moreover, the EU will participate in the Committee when legal instruments and texts concerned with the Convention system, such as Protocols to the Convention, are addressed.

On the other hand, the necessity of preserving the effective exercise by the Committee of Ministers of its supervisory role required appropriate guarantees to be taken; since under the present circumstances, the EU and its Member States would command twenty-eight out of forty-eight votes in ECHR matters, and thus able to block every decision if they so wished (Groussot, Pech and Lock, 2011: 8-9). Accordingly, a specific provision is set forth concerning the EU's right to vote when the Committee takes decisions on supervision under Article 39 and 46 of the

¹⁴⁹See also, Groussot, Xavier, Laurent Pech and Gunnar Thor Petursson. 2011. "The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication". Eric Stein Working Paper 1: 3

Convention. The EU and its Member States will act in a “coordinated manner” when expressing their positions and voting under Articles 39 and 46 of the Convention.

Implementation of this specific rule for the EU is set forth differently for the Contracting Party in question. Firstly, if the Committee of Ministers supervises the fulfillment of obligations under the Convention by one or more of the Member States of the EU or by the EU alone, and the EU is respondent or co-respondent, the EU and its Member States shall express their positions and vote in a coordinated manner, in accordance with the EU Treaties. Secondly, if the Contracting Party under supervision of the Committee of Ministers is a Member State or states of the EU, the EU Member States have no obligation to act in a coordinated manner and thus, they can express their own position and vote. Thirdly, if the Contracting Party under supervision is not a member of the EU, the EU and its Member States have no obligation to act in a coordinated manner. Both the EU and its Member States can express their own position and vote separately.

Who will represent the EU within the Committee of Ministers is under question. Since representation at the Committee of Ministers is necessary for the Union to preserve its specific characteristics; the European Commission would be suitable for this task. The representation of the EU within the Committee of Ministers would ensure the execution of the judgement by guaranteeing that the necessary measures are taken at the appropriate level (Di Federico, 2011: 49).

CHAPTER V

CONCLUSION

The European Union's political integration process based on normative values has been the main driving force behind the Union's emphasis on human rights. While the Union have been making references to the ECHR both in its internal and external affairs, it is not a party to the Convention and thus, its institutions are not under the review of the ECtHR. Accordingly, accession to the Convention, which is considered to be the constitutional instrument of European public order in the field of human rights, will assist to strengthen the normative character of the Union.

Both the Union and the Council of Europe consider the European Union's accession to the European Convention on Human Rights as a significant step for achieving coherence and consistency in Europe, concerning fundamental rights protection in Europe. Overcoming legal impediments that prevent the Union's accession to the Convention both at the EU and the ECHR level, the official talks on accession finally started on 7 July 2010 under the joint informal working group, that is the Steering Committee for Human Rights and European Union. The CDDH-UE

finalized and published “Draft legal instruments on the accession of the European Union to the European Convention on Human Rights” on 19 July 2011. These legal instruments were subsequently finalized at an extraordinary meeting of the CDDH held on 12th-14th October 2011. The Draft Accession Agreement comprises provisions on scope of the accession, the signature and ratification process of the Convention; reservations to the Convention and its Protocols; co-respondent mechanism; interpretation of some the articles of the Convention; participation of the EU to Council of Europe institutions which are of concern to the Convention mechanism; EU contribution to the expenditure related to the Convention; relation of the EU with a number of Council of Europe conventions and agreements; and entry into force of the Convention. While the Draft Accession Agreement answers some of the questions on legal and judicial implications of accession both for the Union and the ECHR system; a detailed analysis is necessary to see whether the accession of the EU to the ECHR affect the legal status and judicial protection of EU fundamental rights at the EU level.

As a matter of fact, fundamental rights have been increasingly granted legal and judicial protection at the EU level especially since the 1970's, even afforded with a higher protection than the ECHR system. General principles of EU law and the legally binding EU Charter of Fundamental Rights have been the main sources of fundamental rights protection at the EU level. The ECHR have been considered as an inspiration for development of EU fundamental rights as general principles of EU law. Moreover, the EU fundamental rights as general principles of EU law do already have primacy, direct effect and direct applicability within the legal orders of the EU Member States. Following the accession, the Convention will become a direct source of the Union law as a mixed international agreement and thus, its status will be

below primary EU law but above secondary EU law. It will also have primacy over the national laws of the Member States but its direct effect and direct applicability will be decided by the Union itself. These two aspects of accession demonstrates that while legal status of the Convention will change within the EU legal order; this will not cause a significant change for the overall legal status of EU fundamental rights. These initial assessments established the grounds for the main argument of this study, that is, the accession to the Convention will not cause significant changes for the legal status and judicial protection of EU fundamental rights at the EU level.

The third chapter of the research demonstrated that the accession will not have significant legal implications on the legal protection of EU fundamental rights. The Convention rights, which are civil and political in nature, have already been guaranteed at the EU level. Even, the EU guarantees more rights than the Convention.

The accession will not also cause conflict of interpretation between the CJEU and the ECtHR. Both Courts apply similar rules for interpretation; margin of appreciation principle applied by the ECtHR, will give discretion to the Union to preserve its vital choices on many issues; the Court of Justice has already been drawing inspiration from both the ECHR and the case law of its Court, since Article 6(3) TEU and Article 52(3) and 53 of the Charter explicitly mentions the role of the ECHR. Also the Draft Accession Agreement sets forth a mechanism, the co-respondent mechanism, to prevent any divergences in interpretation¹⁵⁰. Since accession to the Convention will be limited to the competences of the Union and the EU has already been guaranteeing the Convention rights through general principles

¹⁵⁰ This mechanism will be explained in detail under Chapter III Section 3.

of EU law and the Charter; the undertakings of the EU and the Member States will not be significantly affected as a consequence of accession. The only implication will be that the Union will be under direct obligation to guarantee Convention rights, instead of Member States' obligation to secure the compatibility of the Union law with the Convention as a consequence of being a party to an international organization. The addressees of the EU fundamental rights, which are the EU and the Member States only when they are implementing, applying and derogating from the Union law, will not be altered following the accession. While individuals and the EU Member States will continue to be the beneficiaries of the EU fundamental rights; the EU itself will also become a beneficiary of the guaranteed rights by the Convention. The case law of the Court of Justice have long been referring to the ECHR and its case law on limitations, and the Charter prevents the Union to apply lower standards than the Convention that; accession to the Convention by the Union will not have a significant changing effect on the limitations of the EU fundamental rights. Finally, accession to the ECHR will have no changing effect on the territorial scope of EU fundamental rights since territorial jurisdiction of the EU coincides with its Member States'. Temporal scope of EU fundamental rights will not also be altered since "entry into force" rule governs both the temporal scope of EU fundamental rights and the Convention.

While the most significant implications of accession will be on judicial protection of EU fundamental rights at the EU level, findings of the fourth chapter demonstrated that the ECtHR have already been ruling on the compatibility of EU law with that of the Convention indirectly. Moreover, EU fundamental rights have already been under judicial protection of the Court of Justice, which has utilized the Convention and its case law as an inspiration for fundamental rights protection as

general principles of EU law and has made explicit references to the Convention provisions and the case law of the ECtHR. While these two findings have shown that the accession will not make any significant change for fundamental rights jurisdiction at the EU level in general, it will have various consequences for the fundamental rights jurisdiction on specific issues. Firstly, all EU law will be under direct review of the ECtHR; addressees of the alleged violation of the Convention rights will be determined in accordance with the co-respondent mechanism; future of the equivalent protection doctrine will be clarified by the ECtHR in its future rulings; it will be possible for non-EU Contracting Parties to the Convention to bring a case against the Union under inter-party cases; the CJEU will have jurisdiction over the ECHR since it will become part of the Union law as a mixed international agreement; the relationship between the CJEU and the ECtHR will be a complementary one and the EU will be represented in the ECtHR with a judge and in the Council of Ministers when it exercises its functions concerning the Convention system.

In conclusion, the main contribution of this study is to evaluate whether the accession to the Convention will have significant implications for legal status and judicial protection of fundamental rights at the EU level. While findings within this research demonstrated that the accession will not cause significant changes for the legal status and judicial protection of fundamental rights at the EU level, in light of detailed analysis of several aspects of accession's implications, further research may be done especially in terms of direct effect of the Convention within the laws of the EU Member States as a mixed international agreement and implications of co-respondent mechanism for the judicial system of the EU.

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APPENDICES

APPENDIX A

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AS AMENDED BY PROTOCOLS NO. 11 AND 14¹⁵¹

Article 1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I RIGHTS AND FREEDOMS

Article 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

¹⁵¹The Convention is available at
<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG>.

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of un-sound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the

trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and im-partiality of the judiciary.

Article 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 § 1 and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II EUROPEAN COURT OF HUMAN RIGHTS

Article 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis.

Article 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22

Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

Article 23

Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.
2. The terms of office of judges shall expire when they reach the age of 70.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

Article 24

Registry and rapporteurs

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.
2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

Article 25

Plenary Court

The plenary Court shall

- (a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- (b) set up Chambers, constituted for a fixed period of time;
- (c) elect the Presidents of the Chambers of the Court; they may be re-elected;
- (d) adopt the rules of the Court;
- (e) elect the Registrar and one or more Deputy Registrars;
- (f) make any request under Article 26 § 2.

Article 26

Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in Committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up Committees for a fixed period of time.

2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

Article 27

Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
2. The decision shall be final.
3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a Committee or to a Chamber for further examination.

Article 28

Competence of Committees

1. In respect of an application submitted under Article 34, a Committee may, by a unanimous vote,
 - (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
 - (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
2. Decisions and judgments under paragraph 1 shall be final.
3. If the judge elected in respect of the High Contracting Party concerned is not a member of the Committee, the Committee may at any stage of the proceedings invite that judge to take the place of one of the members of the Committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1 (b).

Article 29

Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.

2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30

Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 31

Powers of the Grand Chamber

The Grand Chamber shall

- (a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
- (b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46 § 4; and
- (c) consider requests for advisory opinions submitted under Article 47.

Article 32

Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33

Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

Article 34

Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35

Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that
 - (a) is anonymous; or
 - (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
 - (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
 - (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36

Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.
3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

Article 37

Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
 - (a) the applicant does not intend to pursue his application; or
 - (b) the matter has been resolved; or
 - (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.
2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38

Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

Article 39

Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.
2. Proceedings conducted under para-graph 1 shall be confidential.
3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.
4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

Article 40

Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41

Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42

Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44 § 2.

Article 43

Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44

Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
 - (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or

- (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
 - (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

Article 45

Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

Article 47

Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48

Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49

Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51

Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Section III MISCELLANEOUS PROVISIONS

Article 52

Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53

Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

Article 54

Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55

Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the

interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56

Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57

Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

Article 58

Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59

Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
 2. The European Union may accede to this Convention.
 3. The present Convention shall come into force after the deposit of ten instruments of ratification.
 4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
 5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.
- Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

APPENDIX B

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION¹⁵²

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared

¹⁵²The Charter is available at <http://eur-lex.europa.eu/en/treaties/index.htm>.

under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention. Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
 - (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
 - (c) the prohibition on making the human body and its parts as such a source of financial gain;
 - (d) the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13

Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).

Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26

Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

TITLE IV SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Article 28

Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29

Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33

Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Article 35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

Article 36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Article 37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V CITIZENS' RIGHTS

Article 39

Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42

Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

Article 43

European Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

Article 44

Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Article 46

Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

**TITLE VI
JUSTICE****Article 47****Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48**Presumption of innocence and right of defence**

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49**Principles of legality and proportionality of criminal offences and penalties**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50**Right not to be tried or punished twice in criminal proceedings for the same criminal offence**

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

TITLE VII

GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European

Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.

APPENDIX C

EXTRACTS OF RELEVANT TEXTS OF THE EUROPEAN UNION ON THE ACCESSION TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS¹⁵³

TREATY ON EUROPEAN UNION

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

TREATY ON FUNCTIONING OF THE EUROPEAN UNION

Article 218

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

¹⁵³Steering Committee for Human Rights. 2010. "1st Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission: Extracts of relevant texts of the European Union on the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms". CDDH-UE(2010)02.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.
3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.
4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.
5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.
6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

 - (a) after obtaining the consent of the European Parliament in the following cases:
 - (i) association agreements;
 - (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
 - (iii) agreements establishing a specific institutional framework by organising cooperation procedures;
 - (iv) agreements with important budgetary implications for the Union;
 - (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.
 - (b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.
7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.
8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.
9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the

Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

PROTOCOL NO. 8 RELATING TO ARTICLE 6(2) OF THE TREATY ON EUROPEAN UNION ON THE ACCESSION OF THE UNION TO THE EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

THE HIGH CONTRACTING PARTIES,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;

(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

Article 3

Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

DECLARATION ON ARTICLE 6(2) OF THE TREATY ON EUROPEAN UNION

The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.

APPENDIX D

DRAFT AGREEMENT ON THE ACCESSION OF THE EU TO THE ECHR

AND

DRAFT RULE TO BE ADDED TO THE RULES OF THE COMMITTEE OF MINISTERS FOR THE SUPERVISION OF THE EXECUTION OF JUDGMENTS AND OF THE TERMS OF FRIENDLY SETTLEMENTS¹⁵⁴

I. Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms

Preamble

The High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (ETS No. 5, hereinafter referred to as “the Convention”), being member States of the Council of Europe, and the European Union,

Having regard to Article 59, paragraph 2, of the Convention;

Considering that the European Union is founded on the respect for human rights and fundamental freedoms;

Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe;

Considering, in particular, that the individual should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights (hereinafter referred to as “the Court”);

Considering that, having regard to the specific legal order of the European Union, its accession requires certain adjustments to the Convention system to be made by common agreement,

¹⁵⁴ Available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents_en.asp.

Have agreed as follows:

Article 1

Scope of the accession and amendments to Article 59 of the Convention

1. The European Union hereby accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention.
2. Paragraph 2 of Article 59 of the Convention shall be amended to read as follows:
“2.a. The European Union may accede to this Convention and the Protocols thereto. Accession of the European Union to the Protocols shall be governed, *mutatis mutandis*, by Article 6 of the Protocol, Article 7 of Protocol No. 4, Articles 7 to 9 of Protocol No. 6, Articles 8 to 10 of Protocol No. 7, Articles 4 to 6 of Protocol No. 12 and Articles 6 to 8 of Protocol No. 13.
b. The status of the European Union as a High Contracting Party to the Convention and the Protocols thereto shall be further defined in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.
c. Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the Protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.
d. Where any of the terms ‘State’, ‘State Party’, ‘States’ or ‘States Parties’ appear in paragraph 1 of Article 10, and in Article 17 of this Convention, as well as in Articles 1 and 2 of the Protocol, Article 2 of Protocol No. 4, Articles 2 and 6 of Protocol No. 6, Articles 3, 4, 5 and 7 of Protocol No. 7, Article 3 of Protocol No. 12, and Article 5 of Protocol No. 13, they shall be understood as referring also to the European Union.
e. Where any of the terms ‘national security’, ‘national law’, ‘national laws’, ‘national authority’, ‘life of the nation’, ‘country’, ‘administration of the State’, ‘territorial integrity’, ‘territory of a State’ or ‘domestic’ appear in Articles 5, 6, 7, 8, 10, 11, 12, 13, 15 and 35 of this Convention, in Article 2 of Protocol No. 4 and in Article 1 of Protocol No. 7, they shall be understood as relating also, *mutatis mutandis*, to the European Union.”
3. Paragraph 5 of Article 59 of the Convention shall be amended to read as follows:
“5. The Secretary General of the Council of Europe shall notify all the Council of Europe member States and the European Union of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently.”

Article 2

Reservations to the Convention and its Protocols

1. The European Union may, when signing or expressing its consent to be bound by the provisions of this Agreement in accordance with Article 10, make reservations to the Convention and to the Protocol in accordance with Article 57 of the Convention.
2. Paragraph 1 of Article 57 of the Convention shall be amended to read as follows:
“1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. The European Union may, when acceding to this Convention,

make a reservation in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.”

Article 3

Co-respondent mechanism

1. Article 36 of the Convention shall be amended as follows:

a. The heading of Article 36 shall be amended to read as follows: “Third party intervention and co-respondent”.

b. The following paragraph shall be added at the end of Article 36:

“4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this Article are met.

5. A High Contracting Party shall become a co-respondent only at its own request and by decision of the Court. The Court shall seek the views of all parties to the proceedings. When determining a request of this nature the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this Article are met.

6. In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

7. The respondent and the co-respondent shall appear jointly in the proceedings before the Court.

8. This Article shall apply to applications submitted from the date of entry into force of this Agreement.

Article 4

Inter-Party cases

1. The first sentence of paragraph 2 of Article 29 of the Convention shall be amended to read as follows:

“A Chamber shall decide on the admissibility and merits of inter-Party applications submitted under Article 33”.

2. The heading of Article 33 of the Convention shall be amended to read as follows: “Article 33 – Inter-Party cases”.

Article 5

Interpretation of Articles 35 and 55 of the Convention

Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention.

Article 6

Election of judges

1. A delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions related to the election of judges in accordance with Article 22 of the Convention. The number of representatives of the European Parliament shall be the same as the highest number of representatives to which any State is entitled under Article 26 of the Statute of the Council of Europe.

2. The modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies shall be defined by the Parliamentary Assembly of the Council of Europe, in cooperation with the European Parliament.

Article 7

Participation of the European Union in the Committee of Ministers of the Council of Europe

1. The European Union shall be entitled to participate in the Committee of Ministers, with the right to vote, when the latter takes decisions:

a. under Article 26, paragraph 2, Article 39, paragraph 4, Article 46, paragraphs 2 to 5, or Article 47 of the Convention;

b. regarding the adoption of Protocols to the Convention;

c. regarding the adoption or implementation of any other instrument or text addressed to the Court or to all High Contracting Parties to the Convention, or relating to the functions exercised by virtue of the Convention by the Committee of Ministers or the Parliamentary Assembly of the Council of Europe.

2. The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply.

a. Where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its

member States jointly, it derives from the European Union treaties that the European Union and its member States express positions and vote in a co-ordinated manner. The Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances.

b. Where the Committee of Ministers otherwise supervises the fulfilment of obligations by a member State of the European Union, the European Union is precluded for reasons pertaining to its internal legal order from expressing a position or exercising its right to vote. The European Union treaties do not oblige the member States of the European Union to express positions or to vote in a co-ordinated manner.

c. Where the Committee of Ministers supervises the fulfilment of obligations by a High Contracting Party other than the European Union or a member State of the European Union, the European Union treaties do not oblige the member States of the European Union to express positions or to vote in a co-ordinated manner, even if the European Union expresses its position or exercises its right to vote.

Article 8

Participation of the European Union in the expenditure related to the Convention

1. The European Union shall pay an annual contribution dedicated to the expenditure related to the functioning of the Convention. This annual contribution shall be in addition to contributions made by the other High Contracting Parties. Its amount shall be equal to 34% of the highest amount contributed in the previous year by any State to the Ordinary Budget of the Council of Europe.

2. *a.* If the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, deviates in each of two consecutive years by more than 2.5 percentage points from the percentage indicated in paragraph 1, the Council of Europe and the European Union shall, by agreement, amend the percentage in paragraph 1 to reflect this new proportion.

b. For the purpose of this paragraph, no account shall be taken of:

– a decrease in absolute terms of the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention as compared to the year preceding that in which the European Union becomes a Party to the Convention;

– [an increase in the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, where this results from a decrease in absolute terms of the Ordinary Budget and either no change or a decrease in absolute terms of the amount dedicated within it to the expenditure related to the functioning of the Convention.]³

c. The percentage that results from an amendment under paragraph 2.a may itself later be amended in accordance with this paragraph.

3. For the purpose of this Article, the expenditure related to the functioning of the Convention comprises the total expenditure on:

a. the Court;

b. the supervision of the execution of judgments of the Court; and

c. the functioning, when performing functions under the Convention, of the Committee of Ministers, the Parliamentary Assembly and the Secretary General of

the Council of Europe, increased by 15% to reflect related administrative overhead costs.

4. Practical arrangements for the implementation of this Article may be determined by agreement between the Council of Europe and the European Union.

Article 9

Relations with other Agreements

1. The European Union shall respect the provisions of:

a. Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights of 5 March 1996 (ETS No. 161);

b. Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 (ETS No. 2) and Articles 2 to 6 of its Protocol of 6 November 1952 (ETS No. 10), in so far as they are relevant to the operation of the Convention; and

c. Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 5 March 1996 (ETS No. 162).

2. For the purpose of the application of the Agreements and Protocols referred to in paragraph 1, the Contracting Parties to each of them shall treat the European Union as if it were a Contracting Party to that Agreement or Protocol.

3. The European Union shall be consulted before any Agreement or Protocol referred to in paragraph 1 is amended.

4. With respect to the Agreements and Protocols referred to in paragraph 1, the Secretary General of the Council of Europe shall notify the European Union of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force in accordance with the relevant provisions of those Agreements and Protocols; and

d. any other act, notification or communication relating to those Agreements and Protocols.

Article 10

Signature and entry into force

1. The High Contracting Parties to the Convention at the date of the opening for signature of this Agreement and the European Union may express their consent to be bound by:

a. signature without reservation as to ratification, acceptance or approval; or

b. signature with reservation as to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Agreement shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention mentioned in paragraph 1 and the European Union have expressed their consent to be bound by the Agreement in accordance with the provisions of the preceding paragraphs.

4. The European Union shall become a Party to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention at the date of entry into force of this Agreement.

Article 11 Reservations

No reservation may be made in respect of the provisions of this Agreement.

Article 12

Notifications

The Secretary General of the Council of Europe shall notify the European Union and the member States of the Council of Europe of:

- a.* any signature without reservation in respect of ratification, acceptance or approval;
- b.* any signature with reservation in respect of ratification, acceptance or approval;
- c.* the deposit of any instrument of ratification, acceptance or approval;
- d.* the date of entry into force of this Agreement in accordance with Article 10;
- e.* any other act, notification or communication relating to this Agreement.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at the, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the European Union.

II. Draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements

Rule 18

Judgments and friendly settlements in cases to which the European Union is a party

Where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, the High Contracting Parties shall:

- a.* without prejudice to the provisions under sub-paragraphs *b* and *c*, consider decisions by the Committee of Ministers as adopted if a simple majority of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union is in favour;
- b.* consider decisions by the Committee of Ministers under Rules 10 and 11 as adopted if two thirds of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union are in favour; and
- c.* consider decisions by the Committee of Ministers under Rule 17 as adopted if, in addition to the majority set out in Article 20.d of the Statute of the Council of Europe, a simple majority of the representatives casting a vote on behalf of those High Contracting Parties that are not member States of the European Union is in favour.